commission of the underlying offense, without additional involvement in the underlying offense, does not establish that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the underlying offense.

(C) Non-Applicability of Enhancements —If subsection (a)(1) applies, and the conduct that forms the basis for an enhancement under the guideline applicable to the underlying offense is the only conduct that forms the basis for application of any of the enhancements in subsection (b) of this guideline, do not apply the subsection (b) enhancement under this guideline.

3. Application of Subsection (a)(2).—

(A) In General.—Subsection (a)(2) applies to cases in which (A) the defendant did not commit the underlying offense; or (B) the defendant committed the underlying offense (or otherwise would be accountable for the underlying offense under §1B1.3(a)(1)(A) (Relevant Conduct), but the offense level for the underlying offense is impossible or impracticable to determine.

(B) Commingled Funds.—In a case in which a transaction, financial transaction, monetary transaction, transportation, transfer, or transmission results in the commingling of legitimately derived funds with criminally derived funds, the value of the laundered funds, for purposes of subsection (a)(2), is the amount of the criminally derived funds, not the total amount of the commingled funds, if the defendant provides sufficient information to determine the amount of criminally derived funds without unduly complicating or prolonging the sentencing process. If the amount of the criminally derived funds is difficult or impracticable to determine, the value of the laundered funds, for purposes of subsection (a)(2), is the total amount of the commingled funds.

[Value of Funds - Option 1:

(C) Value of Laundered Funds for Certain Defendants.—There may be cases in which (A) subsection (a)(2) applies; (B) the defendant did not commit the underlying offense; (C) the underlying offense is a fraud or another economic crime covered by a guideline that uses the table in subsection (b)(1) of §2F1.1 (Fraud and Deceit); and (D) the value of the laundered funds under subsection (a)(2) is substantially greater than the value of the loss or other monetary amount attributable to the underlying offense for purposes of §2F1.1(b)(1). In such cases, a downward departure may be warranted to ensure that the seriousness of the punishment for the money laundering offense is reasonably related to the seriousness of the punishment that would be warranted for the underlying offense. However, any such downward departure shall not result in an offense level lower than that which would result if the sentence were determined using the base offense

level under subsection (a)(1). For example, the underlying offense may have involved the fraudulent sale of stock for $200,000 that was worth $180,000. The defendant did not commit the underlying offense but laundered all of the $200,000. The value of the laundered funds is $200,000, but the loss amount for purposes of §2F1.1(b)(1) is $20,000. In such a case, the downward departure shall not result in an offense level lower than the sum of the base offense level under §2F1.1(a) and the enhancement under §2F1.1(b)(1) for the value of the loss. Accordingly, a downward departure, if warranted, shall not result in an offense level lower than level 9 (§2F1.1(a) base offense level of level 6 plus §2F1.1(b)(1) increase of 3 offense levels to account for loss amount of $20,000).

[Value of Funds - Option 2:

(C) Value of Laundered Funds for Certain Defendants.—In a case in which (A) subsection (a)(2) applies, (B) the defendant did not commit the underlying offense, and (C) the underlying offense is a fraud or another economic crime covered by a guideline that uses the table in subsection (b)(1) of §2F1.1 (Fraud and Deceit), the value of the laundered funds is the lesser of the actual value of the laundered funds or the value of the loss or other monetary amount attributable to the underlying offense for purposes of §2F1.1(b)(1). For example, the underlying offense may have involved the fraudulent sale of stock for $200,000 that was worth $180,000. The defendant did not commit the underlying offense but laundered all of the $200,000. The actual value of the laundered funds is $200,000, but the loss amount for purposes of §2F1.1(b)(1) is $20,000. In such a case, the value of the laundered funds, for purposes of subsection (a)(2), is $20,000. Accordingly, the base offense level under subsection (a)(2) is the sum of the base offense level under §2F1.1(a) and the enhancement under §2F1.1(b)(1) for the value of the loss. Therefore, in this example, the base offense level under subsection (a)(2) is level 9 (§2F1.1(a) base offense level of level 6 plus §2F1.1(b)(1) increase of 3 offense levels to account for loss amount of $20,000).

[Value of Funds - Option Three: No specific provision]

4. Enhancement for Business of Laundering Funds.—

(A) In General.—The court shall consider the totality of the circumstances to determine whether a defendant who did not commit the underlying offense was in the business of laundering funds, for purposes of subsection (b)(2)(A).

(B) Factors to Consider.—The court shall consider the following factors in determining whether, under the totality of circumstances, the defendant was in the business of laundering funds for purposes of subsection (b)(2)(A):

(i) The defendant [regularly] [routinely] engaged in acts of laundering funds during an extended period of time.

(ii) The defendant laundered criminally derived funds from multiple sources during an extended period of time.

(iii) The defendant generated a substantial amount of revenue in return for laundering the funds.

(iv) At the time the defendant committed the instant offense, the defendant had one or more prior convictions of an offense under 18 U.S.C. § 1956 or §1957, [31 U.S.C. §§ 5313, 5314, 5316, 5324 or 5326] or any similar offense under state law, or an attempt or conspiracy to commit any such federal or state offense. Prior convictions taken into account under subsection (b)(2)(A) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

5. *[Significant][Material]Promotion of Further Criminal Conduct.—In order for subsection (b)(2)(B) to apply, all or part of the laundered funds must have been used to further criminal conduct in addition to or beyond the criminal conduct from which the laundered funds were derived. [Subsection (b)(2)(B) does not apply if the defendant laundered criminally derived proceeds that were generated from an underlying offense that was completed at the time of the laundering.] For example, subsection (b)(2)(B) would apply in a case in which the defendant reinvested (i.e., plowed-back) all or part of the laundered funds from an ongoing, fraudulent telemarketing scheme to finance the continued operation of that scheme but would not apply in a case in which the defendant used all or part of the laundered funds only to finance a lavish lifestyle. Similarly, subsection (b)(2)(B) would apply in a case in which the defendant used laundered funds from an underlying drug offense to purchase additional drugs for distribution but would not apply in a case in which the defendant used those laundered funds to pay for drugs the defendant had already distributed as part of the underlying drug offense.*

Subsection(b)(2)(B) does not apply to transactions that only give the defendant access to, or the use of for otherwise legal purposes, the criminally derived funds. For example, subsection (b)(2)(B) does not apply in a case in which the defendant deposits checks that represent the criminally derived proceeds from a fraudulent scheme into an account, and subsequently spends the funds for items that are not inherently illegal or items that do not further additional criminal conduct.

[Subsection (b)(2)(B) does not apply if the value of laundered funds used or intended to be used to promote criminal conduct was de minimis relative to the value of the laundered funds.]

6. *Sophisticated Concealment.—For purposes of subsection (b)(2)(C), "sophisticated concealment" means especially complex or especially intricate offense conduct in which deliberate steps were taken to conceal the nature, location, source, ownership, or control of the criminally derived funds, in order to make the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of 18 U.S.C. § 1956 or § 1957, or the extent of that violation, difficult to detect.*

Sophisticated concealment typically involves hiding assets or hiding transactions, or both, through:

(A) the use of fictitious entities;

(B) the use of shell corporations;

(C) creating two or more levels (i.e., layering) of transactions, transportation, transfers, or transmissions, of criminally derived funds that were intended to appear legitimate; or.

(D) the transportation, transmission, or transfer of criminally derived funds from or through a place inside the United States to or through a place outside the United States (e.g., an offshore bank account) or from or through a place outside the United States to or through a place inside the United States. For purposes of this subdivision, "United States" has the meaning given that term in §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States).

7. *Grouping of Multiple Counts.—In a case in which the defendant is to be sentenced on a count (or a Group of counts) for the underlying offense from which the laundered funds were derived, the count for the offense under this guideline shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely-Related Counts) with the count for the underlying offense or, in the case of a Group of counts for the underlying offense, with the most serious of the counts comprising the Group, i.e., the count resulting in the greatest offense level.*

* * *

§2S1.3. Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports

* * *

Commentary

Statutory Provisions: 26 U.S.C. § 7203 (if a violation based upon 26 U.S.C. § 6050I), § 7206 (if a violation based upon 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5316, 5324, 5326. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2T2.2. Regulatory Offenses

(a) Base Offense Level: **4**

Commentary

Statutory Provisions: 18 U.S.C. § 1960; 26 U.S.C. §§ 5601, 5603-5605, 5661, 5671, 5762, ~~provided~~if the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes; 31 U.S.C. § 5326. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 1956	2S1.1
18 U.S.C. § 1957	~~2S1.2~~2S1.1
18 U.S.C. § 1958	2E1.4
18 U.S.C. § 1959	2E1.3
18 U.S.C. § 1960	2T2.2
18 U.S.C. § 1962	2E1.1

* * *

~~31 U.S.C. § 5322~~	~~2S1.3~~
31 U.S.C. § 5324	2S1.3
31 U.S.C. § 5326	2S1.3, 2T2.2
33 U.S.C. § 403	2Q1.3

* * *

Conforming Amendments:

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

* * *

Commentary

Application Notes:

* * *

6. *A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. ~~For example, in §2S1.1 (Laundering of Monetary Instruments), subsection (a)(1) applies if the defendant "is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)."~~ Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) ("if the offense was committed by the means set forth in 18 U.S.C. § 2242").*

An express direction to apply a particular factor only if the defendant was convicted of a

particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. ~~*For example, §2S1.1(a)(1) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A).*~~

* * *

§3D1.2. Groups of Closely Related Counts

* * *

(d) * * *

Offenses covered by the following guidelines are to be grouped under this subsection:

* * *

§§2S1.1, ~~2S1.2,~~ 2S1.3;

* * *

§8C2.1. Applicability of Fine Guidelines

The provisions of §§8C2.2 through 8C2.9 apply to each count for which the applicable guideline offense level is determined under:

* * *

§§2S1.1~~, 2S1.2,~~ 2S1.3;

* * *

§8C2.4. Base Fine

* * *

Commentary

Application Notes: * * *

5. *Special instructions regarding the determination of the base fine are contained in §§2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery); 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); 2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations); 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors);* ~~*2S1.1 (Laundering of Monetary*~~

~~*Instruments); and 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity)*~~.

* * *

Background: *Under this section, the base fine is determined in one of three ways: (1) by the amount, based on the offense level, from the table in subsection (d); (2) by the pecuniary gain to the organization from the offense; and (3) by the pecuniary loss caused by the organization, to the extent that such loss was caused intentionally, knowingly, or recklessly. In certain cases, special instructions for determining the loss or offense level amount apply. As a general rule, the base fine measures the seriousness of the offense. The determinants of the base fine are selected so that, in conjunction with the multipliers derived from the culpability score in §8C2.5 (Culpability Score), they will result in guideline fine ranges appropriate to deter organizational criminal conduct and to provide incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct. In order to deter organizations from seeking to obtain financial reward through criminal conduct, this section provides that, when greatest, pecuniary gain to the organization is used to determine the base fine. In order to ensure that organizations will seek to prevent losses intentionally, knowingly, or recklessly caused by their agents, this section provides that, when greatest, pecuniary loss is used to determine the base fine in such circumstances. Chapter Two provides special instructions for fines that include specific rules for determining the base fine in connection with certain types of offenses in which the calculation of loss or gain is difficult, e.g., price-fixing* ~~*and money laundering*~~*. For these offenses, the special instructions tailor the base fine to circumstances that occur in connection with such offenses and that generally relate to the magnitude of loss or gain resulting from such offenses.*

Issues for Comment: *The Commission invites comment on the following:*

(1) Whether application of subsection (a)(1) of proposed §2S1.1 should be expanded to include defendants who are otherwise accountable for the underlying offense under §1B1.3(a)(1)(B)(Relevant Conduct), in addition to defendants who commit or are otherwise accountable for the underlying offense under §1B1.3(a)(1)(A).

(2) Whether proposed §2S1.1 should include enhancements for conduct that constitutes elements of the money laundering offense, even if the conduct did not constitute an aggravated form of money laundering offense conduct. Specifically, the Commission invites comment on whether and, if so, to what extent, proposed §2S1.1 should include an enhancement if:

(A) The offense involved concealment (coextensive with the meaning of the term under 18 U.S.C. § 1956), even if the conduct did not constitute sophisticated concealment.

(B) If the defendant is convicted (A) under 18 U.S.C. § 1956(a)(1)(A)(ii); (B) under 18 U.S.C. § 1956(a)(1)(B)(ii); (C) under 18 U.S.C. §

1956(a)(2)(B)(ii); (D) under 18 U.S.C. § 1956(a)(3)(C); or (E) of attempting, aiding or abetting, or conspiracy to commit any of the offenses referred to in subdivisions (A) through (D).

(C) If subsection (a)(1) applies and (1) the defendant did not engage in an aggravated form of money laundering as accounted for by subsection (b)(2), and (2) the value of funds laundered exceeded $10,000.

(3) Whether application of subsection (b)(2)(A) ("in the business of laundering funds") should be expanded to include defendants (1) whose base offense level is determined under subsection (a)(1) and (2) who launder criminally derived funds generated by offenses which they did not commit and are not otherwise accountable under §1B1.3(a)(1)(A).

(4) Whether violations of 18 U.S.C. § 1960 (Illegal Money Transmitting Businesses) should be referenced to §2S1.3 (Structuring Transactions to Evade Reporting Requirements).

Proposed Amendment: Miscellaneous New Legislation and Technical Amendments

21. Synopsis of Proposed Amendment: *This is a two-part proposed amendment.*

First, the proposed amendment addresses miscellaneous legislation enacted during the 106th Congress by (1) adding to Appendix A (Statutory Index) and the statutory provisions of several guidelines references to new statutes; and (2) providing commentary to §2M3.9 that implements the new consecutive sentencing requirement of 50 U.S.C. § 421 (pertaining to the disclosure of information identifying a covert agent). Note that there were no directives to the Commission contained in any of the legislation that created these new offenses.

In each instance, the new Appendix A references are based on a determination that the new offense is sufficiently similar to other offenses covered by the referenced guideline.

The new offenses and proposed guideline references are as follows:

7 U.S.C. § 7734 - prohibits knowingly importing, exporting, or moving in interstate commerce any plant pest or noxious weed, or knowingly forging any permit authorizing movement of plant pests or noxious weeds. Referenced to §2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product).

5 U.S.C. § 6821 - prohibits (A) obtaining or attempting to obtain customer information from a financial institution by false statements, representations, or documents; or (B) requesting another person to obtain customer information knowing the information will be obtained under false pretenses. Referenced to §2F1.1 (Fraud and Deceit).

18 U.S.C. § 38 - prohibits falsifying any material fact, or making any fraudulent representation concerning aircraft or space vehicle parts. Referenced to §2F1.1 (Fraud and Deceit).

18 U.S.C. § 842(p)(2) - prohibits any person to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or distribute by any means information pertaining to the manufacture of an explosive, destructive device, or weapon of mass destruction with the intent that the teaching, demonstration, or information will be used for, or in furtherance of any federal crime of violence. Referenced to §2K1.3 (Unlawful Receipts, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials) or §2M6.1 (Unlawful Acquisition, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities) (if the information pertained to a weapon of mass destruction).

42 U.S.C. § 1011 - knowingly and willfully making of any false statement or representation of a material fact in an application for benefits established by the Social Security Act. Referenced to §2F1.1 (Fraud and Deceit).

49 U.S.C. § 30170 - prohibits violating 18 U.S.C. § 1001 with respect to the reporting requirements of 49 U.S.C. § 30166, with the specific intention of misleading the Secretary of Transportation regarding motor vehicle or motor vehicle equipment safety related defects that have caused death or serious bodily injury to an individual. Referenced to §2F1.1 (Fraud and Deceit).

49 U.S.C. § 46317(a) - prohibits (1) knowingly and willfully serving or attempting to serve as an airman operating an aircraft without an airman's certificate; or (2) knowingly and willfully employing as an airman to operate an aircraft any individual who does not have an airman's certificate. Referenced to §2F1.1 (Fraud and Deceit).

49 U.S.C. § 46317(b) prohibits offenses described in 49 U.S.C. § 46317(a) that relate to transporting a controlled substance by aircraft or aiding or facilitating a controlled substance violation and that transporting, aiding, or facilitating—

> *is punishable by imprisonment of more than one year under Federal or State law; or*
>
> *is related to a Federal or state controlled substance law (except simple possession) punishable by imprisonment of more than one year.*
>
> *Referenced to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking).*

Second, the proposed amendment makes technical and conforming changes as follows: (1) modifies Application Note 3 of the Commentary to §2J1.6 to improve the transition between the first and second paragraphs; (2) adds a reference to 18 U.S.C. § 842(l)-(o) to the Commentary of §2K1.3; and (3) adds a reference to 7 U.S.C. § 6810 to the Commentary of

§2N2.1. (With respect to the latter two technical amendments, the statutory provision was listed in Appendix A (Statutory Index) but not in the Commentary of the respective guidelines.)

Proposed Amendment:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)-(3), (7), 960(a), (b); 49 U.S.C. § 46317(b). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 659, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4), 1031, 1341-1344, 2314, 2315; 42 U.S.C. § 1011; 49 U.S.C. §§ 30170, 46317(a). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(a)-(e), (h), (i), (l)-(o), (p)(2), 844(d), (g), 1716; 26 U.S.C. § 5685.

* * *

§2M3.9. Disclosure of Information Identifying a Covert Agent

* * *

Commentary

Statutory Provision: 50 U.S.C. § 421.

Application Notes:

* * *

3. A term of imprisonment imposed for a conviction under 50 U.S.C. § 421 shall be imposed consecutively to any other term of imprisonment.

* * *

§2M6.1. Unlawful Acquisition, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities

* * *

Commentary

Statutory Provisions: 42 U.S.C. §§ 2077(b), 2122, 2131. Also, 18 U.S.C. §§ 831 (only ~~where~~if the conduct is similar to that proscribed by the aforementioned statutory provisions),842(p)(2). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2N2.1. Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product

* * *

Commentary

Statutory Provisions: 7 U.S.C. §§ 150bb, 150gg, 6810, 7734; 21 U.S.C. §§ 115, 117, 122, 134-134e,

151-158, 331, 333(a)(1), (a)(2), (b), 458-461, 463, 466, 610, 611, 614, 617, 619, 620, 642-644, 676; 42 U.S.C. § 262. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

APPENDIX A - STATUTORY INDEX

* * *

7 U.S.C. § 6810	2N2.1
7 U.S.C. § 7734	2N2.1
	* * *
15 U.S.C. § 2614	2Q1.2
15 U.S.C. § 6821	2F1.1
	* * *
18 U.S.C. § 37	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2A5.1, 2A5.2, 2B1.3, 2B3.1, 2K1.4, 2X1.1
18 U.S.C. § 38	2F1.1
	* * *
18 U.S.C. § 842(l)-(o)	2K1.3
18 U.S.C. § 842(p)(2)	2K1.3, 2M6.1
	* * *
42 U.S.C. § 408	2F1.1
42 U.S.C. § 1011	2F1.1
	* * *
49 U.S.C. § 16104	2J1.1
49 U.S.C. § 30170	2F1.1
	* * *
49 U.S.C. § 46312	2Q1.2
49 U.S.C. § 46317(a)	2F1.1
49 U.S.C. § 46317(b)	2D1.1

§2J1.6. Failure to Appear by Defendant

* * *

Commentary

* * *

Application Notes:

* * *

3. *In the case of a failure to appear for service of sentence, any term of imprisonment imposed on the failure to appear count is to be imposed consecutively to any term of imprisonment imposed for the underlying offense. See §5G1.3(a). The guideline range for the failure to appear count is to be determined independently and the grouping rules of §§3D1.1-3D1.5 do not apply.*

   However, ~~I~~in the case of a conviction on both the underlying offense and the failure to appear, other than a case of failure to appear for service of sentence, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense, and the failure to appear count and the count or counts for the underlying offense are grouped together under §3D1.2(c). (Note that 18 U.S.C. § 3146(b)(2) does not

require a sentence of imprisonment on a failure to appear count, although if a sentence of imprisonment on the failure to appear count is imposed, the statute requires that the sentence be imposed to run consecutively to any other sentence of imprisonment. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1-3D1.5 apply. See §3D1.1(b), comment. (n.1), and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a "total punishment" that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, if the combined applicable guideline range for both counts is 30-37 months and the court determines that a "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months' sentence for the failure to appear count would satisfy these requirements. (Note that the combination of this instruction and increasing the offense level for the obstructive, failure to appear conduct has the effect of ensuring an incremental, consecutive punishment for the failure to appear count, as required by 18 U.S.C. § 3146(b)(2).)

UNITED STATES SENTENCING COMMISSION
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February 9, 2001

MEMORANDUM

TO: Chair Murphy
Commissioners
Tim McGrath
Susan Hayes
Charlie Tetzlaff
Ken Cohen
J. Deon Haynes
Pam Montgomery
Andy Purdy
Lou Reedt
Judy Sheon
Susan Winarsky

FROM: Mike Courlander

SUBJECT: Public Comment and Correspondence from DOJ

Attached for your review are three letters from DOJ that were received just today.

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

February 8, 2001

The Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Murphy:

I am writing on behalf of the new Administration to request, in light of the serious impact on law enforcement that our preliminary analysis leads us to believe would result from adoption of certain recently published guideline amendments, that the U.S. Sentencing Commission refrain from acting on these matters until the next amendment cycle, in order to permit time for the new leadership of the Justice Department to review these proposals. None of the issues that cause us concern is the subject of a congressional or other mandate requiring action, and each would have a major impact on the justice system. We therefore ask that the Commission defer action in order to give the Department a fair opportunity to examine thoroughly these proposals and provide the Commission with our views.

We are concerned about three sets of proposals for the following reasons:

1. Money Laundering.

The current money laundering guidelines are relatively straightforward, easy to apply, and consistent with the purposes of the money laundering statutes. The published versions would consolidate the existing two guidelines into one and would create new distinctions based on whether the offender committed the underlying offense that generated the laundered funds, and on whether the offense involved material or significant promotion of illegal activity or sophisticated concealment. For most money launderers, the published guidelines would link the severity of the offense to the underlying crime.

The Department regards money laundering as a very serious offense. Indeed, Congress has fixed the maximum penalty for the most serious forms of money laundering at 20 years' imprisonment. Yet our analysis of the published proposal raises concerns whether the resulting sentences would be sufficient and whether the distinctions drawn by the new proposal are valid or would give rise to excessive litigation. Moreover, the effect of amendments the Commission is considering in the white collar crime package and the flexibility proposals discussed below on the money laundering amendments have not been studied. In short, while the money laundering proposal would tie the offense level to that of the underlying crime in most cases, the underlying offense level itself and the sentencing table are the subject of possible changes that could significantly alter the sentencing outcome.

As you know, Congress in 1995 rejected a proposed amendment of the money laundering guideline that would have dramatically altered the structure of this guideline and substantially lowered sentences. The proposed guideline could result in similar decreases. We understand that the primary reason for proceeding with an amendment is the belief that certain sentences under the existing guideline are too severe, especially in certain small-scale fraud cases. We share this concern to some extent and are not averse to an appropriate adjustment, but the current proposal is simply too problematic.

2. Flexibility Amendments Related Primarily to White Collar Crime.

The Department is extremely concerned about Amendment 14 and Option 1 of Amendment 13 as published for comment. Each of these proposals would affect thousands of cases. Option 1 of Amendment 13, which relates to fraud and theft offenses, would direct courts to increase or decrease the offense level, by two or four levels, depending on whether the offense involves "aggravating," "significantly aggravating," "mitigating," or "significantly mitigating" factors. In effect this amendment would create an eight-level range for most economic crimes, corresponding to a potential variation of 300 or 400 percent in the amount of prison time, on the basis of a finding under these broad standards. Amendment 14, Option 1, would change the sentencing table applicable to ***all*** offenses by increasing the number of offense levels for which alternatives to incarceration would be permitted for offenders in criminal history categories I and II. Option 2 would provide a two-level decrease in sentence for many economic crimes, depending on the existence of specified

factors, such as the absence of prior criminal history or a weapon. While Option 2 is more modest in its approach than Option 1, it nevertheless provides a significant decrease in sentence for a broad array of offenses at a time when a great deal of concern exists in the law enforcement community over the increasing use of technology to foster criminal activity.

The changes described above would lower sentences for thousands of defendants and are of a magnitude and nature deserving of careful consideration even prior to publication of options for comment. Moreover, these flexibility amendments appear to be inconsistent with the goals of other amendments the Commission has published, such as sentence increases based on loss amounts involved in economic crimes. Certain of the proposals also raise considerable concern regarding their consistency with the governing statute, the Sentencing Reform Act of 1984. That statute, as you know, provides generally that, if a guideline sentence includes a term of imprisonment, the imprisonment range may not exceed 25 percent.
28 U.S.C. 994(b)(2).

We understand the desire of the Commission to increase judicial discretion and flexibility under the guidelines but this must be accomplished in accordance with the statute. The Commission, of course, is free to propose amendments of the statute, and we would be willing to examine whether any amendments to enhance flexibility and reduce the incidence of departures are needed.

3. Immigration.

A particularly problematic amendment concerns the unlawful entry into the United States of aliens previously deported following conviction of an aggravated felony. The amendment in question would significantly change the way in which this offense is sentenced and reduce sentences sharply in some cases.

As you know, unlawful reentry by a previously deported aggravated felon carries a sentence ranging from about 4 to 10 years of imprisonment, depending upon the defendant's criminal history, but not otherwise subject to variation on the basis of the seriousness of the past offense. By contrast, under the proposed amendment the length of time served for the past offense would be the primary basis for determining the sentence for the unlawful reentry offense. For the least serious category of prior offense (less than 2 years of imprisonment served), the amendment would reduce the sentence to just over a year of

imprisonment for a person in the lowest criminal history category. The amendment includes several alternative options for weighing the seriousness of past offenses.

The immigration amendment is extremely problematic for several reasons. First, it could lower sentences too severely in some cases. Next, the proposed guideline is based on the time served for past offenses, but time served is not a particularly good measure of the seriousness of an offense. Overcrowding in state prisons may result in early releases in some cases and understate the seriousness of the offense. Moreover, time served is a difficult factor to establish and was rejected by the U.S. Sentencing Commission as a basis for criminal history scoring early in the guidelines' history. Establishing time served could substantially slow the prosecution of alien offenders and have a negative impact on the prosecution of large numbers of aliens along the Southwest border. As the Commission knows, there has been a significant increase in the number of alien cases prosecuted over the last several years. An amendment of the sentencing guidelines on immigration should address the need to prosecute these cases in an expeditious manner. Finally, the proposal fails to prevent creative bases for downward departure that have arisen, particularly in districts that do not have "fast track" policies.

In sum, we urge the Commission to refrain from acting on any amendments in the areas described above until the next amendment cycle so as to allow the Department to fully examine the ramifications of these important proposals, and to provide the Commission with our views and, where appropriate, suggest alternative approaches. We deeply appreciate your consideration.

Sincerely,

Robert S. Mueller
Acting Deputy Attorney General

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

February 9, 2001

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

Dear Judge Murphy:

The Department of Justice submits the following comments regarding the proposed emergency amendments to the federal sentencing guidelines published for comment in the Federal Register January 26, 2001. These comments concern all four of the proposed emergency amendments: Amendment 1, (ecstasy); Amendment 2 (amphetamine), Amendment 3 (trafficking in List I chemicals), and Amendment 4 (human trafficking).

Amendment 1, Ecstasy

The proposed Ecstasy amendment would substantially raise penalties for this serious drug of abuse. We strongly support this amendment since current Ecstasy penalties are too low to serve as an effective deterrent. We estimate that an Ecstasy offense subject to level 26 (roughly five years of imprisonment for a first offender) under the current guideline would involve approximately 11,500-46,000 pills, based on the typical weight of a pill of 250 mg. It is not surprising, given this penalty structure, that federal law enforcement, including federal prosecutors, have found the existing penalties for this dangerous drug to be woefully inadequate. Inadequate federal sentences may be one reason that Ecstacy trafficking has increased in so many American cities. By contrast, under the proposed amendment, offenses involving 100 grams of Ecstasy, or about 400-1,600 pills, would be subject to offense level 26. This penalty structure is much more likely to deter Ecstasy offenses than the current structure. Of course, since no mandatory minimum sentence applies to Ecstasy, reductions in sentence based on role in the offense and acceptance of responsibility would apply throughout offense levels. Similarly, some offenders would qualify for a two-level reduction based on "safety valve" eligibility (see guideline §2D1.1(b)(6)).

As you know, the proposed amendments respond to a directive in the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. No. 106-310, § 3663 (hereinafter "Meth Act"). The Act requires the Sentencing Commission to increase penalties for Ecstasy and directs the Commission to assure that the guidelines reflect the need for aggressive law enforcement, the rapidly growing incidence of abuse of the drug, the recent increase in its illegal importation, and the fact that it is frequently marketed to youth, among other factors.

We believe that the proposed penalty levels for Ecstasy comply with the statutory directive, are consistent with the 20-year statutory maximum term of imprisonment for a first offense (see 21 U.S.C. § 841(b)(1)(C)), and are appropriate. While the Commission has identified the proposed penalty levels as being the same as those that apply to heroin, it is the dangerous nature of Ecstasy that makes these sentencing levels appropriate, rather than any direct relationship to heroin. In our view, the weight equivalency of the two drugs is coincidental. Ecstasy is a highly abused Schedule I controlled substance that may cause significant, long-term health consequences. It has a high potential for abuse, causes widespread actual abuse, and has no acceptable medical use. The target population for Ecstasy consists of teenagers and young adults, and the drug is quickly becoming one of the most abused drugs in the United States.

Contributing to the abuse problem is the fallacy that Ecstasy is safe to use and has no severe long-term effects. Ecstasy, which includes 3,4-methylenedioxymethamphetamine (MDMA) and related drugs, is a stimulant with mild hallucinogenic properties. Its stimulant effects include an increase in heart rate and blood pressure, overheating, and dehydration. Its hallucinogenic properties include enhanced sensations, particularly tactile sensations. Recent scientific studies have established that MDMA is neurotoxic and destroys serotonin neurons in the brain. It causes the death of brain cells by producing both high body temperature and high blood/brain levels of the drug. The damage this drug can produce is significant and long-term. Unfortunately for users of MDMA, the dose ingested does not seem to correlate with the severity of symptoms.

We urge the Commission to adopt the proposed amendment, which will send a strong signal to those who would import or traffic in Ecstasy that it is a serious drug of abuse and that its spread cannot be tolerated.

Amendment 2, Amphetamine

Amendment 2 would raise amphetamine penalties so that they equate with those for methamphetamine. We strongly support this proposal. Two options are presented for accomplishing this change. One would simply revise the drug equivalency table in §2D1.1, and

the other would do the same and also amend the drug quantity table specifically to list amphetamine. We believe both options accomplish the desired result and express no preference between them.

This amendment responds to a statutory directive in the Meth Act, § 3611, to provide increased penalties for amphetamine trafficking offenses "such that those penalties are comparable to the base offense level for methamphetamine ...." The Act also directs the Commission to take into account the "extreme dangers associated with unlawful activity involving amphetamines," including the rapidly growing incidence of amphetamine abuse and the high risk of amphetamine addiction, among other factors.

The proposed amendment, which would treat equal quantities of methamphetamine and amphetamine in the same manner, would fulfill the statutory requirement that these two substances be subject to comparable penalties. Currently, the penalties are very far apart. While one gram of methamphetamine (actual) equates with 20 kilograms of marihuana and one gram of methamphetamine (mixture) equates with two kilograms of marihuana, one gram of amphetamine (actual or mixture) equates with only 200 grams of marihuana. According to a research review conducted by the Drug Enforcement Administration, there is no demonstrable difference in the potencies of amphetamine and methamphetamine. These drugs are, for the most part, illegally produced, marketed, and abused interchangeably. The penalty differential between the two may partially account for a recent rise in the number of amphetamine clandestine laboratories; comparable penalties could deter this effect. Of course, since Congress did not enact a mandatory minimum sentence for amphetamine, there are cases in which the guidelines will operate to provide a lower sentence for amphetamine than for an equal quantity of methamphetamine, but this distinction is consistent with the statutory scheme established by Congress.

The Commission has included an issue for comment regarding whether the enhancement in the current guidelines for the importation of methamphetamine or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully (see §2D1.1(b)(4)) should be amended to include the importation of amphetamine or the manufacture of amphetamine from such listed chemicals. We believe that such an amendment is in order. Many of the same chemicals are used to manufacture amphetamine as are used for methamphetamine. Moreover, many of the same or related organizations produce both drugs, and sometimes the particular drug produced will depend on nothing more than which precursors are available. An amendment to make this enhancement applicable to amphetamine offenses is consistent with the goal of treating offenses involving the two drugs comparably.

Finally, we note that the proposed amendment continues the separate listing of dextroamphetamine and adds a listing for dextroamphetamine (actual). Dextroamphetamine is one isomer of amphetamine and should not be listed separately in the drug equivalency table. Most clandestinely manufactured amphetamine is a mixture of the dextro and levo isomers of amphetamine. The inclusion of dextroamphetamine in the drug quantity table or the drug equivalency table is unnecessary because it is chemically identical to amphetamine, and such inclusion may be confusing since other isomers are not included. Indeed, the listing of the levo isomer of methamphetamine was removed from the drug equivalency table by Amendment 518 after it caused extensive litigation concerning methamphetamine sentences. If, however, the Commission does not delete the specific references to dextroamphetamine, then the proposed amendment of §2D1.1(b)(4) should also expressly apply to this substance.

Amendment 3, Trafficking in List I Chemicals

Amendment 3 would increase penalties for certain chemical offenses. First, it would substantially raise penalties for offenses involving ephedrine, phenylpropanolamine (PPA), and pseudoephedrine under guideline §2D1.11. Next, it would add to the drug equivalency table in the drug trafficking guideline, §2D1.1, a conversion table for these three substances. In addition, the proposed amendment would increase penalties for five other chemicals associated with methamphetamine and amphetamine production: benzaldehyde, hydriodic acid, methylamine, nitroethane, and norpseudoephedrine. With respect to these chemicals, the proposal would not increase the current offense levels, but rather would add a new offense level 32 for greater quantities than now specified. Finally, the proposal replaces current language that provides a mechanism for adding total quantities of different List I chemicals for purposes of determining the offense level when the chemicals are used to make different controlled substances or when they are used to make the same controlled substance by different manufacturing processes. In place of this instruction, the proposed amendment provides that the quantity of the single chemical that results in the greatest offense level should be used, except in cases involving ephedrine, PPA, and pseudoephedrine. Upward departure language is included for cases in which the chemicals are not added together.

We support the proposed amendment in most respects. It carries out a statutory directive in the Meth Act, § 3651(b), to increase penalties for ephedrine, PPA, and pseudoephedrine so that those penalties correspond to "the quantity of controlled substances that could reasonably have been manufactured using the quantity of ephedrine, [PPA], or pseudoephedrine possessed or distributed." We believe the proposed level of increase is necessary in order for the Commission to fulfill its statutory obligation. Of course, since PPA is used to manufacture amphetamine but not methamphetamine, the

amendment relating to PPA is dependent upon whether Amendment 2 is adopted, as we urge it should be.

With respect to the proposed treatment of chemicals other than ephedrine, PPA, and pseudoephedrine, the amendment would simply add another offense level to the existing chemical quantity table for five List I chemicals so that offenses involving large quantities of these chemicals would be punishable at level 32, rather than 30. The statutory directive for offenses involving List I chemicals other than ephedrine, PPA, and pseudoephedrine requires the Commission "to provide for increased penalties such that those penalties reflect the dangerous nature of such offenses, the need for aggressive law enforcement action to fight such offenses, and the extreme dangers associated with unlawful activity involving methamphetamine and amphetamine ...." Meth Act, § 3651(c). We do not think the proposed guideline amendment adequately implements this directive.

To comply with this directive and to recognize the seriousness of offenses involving chemicals other than ephedrine, PPA, or pseudoephedrine, we urge the Commission to provide a penalty increase throughout the chemical quantity table for the five List I chemicals identified and to add more offense levels. An issue for comment specifically solicits views on this issue. Such an amendment would reduce the sentencing "cliff" that would otherwise occur between offenses involving ephedrine, PPA, or pseudoephedrine, and offenses involving the other chemicals--for example, offenses in which the defendant had obtained all the necessary chemicals to produce methamphetamine, except ephedrine or pseudoephedrine. We also note the need for a technical correction: the proposed chemical quantity table should most likely provide that at least 17.8 grams of benzaldehyde, rather than 17 grams, correspond to offense level 30, so that the quantity assigned to this level does not overlap with the quantity assigned to level 28.

Finally, we recommend that for violations involving multiple chemicals, the various quantities should be added together to arrive at an offense level. As proposed, the amendment could provide a windfall in certain cases involving multiple chemicals other than ephedrine, PPA, and pseudoephedrine since the offense level would be determined in such cases only by determining the offense level for the single chemical carrying the highest offense level. The current guideline provides for combining List I chemical quantities for different chemicals used to manufacture different controlled substances or used to manufacture one controlled substance by different manufacturing processes (see §2D1.11, Note A following the chemical quantity table). Although the proposed amendment recognizes the appropriateness of upward departure if the offense level does not adequately address the seriousness of the offense (proposed Application Note 4(C)), upward departures are a rare event in sentencing guidelines practice, and the guidelines themselves

should recognize the increased seriousness of an offense involving multiple chemicals.

Amendment 4, Human Trafficking

Amendment 4 would amend §2G1.1 (promoting prostitution or prohibited sexual conduct), §2G2.1 (sexually exploiting a minor by production of sexually explicit visual or printed material), and §2H4.1 (peonage, involuntary servitude, and slave trade). It would also create a new guideline, §2H4.2 (willful violations of the Migrant and Seasonal Agricultural Worker Protection Act). The need for an amendment on human trafficking arises in part from the enactment of four new statutes: 18 U.S.C. §§ 1589 (forced labor), 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor); 1591 (sex trafficking of children or by force, fraud or coercion); and 1592 (unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor). Finally, the amendment also addresses changes to other statutes, including 18 U.S.C. §§ 1581 (peonage; obstructing enforcement); 1583 (enticement into slavery); and 1584 (sale into involuntary servitude). These proposed amendments respond to the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386. In general, ~~we agree with~~ most of proposed Amendment 4 and have the following comments.

Promoting Prostitution or Prohibited Sexual Conduct, §2G1.1

The Commission has presented several options for amending the specific offense characteristic relating to young victims of prostitution and prohibited sexual conduct, §2G1.1(b)(2). While the current guideline differentiates between crimes involving victims under 12 years of age and those involving victims between 12 and 16, the proposal makes a further distinction to address crimes involving victims between the ages of 12 and 14. We agree that this further distinction is appropriate because 12- and 13-year-old children are at a vulnerable age for these types of offenses and are in need of increased protection. Moreover, the new statute differentiates minors 14 and below from others, 18 U.S.C. § 1591. We also support an increase in the applicable enhancement at each age included in the proposal.

Prostitution and prohibited sexual activity aimed at minors are serious offenses that have taken on international dimensions. Under the current guideline a person who unduly influences a 13-year-old girl from an impoverished background to engage in prostitution would be subject to an offense level of 23, assuming the absence of sufficient proof of force or coercion. With a three-level reduction for acceptance of responsibility, an offender in Criminal History Category I would face a prison term of just 33 to 41 months. Higher penalties are needed, and we agree with the higher of the two

options presented in the Commission's proposed amendment of §2G1.1(b)(2). Under this proposal the offender in the example described above would be subject to an offense level of 27, or 24 after a three-level reduction for acceptance of responsibility (51 to 63 months of imprisonment for a first offender). This approach would assure appropriate sentences for these serious offenses and maintain proportionality with related offenses.

Our next concern involves the number of victims involved in promoting prostitution or prohibited sexual conduct. The Victims of Trafficking and Violence Protection Act of 2000 directs the Commission to consider providing sentencing enhancements if the offense involved a large number of victims, Pub. L. No. 106-386, §112(b)(2)(C)(i). Currently, §2G1.1(d)(1) establishes, by way of a special instruction, that if the offense involved more than one victim, the multiple count rules of Chapter Three are to be applied as if the promoting of prostitution or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction. The proposed amendment includes a new Application Note 12 stating that an upward departure may be appropriate if the offense involved substantially more than a specified number of victims, ranging from six to 25. We agree with this treatment and would favor a starting point for upward departure that assures that the penalties take into account all victims. We also believe that the proposed application note would be better placed as part of Application Note 4, which addresses the special instruction on multiple victims.

We also recommend an amendment to the commentary to §2G1.1 to address offenses that involve international trafficking since such cases are particularly egregious. Often, defendants are part of international prostitution rings, and they prey upon the victims' economic disadvantage and cultural expectations. Coercion is generally a factor, but given the difficulty of proving cases that go beyond the boundaries of the United States, coercion is particularly difficult to prove. It necessitates producing witnesses from the victim's family and community and entails all of the difficulties that are inherent in crossing language and cultural barriers. When a prostitution or related case has international dimensions, coercion is common. Therefore, we urge the Commission to provide in commentary to §2G1.1 that there is a rebuttable presumption of coercion under subsection (b)(1) if the victim is transported to the United States from another country or if the offense involved an attempt to transport the victim. A precedent for such a presumption is currently in the commentary to this guideline. Application Note 7 establishes a rebuttable presumption of undue influence if the participant is at least 10 years older than the minor.

Finally, new background language summarizes the coverage of 18 U.S.C. § 1591. However, the statute actually includes a broader

range of offenses than specified, including harboring, obtaining, and enticing the victim. The proposed amendment should either list all of the conduct or clarify that there is other conduct subject to the statute.

Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material, §2G2.1

The proposed amendment of the guideline on production of child pornography, §2G2.1, would provide enhancements relating to the age of the minor that are identical to the enhancements proposed for §2G1.1. While we agree that the new distinction for victims between the ages of 12 and 14 years is needed, we believe that for this guideline the lower options presented are appropriate. Choosing the lower options recognizes the high base offense level for child pornography production offense and the need for proportionality among related offenses.

Peonage, Involuntary Servitude, and Slave Trade, §2H4.1

The proposed amendment would substantially revise the guideline on peonage, involuntary servitude, and slave trade, §2H4.1. While the current base offense level is 22 for this offense, the proposal adds a lower base offense level if the defendant was convicted only of unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor, 18 U.S.C. § 1592. We agree with a reduced offense level for this offense, which carries a maximum term of imprisonment of five years, but prefer offense level 18 over 15. Offenses involving documents are serious ones that have as elements violations of other statutes, or the intent to violate such other statutes, involving peonage, slavery, and related crimes. We also favor proposed subsection (b)(2), which provides a four-level enhancement if a dangerous weapon was used and a two-level enhancement if one was brandished or its use was threatened. The current guideline establishes only a two-level enhancement for use of a dangerous weapon. Finally, subsection (b)(3) would provide an enhancement based on the number of victims. We believe a better approach to address multiple victims is embodied in §2G1.1(d)(1) and an application note on upward departure, as discussed above. The enhancement as proposed could result in the failure to provide a sentencing increment for a small number of multiple victims.

Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act, §2H4.2

The proposed amendment also includes a new guideline, §2H4.2, addressing willful violations of the Migrant and Seasonal Agricultural Worker Protection Act. We agree with the proposal and prefer the option for a base offense level of six. Violations affecting migrant and seasonal agricultural workers can be serious

offenses. While not involving involuntary servitude, these offenses can present significant danger to the victim, including the risk of bodily injury or death because of crowded and substandard living and transportation conditions. The guideline should provide for a term of imprisonment for serious offenses, which would be possible with a base offense level of six, since such a sentence can create a deterrent effect.

We look forward to working with the Commission on these and other sentencing guideline amendments.

Sincerely,

Michael Horowitz
Chief of Staff

Member (ex officio)
U.S. Sentencing Commission

Office of the Deputy Attorney General
Washington, D.C. 20530

February 8, 2001

The Honorable Diana E. Murphy
Chair, U. S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Murphy:

As you know, Laird Kirkpatrick, the Department of Justice's previous *ex officio* representative on the U. S. Sentencing Commission, has left the Department. I am pleased to inform you that Michael Horowitz, the current Chief of Staff in the Criminal Division and a former senior prosecutor in the U.S. Attorney's Office for the Southern District of New York, will serve as the Department's new *ex officio* representative. I know he looks forward, as do I, to a constructive relationship with the Commission as it continues its important work.

Sincerely,

Robert S. Mueller, III
Acting Deputy Attorney General

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
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WASHINGTON, D.C. 20002-8002
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February 15, 2001

MEMORANDUM

TO: Chair Murphy
Commissioners
Tim McGrath
Susan Hayes
Ken Cohen
J. Deon Haynes
Janeen Gaffney
Pam Montgomery
Lou Reedt
Judy Sheon
Charlie Tetzlaff
Susan Winarsky

FROM: Mike Courlander

SUBJECT: Public Comment

Attached for your reference is some recently received public comment.

Families Against Mandatory Minimums
FOUNDATION

Rec'd 2:05 PM.
2/13/01 CMT

January 8, 2001

The Honorable Diana E. Murphy
and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Proposed Emergency Amendment 1: Ecstasy

Dear Judge Murphy and Commissioners:

I write to express the deep concern of Families Against Mandatory Minimums (FAMM) about the proposed emergency amendment 1, establishing a marijuana equivalency for Ecstasy comparable to that of heroin. FAMM urges the Commission to delay action until it has had an opportunity to conduct further investigation into the drugs, including a public hearing and discussion about the dangers associated with Ecstasy and the purposes served in choosing a particular guideline range or equivalency for the drug. Taking the time to further explore and define the bases for determining an appropriate level would ensure that the amended guideline range is based on the best information currently available to the Commission and thus more accurately addresses the seriousness of offenses related to the drug.

FAMM appreciates that the proposed emergency amendment responds to the mandate contained in Pub. L. No. 106-310 that directs the Commission, among other things, to amend the guidelines by increasing penalties to reflect the seriousness of the manufacture and trafficking in Ecstasy. We are concerned that the Commission has not determined just what the seriousness is. While FAMM does not doubt there is cause for concern, the severity of the proposed amendment and the dearth of information supporting such a drastic increase, counsel a more considered approach. Even the options presented through the issue for comment suggests that the Commission and the public would be well served by a public hearing or, at a minimum, further research and consideration.

FAMM urges the Commission to explore empirical evidence of the drugs' dangers and satisfy itself as to the drugs' short and long-term physiological effects In the Issue for Comment the Commission states that "[i]t has been represented to the Commission that Ecstasy . . . is similar in its hallucinogenic effect on the user to mescaline, and also has been described as having an added stimulant component that can elevate heart rate, blood pressure, and body temperature. It has also been suggested that the drug is neither physically nor psychologically addictive." If that is the case, we are hard pressed to understand why the Commission proposes equating

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Families Against Mandatory Minimums
FOUNDATION

February 13, 2000

The Honorable Diana E. Murphy
and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Proposed Emergency Amendment 1: Ecstasy

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offenses associated with the drug to those associated with heroin or cocaine, whose physical and psychological addictive properties are well known.[1]

The Commission could also invite testimony from experts to help put Ecstasy in context with respect to collateral dangers attendant on its use compared to those associated with other controlled substances. Simply assigning a guideline equivalency range that focuses on quantity begs the question about assigning a value that will get at the real harms posed by the drug and may very well overstate the roles of mere couriers and others whose culpability may not be genuinely reflected by mere quantity calculations.

Congress directed not only that the Commission increase the offense levels for Ecstasy, but that it provide a report, no later than 60 days after the amendment's promulgation, that "describ[es] the factors and information considered by the Commission . . . ." Pub. L. 106-310 § 3663 (e)(1). Such a report would be enhanced by a careful and public evaluation of the dangers, risks, and harms associated with the substances and the thoughtful assignment of a level or levels that address the actual physical and social harms.

Thank you for your consideration of our concerns.

Sincerely,

Mary Price
General Counsel

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[1] Furthermore, FAMM opposes the abandonment of the distinctions among the different substances, MDMA, MDA and MDEA, presently found in the drug equivalency table. Those equivalency distinctions were based on the Commission's understanding of differences in the effects of those drugs. Nothing in the directive requires the Commission to treat the three compounds identically and the Commission does not explain why it has taken that step in its proposed emergency amendment or issue for comment.

PROBATION OFFICERS ADVISORY GROUP

to the United States Sentencing Commission

Ellen S. Moore
Chairperson, 11th Circuit

U.S. Probation Office
P.O. Box 1736
Macon, GA 31202-1736

Phone # 478-752-8106
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February 9, 2001

The Honorable Diana E. Murphy, Chairman
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Murphy:

The Probation Officers Advisory Group (POAG) met in Washington, DC on February 6 and 7, 2001, for the purpose of formulating our recommendation with respect to emergency amendments that will be effective May 1, 2001, as well as to provide comment on amendments to be considered effective November 1, 2001. This paper focuses on amendments that we were informed you will be discussing at your meeting on February 13, 2001.

Following is POAG's position with respect to three of the four proposed emergency amendments:

Proposed Emergency Amendment No. 1 - Ecstasy

Based on the facts presented to POAG concerning the harms inflicted by this drug, it is our position that a penalty increase is warranted. POAG is not in a position to comment on whether Ecstasy should be comparable to some other major drug of abuse. The proposed amendment does not present any application difficulties and appears to address the concern that the penalties for this substance is too low.

Proposed Emergency Amendment No. 2 - Amphetamine

POAG supports this amendment and views it appropriate based on the analysis that amphetamine and methamphetamine are chemically similar, produced in a similar fashion, trafficked in a similar manner, share similar methods of use, effect the same parts of the brain, and have similar intoxicating effects. Therefore, these substances should receive the equivalent punishment as there appears to be no objective criteria to differentiate the two. POAG supports Option 2 wherein amphetamine is included in the drug quantity table at USSG §2D1.1(c). This option provides ease of application as it eliminates the mathematical conversion of the amount of amphetamine to its marijuana equivalent.

POAG is of the opinion that USSG §2D1.1(b)(4) should be amended to include amphetamine and dextroamphetamine because of the similarities between these substances and methamphetamine. POAG is of the opinion that whenever possible, the guidelines should be consistent. Therefore, if methamphetamine and amphetamine are treated as a one-to-one ratio and there is a two-level increase for manufacture or importation of methamphetamine, the same should hold for the production or importation of amphetamine.

Proposed Emergency Amendment No. 3 - Trafficking in List I Chemicals

After listening to Committee reports provided by staff members of the United States Sentencing Commission, POAG supports the proposed amendment. POAG is of the opinion that application of the proposed amendment will not be difficult.

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The following comments are related to POAG's position with respect to circuit conflicts which were published in the *Federal Register* November 7, 2000:

Amendment No. 4 - Circuit Conflict Concerning Stipulations

POAG supports the proposed amendments to §1B1.2(a). POAG is of the opinion that the revised proposed language addresses the circuit conflicts and will promote good practice and a uniform understanding that should a plea agreement, written or made orally on the record, contain a stipulation that establishes a more serious offense than the offense of conviction, the Chapter Two guideline applicable to the stipulated conduct is to be applied. There was concern regarding that there may be a misunderstanding between the parties as to the specific Chapter Two guideline that would be referenced as a result of the stipulation.

Amendment No. 5 - Circuit Conflict Concerning Aggravated Assault

POAG agrees that both options address the circuit conflict regarding whether the four-level enhancement in sub-section (b)(2) of USSG §2A2.2 applies even though the basis for the application of the Aggravated Assault guideline is the presence of a dangerous weapon. However, POAG supports Option One as we found Commentary Note 2 provides a thorough explanation regarding the application of the specific offense characteristic. It is also our position that Option One resolves the circuit conflict without making

further substantive changes to this particular guideline. It is POAG's posture that Option Two may inadvertently present additional issues for litigation.

Amendment No. 6 - Circuit Conflict Concerning Certain Fraudulent Misrepresentations

Generally, POAG is in agreement with the proposed amendment. POAG recommends that the Commission review Example (C) as the example does not appear to capture the application of this enhancement in the case of a legitimate organization when all or part of the funds were diverted. An area of concern was identified as the timing of the intended diversion of all or part of the benefit. As in Example (C), it appears the fire chief at the onset of the fund raiser did not intend to divert all or part of the benefit but made the decision to do so during the fund raiser or sometime thereafter. The question of whether or not timing should be an issue needs to be addressed. POAG was of the opinion that Example (C) generated confusion and were in agreement that perhaps another example could be drafted to capture the applicability of the enhancement in a legitimate organization when all or part of the funds were diverted.

Proposed Amendment No. 7 - Circuit Conflict Regarding Drug Defendant's Mitigating Role

POAG supports the general framework of this amendment, however, identified several areas of concern. First, the proposed deletion of the sentence which states in part that, "the minimal role adjustment is intended to be used infrequently" may be interpreted that it is the Commission's intent to actively discourage the application of minimal participant as the deletion of this sentence would be a substantive change to the prior commentary as currently reflected in USSG §3D1.3, comment.(n.2). Second, the concern arose in defining "average participant" as noted at Commentary Note 3A, Substantially Less Culpable Than Average Participant. POAG presented two different interpretations of "average participant". One interpretation was that an average participant was distinguished among others within the conspiracy while the other interpretation of an average participant was compared to participants in like offenses. The context and framework of "average participant" is extremely essential in determining the application of this adjustment.

With respect to proposed application note 3(C), we are of the opinion that the mitigating role adjustment should not be restricted in applying to a defendant whose role in a drug offense is limited to transporting or storing of drugs. Furthermore, we agree that the example in proposed application note (C) should be expanded for the purpose of clarifying that the rule is intended to apply to a defendant who has a similarly limited role in any offense, i.e., telemarketing, and who is accountable under sub-section 1B1.3 only for that portion of the offense for which the defendant was personally involved.

In closing, the Probation Officers Advisory Group appreciates the opportunity to respond to issues involving the Sentencing Guidelines and desires that you find our responses beneficial when making your decisions.

Respectfully,

Ellen S. Moore
Chairman

ESM/amc

THE LINDESMITH CENTER – DRUG POLICY FOUNDATION

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February 07, 2001

Michael Courlander
Office of Public Affairs
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, DC., 20002-8002

Dear Mr. Courlander:

It has been brought to our attention that the U.S. Sentencing Commission is considering very sharp increases in the penalties associated with the manufacturing, importation, exportation, and/or trafficking of MDMA. Severe sentencing increases have not proven effective in controlling the use of other illegal drugs, and such increases will undoubtedly increase harms associated with MDMA. Consequently, The Lindesmith Center-Drug Policy Foundation urges you not to pursue such a sharp increase in the penalty for MDMA.

Under the proposed emergency sentencing guidelines, one gram of MDMA will be treated as the equivalent of one kilogram of marijuana -- the same sentencing structure as for heroin. Such a severe increase in the penalties associated with MDMA is unwarranted given both the nature of the drug and the current scientific evidence regarding its use and problems associated with it. The fact is there is ample evidence supporting the therapeutic uses of MDMA. Some evidence suggests that MDMA can be used in a variety of treatment options such as Post-Traumatic Stress Disorder (PTSD), pain relief for end-stage cancer patients and grief counseling. (See the enclosed articles for more information). Creating new sentencing guidelines with greater severity will add to the burdens of researching the potential benefits of MDMA.

Imposing such a severe increase in the penalty for MDMA would also create a notable discrepancy between how the U.S. Sentencing Commission views MDMA and how the Drug Enforcement Administration (DEA) views the drug. The DEA currently equates MDMA with mescaline, yet current sentencing guidelines treat MDMA offenses much harsher than mescaline offenses. Increasing the penalties for MDMA offenses would place federal sentencing guidelines even further out of touch with both the views of doctors and the DEA. This is a case where increasing the penalties may result in more cumulative harm than the substance itself.

Furthermore, utilizing emergency powers to implement tougher penalties is shortsighted and irresponsible. Sharp sentencing increases should not take place without first determining whether or not the new penalties are warranted in light of the prevailing medical views on any dangers associated with MDMA. There has also been no evaluation of potential unintended consequences that could result from harsher MDMA sentences, such as more counterfeit substances being sold as MDMA (so sellers can meet the demand for MDMA without risking the harsh MDMA sentences). Many of the problems attributed to MDMA stem not from MDMA itself, but from the use of counterfeit drugs sold to unsuspecting buyers as MDMA. Raising the penalties for

MDMA will undoubtedly lead to more counterfeit substances being sold as MDMA, which would even further endanger the lives of our young people. In fact, such sentences are likely to drive users away from clinicians and the social support networks that can best help them reduce or eliminate the use of MDMA.

The Commission should also evaluate the potential impact of new sentencing increases on the illegal MDMA trade. A more fiercely competitive MDMA black market, more risk-prone MDMA dealers, and greater levels of violence associated with the MDMA trade are likely consequences of harsher MDMA penalties. Additionally, information about non-violent offenders, the problems associated with mandatory minimums and harsh sentences, and the potential for racial and other disparities are just a few of the concerns that should be addressed prior to making a final decision. No changes should occur without comprehensive research, public hearings and exhaustive debate.

It is the opinion of The Lindesmith Center-Drug Policy Foundation that the proposed sentencing guidelines are unwarranted and are out of touch with the views of even the DEA. Put simply, the sentencing guidelines ought to be rooted in science and consider the interest of public health. If the Commission believes that harsher penalties are warranted, they should be directed at people who knowingly or recklessly sell a counterfeit drug as MDMA. We would be delighted to assist you in coming up with language to accomplish this task. Finally, we would be happy to provide you with a substantial body of research regarding MDMA, as well as the name of experts in this field.

Sincerely,

William D. McColl, Esq.
Director of Legislative Affairs

EXAMINING THE USE AND ABUSE OF ECSTASY

San Francisco Chronicle
Fri, 02 Feb 2001
By Marsha Rosenbaum and Steve Heilig

WE HEAR a lot about the drug Ecstasy of late.

MDMA (its chemical name) has been around since 1914. But it was not actually used until the 1970s, when a small group of psychiatrists discovered the drug's ability to melt away patients' fears and defenses. It became useful in psychotherapy.

By the early 1980s, entrepreneurs coined the name "Ecstasy." MDMA crossed over from therapy to recreation. The open presence of "X" among young professionals -- coupled with disturbing (though preliminary) research findings about possible brain changes -- caused the Federal Drug Enforcement Administration in 1985 to ban MDMA for both medical and recreational use.

But Ecstasy never disappeared from the drug scene.

Its reputation as a "feel good," "love/hug" drug, and its continued use among affluent young people has caused much concern and controversy.

Millions have tried MDMA, and government studies indicate that use among teenagers is growing faster than any other drug, nearly doubling in the past five years.

Use of Ecstasy in the gay community has grown. A culture of users who attend large dance parties known as "raves" has developed worldwide.

An adulterated market has emerged, making it impossible for users to know exactly what they are actually getting. Other drugs (such as PMA and DXM) look just like Ecstasy but have caused severe reactions in naive users.

The hot, stuffy environment at some raves has overheated and dehydrated dancers, bringing about seizures or fainting.

Meanwhile, researchers remain concerned that even small amounts of MDMA can have long-term consequences for brain chemistry. As a response, the government launched a "Club Drugs" initiative to warn users about Ecstasy's dangers; politicians are calling for stricter penalties for manufacture, distribution and use, and raves are being closely scrutinized, or even shut down.

Resolution is far from imminent. Claims about risks and benefits of MDMA diverge widely, with proponents going so far as to call the drug "a penicillin for the soul" and detractors labeling it "the worst new drug to hit the streets since heroin."

Somewhere in between the extreme views are (1) scientists and physicians who believe MDMA to be less harmful than government officials have claimed; (2) those who wish to conduct

research on both therapeutic and recreational use; (3) those who wish to simply reduce the harms associated with use, and (4) the millions of people who do not know what to believe.

In a first-of-its-kind "only in San Francisco" gathering, scientific researchers, clinical and public health professionals, government officials, patients, psychotherapists and "ravers" are meeting in the city today to discuss the history, medical uses, potential problems and culture of Ecstasy, with an eye toward proposing sound approaches and "harm-reduction" policies.

"The State of Ecstasy: Science, Medicine and Culture" conference is sponsored by the San Francisco Medical Society, the Lindesmith Center-Drug Policy Foundation, the University of California in San Francisco, the San Francisco Department of Public Health and the California Society of Addiction Medicine.

Marsha Rosenbaum is director of the San Francisco office of the Lindesmith Center-Drug Policy Foundation, and is co-author (with Jerome E. Beck) of "Pursuit of **Ecstasy:** The MDMA Experience" (SUNY Press, 1994). Steve Heilig is director of public health and education at the San Francisco Medical Society.

THE CLINICAL PLAN: PARTNERING WITH THE FDA

by Rick Doblin, Ph.D.

A Clinical Plan for MDMA in the Treatment of Post-Traumatic Stress Disorder (PTSD)

In Chapters 4-5 of my dissertation on the regulation of the medical uses of Schedule 1 drugs, a series of regulatory, ethical and methodological issues were addressed for the investigation of psychedelic psychotherapy in the context of FDA-approved clinical trials. Chapter 6 focused on the design, well in advance of any practical necessity, of a system of regulatory controls over the medical uses of psychedelic drugs, if any eventually do become approved by the FDA as prescription medicines. This document builds on the arguments in the dissertation by elaborating a five-year, $4 million Clinical Plan outlining a proposed sequence of studies to investigate MDMA-assisted psychotherapy in the treatment of PTSD. This Clinical Plan starts with pilot studies and concludes with two FDA-required "adequate and well controlled investigations" of safety and efficacy.[1] This discussion outlines a strategy for developing MDMA into an FDA-approved prescription medicine.

Given the political and scientific hurdles, a rational analysis of the likely return on investment would probably not inspire any venture capitalists to invest their risk capital into the development of MDMA as a prescription medicine. MDMA is off patent, PTSD affects more than 200,000 people so that patent protection under FDA's Orphan Drug program cannot be obtained, and the political hurdles due to MDMA's non-medical use may not be surmountable within any time frame that an investor would consider realistic.[2] Though the for-profit approach for the development of MDMA as a prescription medicine is of questionable viability, the non-profit approach is more likely to succeed. There are probably enough philanthropists who, from personal experiences or otherwise, appreciate the political, scientific and medical importance of supporting the struggle to develop MDMA into a legal prescription medicine.

This discussion begins by evaluating the strategic advantages associated with the prioritization of FDA-approved research with MDMA as the specific psychedelic drug and PTSD as the specific clinical indication. Proposed protocol designs and sample sizes for the studies evaluating the potential use of MDMA in the treatment of PTSD are based in part on a review of documents pertaining to Pfizer's successful development of Zoloft into the first FDA-approved medicine for the treatment of PTSD. These documents were obtained from FDA by the author through Freedom of Information Act (FOIA) request.

Choosing Drug and Patient Population

The primary strategic issue in conducting psychedelic psychotherapy research is estimating the probabilities of success in the FDA drug development and approval

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[1] For a personal account of MDMA therapy for PTSD, see http://www.maps.org/research/mdma/marcela.html

[2] Office of National Drug Control Policy (August 1, 2000). Press release: Media Campaign. Drug Czar's media campaign to target rave club drug Ecstasy. Washington, DC. On October 17, 2000, Congress passed a new law (106 P.L. 310) which contained a provision (Title XXXVI, Subtitle C, Ecstasy Anti-Proliferation Act of 2000, Sec. 3664) urging the U.S. Sentencing Commission to increase the penalites for the manufacture, distribution and possession of MDMA.

process of the numerous combinations of the variety of psychedelic drugs and patient populations. Psychedelic drugs, though each with a unique set of actions and side effects, all serve the generally similar function of increasing access to psychological, emotional processes. As a result, psychedelics can be used as general purpose adjuncts to psychotherapy, in the treatment of most conditions for which people seek out psychotherapy or psychiatric treatment. The limited resources available to fund psychedelic psychotherapy research make it essential to chose the best test case of a specific psychedelic drug used in treating a specific clinical indication.

Why MDMA?

On the one hand, the psychological safety profile of MDMA is superior to that of all the other psychedelics. MDMA is relatively short-acting with primary effects lasting only about 4 hours with gradual return to baseline over the course of another 2 hours or so. MDMA rarely interferes with cognitive functioning or perception and usually produces a warm, emotionally grounded feeling with a sense of self-acceptance, and a reduction of fear and defensiveness. Subjects under the influence of MDMA can usually "negotiate" with their emergent psychological material and often retain the ability to move at will toward or away from certain thoughts or emotions. In contrast, LSD lasts 8 to 10 hours, interrupts rational cognitive processes, impacts perception, requires surrender to inner emotional processes rather than permitting negotiation, and can result in feelings of loss of control, fear and panic, as well as more positive emotions. All the major psychedelics such as psilocybin. mescaline, ibogaine, DMT, etc resemble LSD more so than they resemble MDMA. Even the effects of marijuana are more similar to the classic psychedelics than to MDMA.

In terms of therapeutic potential, MDMA is remarkable effective, gentle yet profound. Because it operates on emotions more than cognitions, the MDMA state is only subtly different than normal. As a result, the thoughts and emotions of the MDMA state can be easily remembered after the effects of the drug have worn off, facilitating integration and long-term growth. Due to its relative short-acting duration and its gentle action, MDMA probably has the greatest opportunity of any psychedelic to find its way into psychiatric practice. The classic psychedelics can be equally or even more therapeutic but in different ways and with greater personal struggles required of patients and therapists.

On the other hand, the physiological safety profile of all the classic psychedelics is superior to that of MDMA. The extreme position on risk is expressed by Dr. Alan Leshner, Director of the National Institute on Drug Abuse (NIDA), who claims that "There is no safe way to use any of these drug [such as MDMA],"[3] that "even experimenting with club drugs [such as MDMA] is an unpredictable and dangerous thing to do," and that chronic use of MDMA may cause long-term problems with emotion, memory, sleep and pain.[4] When used recreationally in dance clubs, users of MDMA (almost always in combination with other drugs) have died from hyperthermia as a result of overheating from vigorous dancing in high ambient temperature environments with inadequate water

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[3]Mertl M. Ecstasy and the Brain: Club Drug Rants and Raves, April 11, 2000, http://www.brain.com/about/article.cfm?id=9300&cat_id=500

[4]Leshner, A. Club Drugs Aren't "Fun Drugs." http://www.drugabuse.gov/Published_Articles/fundrugs.html

or other fluid replacement.[5] Furthermore, with the exception of ibogaine, the classic psychedelics have not been claimed to be "neurotoxic," as has MDMA. In primates, at doses slightly higher than the amounts used in psychotherapy, MDMA has been linked to minor persisting reductions in serotonin levels in a few brain regions.[6] Whether therapeutic doses of MDMA have any permanent impact on serotonin levels is a matter of substantial controversy.[7] If high doses of MDMA are consumed frequently, a dosage pattern seen in some recreational users of MDMA, MDMA may reduce serotonin levels for extended periods of time.[8] Though there is evidence of recovery of serotonin levels over time, serotonin does not reach initial levels in all brain regions.[9] Indeed, some brain regions recover to levels higher than baseline. Some changes may indeed be permanent.[10] Fortunately for the heavy recreational users of MDMA, these changes in serotonin levels, if they do indeed occur, seem largely asymptomatic. Evidence for any functional consequences in animals or humans resulting from even massive consumption of MDMA is weak. Concern centers around several studies that show statistically significant but clinically insignificant reductions in a few memory functions in heavy poly-drug users who have consumed large amounts of MDMA.[11] [12]

Recent studies have shown that neurotoxicity is exacerbated by high body temperatures and can be eliminated by a slight cooling of body temperature.[13] The effect of temperature makes data about risk that is gathered from people who take MDMA at

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[5]From 1994 through 1998, there have been a total of 27 MDMA-related deaths reported to the Drug Abuse Warning Network, though not all related to hyperthermia. Data gathered by Substance Abuse Mental Health Services Administration (SAMHSA), Office of Applied Studies. See http://www.samhsa.gov/statistics/statistics.html. Medical Examiner data reports 1 death associated with (may or may not be causal) MDMA in 1994, 6 in 1995, 8 in 1996, 3 in 1997, 9 in 1998. Hospital Emergency Room visits from the DAWN system totaled 247 in 1994, 422 in 1995, 319 in 1996, 637 in 1997, 1142 in 1998. and 2850 in 1999. Relatively few of the Medical Examiner cases and Emergency Room visits were for MDMA alone. Most were associated with MDMA used in combination with one or more other drugs.

[6]Ricaurte GA, DeLanney LE, Irwin I, Langston JW. Toxic effects of MDMA on central serotonergic neurons in the primate: importance of route and frequency of drug administration. Brain Res 1988 Apr 12;446(1):165-8. In unpublished research, Dr. Ricaurte determined that the no-effect level for MDMA neurotoxicity in the primate was 2.5 mg/kg, when administered orally once every two weeks for four months (8X).

[7]Lieberman JA, Aghajanian GK. Caveat emptor: researcher beware. Neuropsychopharmacology 1999 Oct; 21(4):471-3.

[8]McCann UD, Szabo Z, Scheffel U, Dannals RF, Ricaurte GA . Positron emission tomographic evidence of toxic effect of MDMA ("Ecstasy") on brain serotonin neurons in human beings. Lancet 1998 Oct 31;352(9138):1433-7.

[9] Fischer C, Hatzidimitriou G, Wlos J, Katz J, Ricaurte G . Reorganization of ascending 5-HT axon projections in animals previously exposed to the recreational drug (+/-)3,4-methylenedioxymethamphetamine (MDMA, "ecstasy"). J Neurosci 1995 Aug;15(8):5476-85.

[10] Hatzidimitriou G, McCann UD, Ricaurte GA . Altered serotonin innervation patterns in the forebrain of monkeys treated with (+/-)3,4-methylenedioxymethamphetamine seven years previously: factors influencing abnormal recovery. J Neurosci 1999 Jun 15;19(12):5096-107.

[11]Bolla KI, McCann UD, Ricaurte GA. Memory impairment in abstinent MDMA ("Ecstasy") users. Neurology 1998 Dec;51(6):1532-7.

[12]For a comprehensive review by Alex Gamma, Ph.D. of the scientific literature on the impact of MDMA on memory, see the MAPS website, www.maps.org.

[13]Malberg, Sabol and Seiden found that serotonin cells could be protected against neurotoxicity when the researchers kept the rats body temperatures down. Malberg JE, Sabol KE, Seiden LS. Co-administration of MDMA with drugs that protect against MDMA neurotoxicity produces different effects on body temperature in the rat. J Pharmacol Exp Ther1996 Jul; 278(1):258-67.

raves of limited predictive value for estimating the risk of subjects exposed to MDMA in clinical settings.[14] MDMA's increased risk profile is a direct result of its use in recreational settings, with use in clinical research settings relatively non-problematic.[15] In therapy, MDMA is not used on a daily basis but rather as an adjunct to psychotherapy administered a relatively few times, with several weeks between therapy sessions. The most sophisticated investigation of MDMA-neurotoxicity has been conducted by Dr.Franz Vollenweider at the U. of Zurich. Dr. Vollenweider found no evidence for serotonin reductions in several MDMA-naive subjects who were given a PET scan shortly before and then again four weeks after receiving a moderate amount of MDMA in the therapeutic dose range (1.7 mg/kg).[16]

The combination of the remarkable therapeutic potential of MDMA, along with its substantial safety for use in clinical settings, makes it a very attractive choice for drug development. Politically, however, MDMA is not the easiest psychedelic to try to develop into a prescription medicine. Its non-medical use is increasing, especially among young people.[17] Police authorities are seizing increasingly large amounts.[18] NIDA has called the increased use of MDMA an epidemic.[19]

Yet the political controversy about MDMA offers one crucial advantage that makes MDMA much more likely to become the first psychedelic to be approved as a prescription medicine. As a result of the millions of non-medical users of MDMA around the world, health authorities, anti-drug authorities and research scientists have expended an amazing amount of time, energy and money trying to understand the risks of MDMA, its mechanisms of action, and the consequences of acute and long-term use.

The number of scientific papers in the peer-reviewed scientific literature reporting on research with MDMA in humans and animals, along with case reports discussing adverse events, exceeds 900.[20] Data in the peer-reviewed scientific literature can be submitted to FDA as evidence in the assessment of MDMA's risk profile and safety, with the only cost being the time it takes to systematically review the papers and organize the data for submission to FDA.[21] FDA is willing to accept published papers for review and

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[14]Malberg JE, Seiden LS. Small changes in ambient temperature cause large changes in 3,4-methylenedioxymethamphetamine (MDMA)-induced serotonin neurotoxicity and core body temperature in the rat. J Neurosci 1998 Jul 1;18(13):5086-94.

[15]Vollenweider FX, Gamma A, Liechti M, Huber T. Is a single dose of MDMA harmless? Neuropsychopharmacology 1999 Oct;21(4):598-600

[16]4/14/00 personal communication, Dr. Franz Vollenweider.

[17]In the 2000 Monitoring the Future survey, 8.2 % of high school seniors reported they had tried Ecstasy within the last year, up from 5.6% the previous year. http://www.drugabuse.gov/MedAdv/00/HHS12-14.html

[18]Customs officials have seized 9.3 million ecstasy pills in FY 2000, as compared to 3.5 million in FY 1999 and 750,000 in FY 1998. United States Customs Service, Office of Public Affairs, Ecstasy Seizures and Smuggling Methods Fact Sheet, January 5, 2000, and National Drug Intelligence Center, Draft National Drug Threat Assessment 2001: The Domestic Perspective, October, 2000.

[19]Emerging Drug Epidemics: Club Drugs. http://165.112.78.61/Meetings/ClubSat.html

[20]1/8/01 personal communication, Matthew Baggot.

[21]MAPS has been funding an effort since September, 1999 to organize all published reports on MDMA for submission to FDA, the Israeli Ministry of Health, and for posting on the MAPS website. This effort is being directed by Matthew Baggott. The literature review will be ready for submission by March, 2001, and will be continually updated.

has even approved drugs "based primarily or exclusively on published reports."[22] The costs of conducting these published MDMA studies is well over $15 million. The availability of data from these studies dramatically reduces the amount of additional funding that will be required to argue a case before FDA for MDMA's safety and efficacy.

As of April 10, 2000, there is data in the scientific literature about 539 people who have used MDMA in non-medical recreational contexts, some in astonishingly large amounts. These MDMA users have been compared to 484 MDMA-naive controls.[23] Numerous researchers have administered MDMA to human subjects in studies of MDMA's safety, mechanism of action and physiological and psychological effects. The total number of subjects administered MDMA in the context of legal, clinical research contexts has reached 189.[24] An MDMA Phase 1 study with 18 patients has been successful completed in the United States. Two other Phase 1 studies with MDMA focused on objectives other than safety have also been conducted in the United States. An MDMA pharmacokinetic study was conducted at UC San Francisco[25] and a study is underway investigating which brain neurotransmitter receptor sites are involved in producing MDMA's subjective effects.[26] Studies in Switzerland have investigated MDMA's action on brain neurotransmitter receptor sites,[27] on information processing[28] and on the psychological and cardiovascular effects of a single dose of MDMA.[29] Three MDMA pharmacokinetic studies have been conducted in Europe, in England,[30] Spain,[31]

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[22]FDA Guidance Document, Providing Clinical Evidence of Effectiveness for Human Drug and Biological Products, 19. See also III (a) (2) Submission of Published Literature Reports Alone.

[23]4/8/00 personal communication, Matthew Baggott,. He notes, "I am ignoring "polydrug controls" in studies with both "poly" and naive control groups. Also ignoring the low use MDMA group in Parrott and Lasky 98. Also ignoring the fact that some studies use the same people. I am also missing the Peroutka paper and a Parrott 98 paper, so those Ns are not counted."

[24]4/9/00 personal communication, Matthew Baggott. He noted, "This is also not counting a couple papers describing assay methods which also report on urine levels of MDMA and metabolites from some samples donated by the Swiss therapists. I'd estimate the actual number of unique volunteers given MDMA in scientific studies since it was scheduled is probably about 100."

[25] IND 53,648. Preliminary date reported in: Everhart E, Jacob III P, Shwonek P, Baggott M, Jones R, Mendelson J. Estimation of the Metabolic Disposition of MDMA and MDA Enantiomers in Humans. Abstracts - College on Problems of Drug Dependence (CPDD) 1999 Annual Meeting, June 12-17, 1999, 41.

[26]Tancer M and Schuster C. "Serotonin and Dopamine System Interactions in the Reinforcing Properties of Psychostimulants: A Research Strategy." in MAPS 7 (1997) 3:5-11. http://www.maps.org/news-letters/v07n3/07305tan.html

[27]Liechti ME, Baumann C, Gamma A, Vollenweider FX. Acute Psychological Effects of 3,4-Methylenedioxymethamphetamine (MDMA, "Ecstasy") are Attenuated by the Serotonin Uptake Inhibitor Citalopram. Neuropsychopharmacology. 2000 May 1;22(5):513-521.

[28]Vollenweider FX, Remensberger S, Hell D, Geyer MA. Opposite effects of 3,4-methylenedioxymethamphetamine (MDMA) on sensorimotor gating in rats versus healthy humans. Psychopharmacology (Berl). 1999 Apr;143(4):365-72

[29]Vollenweider FX, Gamma A, Liechti M, Huber T. Psychological and cardiovascular effects and short-term sequelae of MDMA ("ecstasy") in MDMA-naive healthy volunteers Neuropsychopharmacology. 1998 Oct;19(4):241-51.

[30]Fallon JK, Kicman AT, Henry JA, Milligan PJ, Cowan DA, Hutt AJ. Stereospecific analysis and enantiomeric disposition of 3, 4-methylenedioxymethamphetamine (Ecstasy) in humans. Clin Chem 1999 Jul;45(7):1058-69 (Published erratum appears in Clin Chem 1999 Sep;45(9):1585).

[31] de la Torre R, Farre M, Ortuno J, Mas M, Brenneisen R, Roset PN, Segura J, Cami J. Non-linear pharmacokinetics of MDMA ('ecstasy') in humans.Br J Clin Pharmacol 2000 Feb;49(2):104-9.

and Switzerland.[32] A Phase 1 dose-response safety study has been completed place in Spain.[33] A study investigating the hormonal effects of MDMA has taken place in England[34] and a study investigating the immunological effects has taken place in Spain.[35] Yet with all this research, there is not one single paper reporting data from a controlled scientific study into the therapeutic use of MDMA.

The effort to initiate controlled, scientific research into the therapeutic potential of MDMA in patient populations began in 1985, and has taken 15 years to come to fruition.[36] A Phase 2 dose-escalation pilot study of MDMA-assisted psychotherapy in the treatment of post-traumatic stress disorder (PTSD) has been approved in Spain. This is currently the only study into the therapeutic use of MDMA approved anywhere in the world. The existence of the Spain study, funded by MAPS, is an important practical factor behind the selection of MDMA as the initial psychedelic drug to focus on developing into an FDA-approved prescription medicine. The first patient in Spain was treated in November 2000. The researchers conducting the study will gather the data in a sufficiently rigorous manner so that it can be submitted to FDA for review. With the approval of this study, the chance to develop the therapeutic potential of MDMA is now more than a mirage.

Why Post-Traumatic Stress Disorder?

In choosing the patient population to study, one of the criteria was that the unique properties of MDMA-enhanced psychotherapy needed to be matched to a patient population in which MDMA therapy could offer a dramatic benefit. Ideally, this benefit would require only from one to three drug sessions to produce significant, measurable and long-lasting clinical progress. Alternative medications for this patient population should be relatively ineffective, at least in some subpopulation of patients. The patient population should also be a group that the general public feels compassion towards, in order to help overcome resistance to the idea of the therapeutic use of psychedelics.

The core of the MDMA experience has been described by one of the pioneering psychiatrists who worked with MDMA-assisted psychotherapy in terminal cancer patients as "reducing the fear response to a perceived emotional threat." When used therapeutically, MDMA is administered as an adjunct to psychotherapy on a intermittent basis within a larger therapeutic relationship, usually fewer than four times and frequently only once or twice. Numerous case histories and anecdotal reports testify to

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[32]Helmlin HJ, Bracher K, Bourquin D, Vonlanthen D, Brenneisen R. Analysis of 3,4-methylenedioxymethamphetamine (MDMA) and its metabolites in plasma and urine by HPLC-DAD and GC-MS. J Anal Toxicol. 1996 Oct;20(6):432-40.

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[34]Henry JA, Fallon JK, Kicman AT, Hutt AJ, Cowan DA, Forsling M. 1998 Low-dose MDMA ("ecstasy") induces vasopressin secretion. Lancet. 1998 Jun 13;351(9118):1784.

[35]Pacifici R, Zuccaro P, Farre M, Pichini S, Di Carlo S, Roset PN, Ortuno J, Segura J, de la Torre R. Immunomodulating properties of MDMA alone and in combination with alcohol: a pilot study. Life Sci. 1999;65(26):PL309-16

[36]MAPS was founded in 1986 with the mission to develop the therapeutic potential of MDMA. Efforts to conduct FDA-approved research with MDMA began in 1985, when MDMA was first made illegal.