UNITED STATES SENTENCING COMMISSION

WRITTEN TESTIMONY

PUBLIC HEARING
MARCH 19, 2001

2001 Public Hearing

Panel One - Miscellaneous

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JON SANDS, ESQ. (Immigration)
Federal Public and Community Defenders

MARK MATTHEWS (Tax Tables)
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BRIAN MAAS, ESQ. (Economic Crimes)
New York Council of Defense Lawyers

Panel Two - MDMA/Ecstasy

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Panel Three - MDMA/Ecstasy

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Summary of Written Testimony Presented for the March 19, 2001 Public Hearing

Federal Public and Community Defenders
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Chair, Sentencing Guidelines Committee of the Federal and Community Defenders

Proposed Amendment 5 – Sexual Predators

The FPCD recommends that the Commission, before promulgating guideline amendments that will have a substantial impact on Native Americans, hear from Native Americans tribes, organizations, and individuals. The dynamic between Native Americans and the dominant society is complex. The FPCD suggests that the Commission hold hearings at least in South Dakota and New Mexico or Arizona before promulgating a pattern of activity and incest enhancement.

In fiscal 1999, 28 out of 36 defendants convicted of an age-differential sex offense were Native Americans.[1] The Native American defendants sentenced under §2A3.2 tend to have committed sexual acts that are truly consensual and would be legal but for the age disparity. Undue influence is rare. For such cases, a base offense level of 15 is appropriate. The FPCD believes that it would be inappropriate to disproportionately punish Native American sex offenders until they have had an opportunity for education and treatment. In an article relied upon by the United States Probation Office, *The American Indian Sexual Offender*, author Dewey Ertz emphasizes that Native American sex offenders, unlike pedophiles, are the most amenable to treatment and have the lowest rates of recidivism.

The congressional directives contained in the Protection of Children from Sexual Predators Act of 1998 were for the most part aimed at the internet sexual predator. These individuals who troll the internet to prey on children are a minority of the sexual offenders in the federal system. The FPCD believes that the guidelines should be written to deal with offenders who make up the majority of the sex-offense defendants in the federal court system–sadly, Native Americans. More egregious offenders can be dealt with as discussed below.

a. Pattern of Activity

If the Commission decides to proceed without hearings with the Native American community, the FPCD recommends promulgating the fourth option presented – an encouraged upward

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[1]*See id.* at 9, table 5.

departure for a defendant who commits repeated acts of sexual abuse of minors.

If the Commission adopts §4B1.5, the FPCD believes that it should only increase a defendant's criminal history category to not less than IV. The guidelines should distinguish between those defendants who have a criminal history category of IV or below and V and above. Since §4B1.5 will only apply to those defendants who are not already facing a mandatory life sentence, the Commission should adopt a departure provision that allows a court to depart when the application of the guideline significantly overstates the future risk to the community or the seriousness of the defendant's criminal history.

The FPCD has grave concerns about enhancements or departures that are based on psycho-sexual evaluations. Psycho-sexual evaluations often base a determination of the risk of recidivism upon inappropriate sentencing characteristics, such as age, education, and employment history. There is no national uniformity concerning the availability of testing or testing protocols. The FPCD argues that these generic psycho-sexual evaluations could lead to unwarranted sentencing disparities. The FPCD does agree that an individual's amenability to treatment in determining risk assessment for the purposes of sentencing is an appropriate consideration.

The FPCD recommends that §4B1.5 have the same §4A1.2(e) limitations as the career offender guideline (§4B1.1) as to the age of applicable convictions.

The FPCD also opposes the proposed sexual predator enhancement (§4B1.6). Section 4B1.6 would allow a five level enhancement, with a floor of level 30 or 32 (to be decided), if the court finds either that the defendant committed the crime as a part of a pattern of activity involving prohibited sexual conduct or that the defendant is a sexual predator. A sexual predator conclusion would be based upon the court's determination, under the totality of circumstances, that a defendant is likely to continue to engage in prohibited sexual conduct with minors in the future.

The FPCD believes that the sexual predator enhancement proposed in §4B1.6 would vitiate the requirement of proof beyond a reasonable doubt. The standard for determining sexual predator status would be totally subjective and result in inconsistent application of the guidelines. The FPCD believes that it is clear that a five level enhancement should be proved by clear and convincing evidence, not by a standard less than a preponderance of evidence. In practice, this standard would shift the burden from the prosecutor to the defendant to prove that he was not a sexual predator.

If the Commission adopts §4B1.6, §4B1.6(b), it should require a finding that the offense was committed as part of a pattern of activity and the defendant is a sexual predator. A requirement that both be found would limit some of the concerns of the sexual predator determination. Moreover, §4B1.6 should only be imposed on those sex offenders who have committed multiple acts of abuse with multiple victims.

Section 4B1.6 would result in disproportionate sentences among sexual offenders. For example, a five level increase in §2A3.1 would result in a level of 32 before the addition of any other specific offense characteristics. The impact in §2A3.1 is clearly disproportionate in comparison to its impact in other guidelines such as §2A3.2 and §2A3.4.

If the Commission chooses to impose a pattern-of-activity enhancement, the FPCD recommends option three–a chapter 2 specific offense characteristic in the sexual abuse guidelines. This would be consistent with the pattern of activity adjustment currently in §2G2.2. Moreover, it would eliminate the need for an arbitrary floor of 30 or 32 by allowing a tailored increase in each guideline. Furthermore, an increase of two levels would bring to the guidelines the proportionality sought by Congress.

The FPCD believes that any pattern of activity enhancement should be limited to defendants whose instant offense of conviction is a sex crime involving the sexual abuse of a child, not including trafficking or receipt of child pornography or possession of child pornography, and who have prior convictions for the sexual abuse of a minor. If the Commission does not limit pattern of activity to prior sex abuse convictions, the FPCD argues that the pattern of activity should require clear and convincing evidence of prior conduct involving the combination of two or more separate instances of prohibited conduct involving a minor different from the victim of the instant offense of conviction.

The FPCD opposes the proposed amendment to §5D1.2 that would require the maximum term of supervised release for sex offenses. While the Commission may encourage a maximum term of supervised release, the imposition of it should be left in the sound discretion of the sentencing court.

b. Grouping

The FPCD recommends that the Commission adopt option one – grouping counts covered by §2G2.2 (trafficking in material involving the sexual exploitation of a minor) and §2G2.4 (possession of materials depicting a minor engaged in sexually explicit conduct) under §3D1.2(d). Offenses sentenced under §2G2.1 (manufacturing of child pornography) would still be specifically excluded from grouping under §3D1.2.

Grouping offenses concerning the trafficking, receipt, and possession of child pornography under §3D1.2, subjects the offenses to the broader relevant-conduct rules of §1B1.3(a)(2). This would allow courts to consider images of child pornography that are outside those images listed in the count or counts of conviction. Furthermore, the court would not be required to identify the victim, a task that can be complex and time consuming (especially if the images were computer-generated or morphed). Grouping will alleviate the need for this determination while permitting the sentencing court to consider a wide range of conduct in determining the appropriate sentence.

The FPCD believes this approach will encourage greater uniformity in sentencing, discourage

sentencing manipulation by plea agreements, and promote judicial economy.

c. Enhancement for Transportation Offenses and Other Amendments

Base-offense level increase. The FPCD believes an increase in the base offense level for non-18 U.S.C. ch. 117 violations is unwarranted. In fiscal year 1999, approximately 78% of the non-18 U.S.C. ch. 117 defendants (28 out of 36 defendants) were Native Americans. If there has been no undue influence, an offense level 15, or 13 with acceptance of responsibility, is an appropriate sentence, especially given the dynamics of reservation life.

If the Commission concludes that there must be an increase for those individuals who commit an offense under 18 U.S.C. ch. 117 involving a sexual act, the FPCD would propose the following: base offense level of 21 for an offense under 18 U.S.C. ch. 117 involving a sexual act; a base offense level of 18 if the violation of 18 U.S.C. ch. 117 did not involve the commission of a sexual act; and a base offense level of 15 in all other cases. The majority of offenders under 18 U.S.C. ch. 117 would be subject to other enhancements in §2A3.2. The FPCD believes, therefore, that a three level across-the-board increase is neither necessary to comply with the directives of the protection of Children from Sexual Predators Act of 1998 nor warranted in terms of proportionality. It goes onto argue that if the Commission promulgates a pattern-of-activity enhancement or encouraged-departure commentary, the most dangerous offenders would be subject to that provision.

Incest enhancement. The FPCD opposes an incest enhancement in §§2A3.1, 2A3.2 and 2A3.4, because, they believe that it would amount to an enhancement for being a Native American. The FPCD opposes any enhancement that would have such a disparate impact upon the Native American community. The FPCD states that reservation incest cases are often some of the most complex in the federal system. In addition to the problems of poverty, isolation, and substance abuse on the reservation, there exists the problem of incest as learned behavior. Significantly, incest cases also involve defendants with the greatest amenability to treatment and the lowest chance for recidivism if afforded a competent treatment regime.

The FPCD believes the current proposals are too compartmentalized and are fundamentally flawed. Congress's major concern was to incapacitate pedophiles who seek out and prey on children. True pedophiles, individuals who prefer children as sexual partners, have a high risk of recidivism and need the greatest amount of treatment. The FPCD submits, however, that not all individuals, even those who, unfortunately, abuse multiple children, are pedophiles or unamenable to treatment.

The FPCD states that Commission's proposed amendments might allow Native American incest cases to be doubly enhanced (for pattern of activity and incest) based upon the same facts. If the Commission is committed to promulgating a pattern-of-activity enhancement and an incest enhancement without holding hearings with the Native American community, the FPCD strongly suggests that acts of incest be prohibited from being used to impose a pattern-of-activity

enhancement. Both pattern of activity and incest are used to enhance the sentence of individuals who engage in more than a one-time act of abuse. However, the dynamics of incest verses pedophilia are different. The guidelines should set up a tiered approach recognizing each individual harm, and sentencing each appropriately.

The FPCD believes that those individuals who engage in a non-incestual pattern of activity of abuse present the greatest danger to the community. Pedophiles are the individuals who would be most appropriately punished by the proposed §4B1.5 and §4B1.6. Individuals who commit repeated acts of incest with multiple family members should receive a greater sentence than an individual who only abuses one family member. However, since in the federal system the incest enhancement will be almost exclusively used on Native Americans, the Commission should keep in mind the particular needs and realities of the Indian Reservation. While Native Americans convicted of sexual acts involving incest may deserve a sentencing increase, they should not be on a higher, or even the same, tier as the predatory pedophile.

The FPCD argues that by removing acts of incest from being used to impose §4B1.5 and §4B1.6, the Commission could avoid the appearance of racism and discrimination against the Native American community. Some Native American defendants might be subject to those enhancements, but only when their actions were similar to the non-Native American defendants who were subject to those enhancements. For example, those Native American defendants who traveled outside of their family compounds on the reservation to abuse children in the general community would be subject to the same enhancements as those non-Native American defendants who travel across Interstate lines to abuse children. Those Native Americans who are isolated on the reservation and act inappropriately toward family members, often while intoxicated, should not and would not be subject to the same enhancements.

Proposed Amendment 6 – Stalking and Domestic Violence

The FPCD opposes any increase in the base offense level of §2A6.2. The apparent basis for the increase is that a stalking offense involving violation of a protective order and bodily injury should receive punishment equal to or greater than an offense covered by §2A6.1 (threatening or harassing communications) that involves violation of a protective order and conduct evincing an intention to carry out the threat. An increase to either level 16 or 18, however, would fail to maintain the necessary proportionality with the more serious, violent offense of aggravated assault, covered by §2A2.2 (base offense level of 15). Thus, a defendant who commits an aggravated assault that results in bodily injury, in violation of a protective order, receives an offense level of 19 (15 + 2 + 2) under §2A2.2, whereas a defendant who commits a stalking offense resulting in bodily injury in violation of a protective order would be subject to an offense level under §2A6.2 of 20, if a base offense level of 16 is set (16 + 2 + 2). The FPCD does not believe that there is a sound reason for an offense level for a stalking offense that is higher than

the offense level for a more serious aggravated assault offense.[2] Moreover, if a base offense level of 18 is set, a stalking offense involving violation of a protective order that *does not* resulting in bodily injury would be subject to a greater punishment (18 + 2 = 20) than an aggravated assault involving violation of a protective order that *does* result in bodily injury (15 + 2 + 2 = 19).

FPCD also argues that, in the interest of proportionality, §2A6.2 ought to include the same four-level reduction provided by §2A6.1(b)(4) to address those cases in which the offense involves a single instance evincing little or no deliberation.

Proposed Amendment 7 – Re-promulgation of Amendment 608 (Emergency Amendment Regarding Enhanced Penalties for Amphetamine and Methamphetamine Laboratory Operators as Permanent Amendment)

Proposed amendment 7, which would re-promulgate amendment 608, sets forth three options; the FPCD prefers the third. Option three assumes that the manufacturing process for amphetamine or methamphetamine necessarily creates a substantial risk of harm. Option three, therefore, would amend §§2D1.1 and 2D1.10 to call for the three- and six-level enhancements and the floors required by Congress if the offense involved manufacture of amphetamine or methamphetamine. The enhancements and floors would apply to manufacture of other controlled substances if the sentencing court finds a substantial risk of harm. Option three puts the substantial-risk enhancement in §2D1.1(b)(5) and makes it an alternative to the environmental-harm enhancement.

The FPCD opposes both options one and two because they call for double counting. Congress determined that a substantial risk of harm to human life required at least a three-level enhancement. Under options one and two, the enhancement under §2D1.1 is going to be five levels in virtually every instance – two levels under subsection (b)(5) for discharge or handling of a hazardous or toxic substance and three levels under subsection (b)(6) for a substantial risk to human life. The FPCD argues that option three appropriately recognizes that there should be a gradation in the enhancement based upon harm by making the substantial-risk enhancement an alternative to the discharge and handling enhancement.

Proposed Amendment 8 – Mandatory Restitution for Amphetamine and Methamphetamine Offenses

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[2]Application note 2 to §2A6.2 reflects that the cross reference of subsection (c)(1) should apply if the resulting offense level is greater in a case involving more serious conduct. "For example, §2A2.2 (Aggravated Assault) most likely will apply pursuant to subsection (c) if the offense involved assaultive conduct in which injury more serious than bodily injury occurred or if a dangers weapon was used rather than merely possessed." However, §2A2.2 includes the same two-level increase for "bodily injury"set forth in §2A6.2(b)(1).

The FPCD does not oppose proposed amendment 8, which would amend §5E1.1(a)(1) to include a reference to 21 U.S.C. § 853(q).

Proposed Amendment 9 – Safety Valve

Proposed amendment 9 would amend the safety-valve provisions of §§5C1.2 and 2D1.1(b)(6). First, the amendment would add a new subsection to §5C1.2, stating that a defendant who meets the five criteria and who is subject to a mandatory minimum of at least five years, cannot have an offense level from chapters two and three of the *Guidelines Manual* that is less than level 17. Next, the amendment would amend §2D1.1(b)(6) to eliminate the requirement that the offense level be at least level 26, thus making the two-level reduction available to any defendant who meets the five criteria of §5C1.2.

The FPCD supports the second part of the amendment, which will help ameliorate the harshness of the drug penalties for defendants whom Congress has identified at the least culpable (those who meet the five criteria in §5C1.2). The FPCD opposes part one of the amendment as unnecessary and unsupported by logic or policy. Indeed, the FPCD believes that part one will result in an unjustifiable disparity of treatment.

The FPCD states that if part one is adopted, the Commission will be treating defendants differently solely on the basis of whether the defendant is subject to a mandatory minimum. Assume, for example, that a level-24 LSD defendant meets the five criteria of §5C1.2 and is entitled to reductions for minimal role and acceptance of responsibility. If that defendant is not subject to a mandatory minimum (because, for example, the government chooses to charge an offense under 21 U.S.C. § 841(a)(1) and (b)(1)(C)), the defendant's final offense level will be 15. If that defendant is subject to a five-year mandatory minimum (because the government chooses to charge under 21 U.S.C. § 841(a)(1) and (b)(1)(B)), the defendant's final offense level will be 17. In effect, then, the second defendant is being penalized more severely because of the prosecutor's charging decision.

Proposed Amendment 10 – Anhydrous Ammonia

Proposed amendment 10 would assign offenses involving anhydrous ammonia to §2D1.12 (unlawful possession, manufacture, distribution, or importation of prohibited flask or equipment; attempt or conspiracy) on the basis that the new crime is similar to other offenses referenced to §2D1.12. The FPCD does not oppose assigning the new offense to §2D1.12.

Proposed amendment 10 seeks comment about whether the two-level enhancement of §2D1.12(b)(1) is sufficient to account for the seriousness of attempting or intending to manufacture methamphetamine using anhydrous ammonia. The FPCD believes that the amendment as proposed, which will result in a two-level enhancement under §2D1.12(b)(1), is appropriate. Under the present guideline, an offense involving an attempt to manufacture

methamphetamine using anhydrous ammonia results in a 2-level enhancement under subsection (b)(2) because of a release into the environment of a hazardous or toxic substance. The Commission has thus determined that the hazardous or toxic nature of a substance calls for a two-level increase. The effect of amending subsection (b)(1) to cover anhydrous ammonia is to double the enhancement already applicable to an offense involving anhydrous ammonia. The FPCD's position is that there is no need for increasing the enhancement if anhydrous ammonia is involved.

The issue for comment also asks whether the seriousness of using anhydrous ammonia should be accounted for by an enhancement in §2D1.12(b)(1) of up to 10 levels or by an alternative method, such as a cross reference to §2D1.11 using a conversion to methamphetamine. The FPCD opposes cross-referencing from §2D1.12 to §2D1.1 using a conversion to methamphetamine from anhydrous ammonia. The FPCD does not know of an established conversion ratio based on any scientific or other reliable data that will specify the quantity of methamphetamine that could reasonably be expected to have been made from a given quantity of anhydrous ammonia. Absent such data, expected yield would have to be litigated case-by-case, which undoubtedly would protract sentencing proceedings, if for no other reason than the necessity to present expert testimony.

Proposed Amendment 11 – GHB

The FPCD agrees with the Commission that, given the statutory maximums, proportionality concerns dictate that the less serious Schedule III substances should not be sentenced comparably to those in Schedules I and II. Amendment 11 also would modify the chemical quantity table of §2D1.11 to include as a list I chemical the substance GBL, which is a precursor in the production of GHB. The FPCD does not oppose this part of the amendment.

Proposed Amendment 12 – Economic Crime Package

The FPCD is concerned that the economic crime package not be used as a vehicle for an across-the-board increase in punishment for the offenses covered by §§2B1.1, 2B1.3, and 2F1.1. The sentences for those offenses fall overwhelmingly below or at the bottom of the applicable guideline range. The FPCD stated that Commission data for FY 1999 indicates that 9.7% of fraud defendants received a downward departure for other than substantial assistance. Of those fraud defendants who did not receive a departure, 61.9% of them received a sentence at the bottom of the guideline range. The data is similar for larceny in FY 1999 – 7.0% of the defendants received a downward departure for other than substantial assistance, and 68.8% of the defendants who did not receive a departure were sentenced at the bottom of the guideline range. This pattern has held true over the years. Thus, the FPCD believes that there is no need – or justification – for an increase in penalties for the offenses covered by §§2B1.1, 2B1.3, and 2F1.1.

a. Consolidation of the theft, property destruction, and fraud guidelines into a new guideline

The FPCD supports consolidation of §§2B1.1, 2B1.3, and 2F1.1. Because the severity of the property offense is related principally to the economic harm caused, it makes sense that a single guideline be used to determine the offense level.

Additionally, the FPCD supports the elimination of the more-than-minimal planning enhancement. The FPCD also supports the proposed amendment's treatment of offenses involving several victims.

The FPCD noted that the newly merged guideline does not carry forth the rationale from the current guideline for a two-level enhancement if the offense was receiving stolen property and the defendant was "in the business of receiving stolen property." Although the amendment merging the guidelines does not indicate why the explanation was not added to §2B1.1, the FPCD stated that it seems unlikely that the Commission was repudiating the rationale.

Regarding the "in the business" enhancement, the Commission has opted for the totality approach, which is consistent with the originally-described purpose of the enhancement. FPCD does not oppose this, but they believe that proposed application note four should be modified to give a better indication of the activity at which the activity is aimed. The FPCD believes that the enhancement should not apply merely because the defendant sold what he or she stole. If selling what has been stolen is sufficient, then the enhancement will be applied in virtually every case. The FPCD suggests that proposed application note four state that the enhancement should not apply if the defendant only distributed goods that the defendant had unlawfully acquired.

The FPCD supports option one for proposed subsection (b)(14), which would apply if, as a result of the offense, the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions.

The FPCD supports proposed subsection (c)(3) without the bracketed language. The issue involved is really determining the applicable offense guideline. Under §1B1.1, that determination is made without reference to the offense level produced by the guideline. Therefore, the FPCD believes that the determination proposed under subsection (c)(3) should be made without reference to the offense level produced by the guideline.

Issue for comment one. The FPCD supports the current approach of the Commission, which is to treat an inchoate offense as less serious than a completed one. The FPCD recommends that the Commission carry forth the language from the last paragraph of current application note 2 from §2B1.1 and the language from current application note 10 from §2F1.1. The FPCD understands the concern that the method for determining the offense level in an inchoate offense be clear and relatively easy to apply. The current method requires several steps but is not unclear.

Issue for comment two. The FPCD favors reliance on departures for handling the destruction of, or damage to, unique or irreplaceable items of cultural heritage, archeological, or historical significance. Cases involving such conduct are relatively infrequent and a fixed enhancement

will be too little in some instances and too much in others. The FPCD stated that a scaled enhancement would be difficult. Finally, the FPCD believes it is best to see how sentencing courts deal with such cases before attempting to draft a specific offense characteristic.

b. Options for a new loss table for the proposed consolidated guideline and options for a new tax loss table

The FPCD does not believe that the Commission should revise the loss table. The increased punishment called for by the three published options is neither necessary, desirable, nor appropriate. The actual sentencing practices of federal judges demonstrate that the current level of punishment is more than adequate for economic crimes. Increasing the level of punishment simply means that federal judges will be departing downward from, or sentencing at the bottom of, higher guideline ranges. The likelihood is for an increase in the number of downward departures (for other than substantial assistance) and sentences at the bottom of the guideline range. None of the published options, in the FPCD's opinion, should be adopted. The table proposed by the Practitioners Advisory Group also would increase punishment levels, but the increases begin at higher loss amounts and are more modest than the increases in the published options.

Further, the FPCD states that adoption of a new loss table is not a prerequisite to consolidating the theft, property destruction, and fraud guidelines because either the current theft or fraud table will mesh with the proposed new guideline. Because the proposed consolidated guideline has a base offense level of six, the FPCD suggests using the loss table in the current guideline.

c. Revised definition of loss

The FPCD supports a comprehensive definition of loss. Even if the Commission decides not to consolidate the theft, property destruction, and fraud guidelines, there should be a single, comprehensive definition of loss applicable to those guidelines.

The FPCD stated that, though it does not support the inclusion of intended loss in the definition, if the Commission does decide to include intended loss, there needs to be some modification to proposed application note 2(A). Specifically, the use of passive voice in proposed application note 2(A) – "the pecuniary harm that was intended to result" – masks whether the test remains the defendant's subjective intention. The proposed commentary appears to be trying to hold a defendant accountable for the defendant's own intention and for the intention of others for whose *conduct* the defendant is accountable under the relevant conduct rules of §1B1.3. The FPCD believes it is inappropriate to attribute to the defendant the loss that another participant in the offense intended to inflict. A defendant should be held accountable only for the defendant's intention.

The FPCD also believes it would be good for the proposed commentary to note that "intended" means more than merely knowing something would result. The FPCD supports the suggestion

of the Practitioners Advisory Group that, if intended loss is to be considered, the standard should be "the pecuniary harm that the defendant purposely intended to cause."

Additionally, the FPCD stated that they believe that, if intended loss is to be considered, the proposed commentary should address intended losses that cannot occur – the filing of an insurance claim for $10,000 for a stolen car with a blue book value of $5,000. The proposed commentary addresses the matter in bracketed language. The FPCD stated that while the bracketed language would work, it would be better if the proposed commentary also defined intended loss to be "the pecuniary harm that reasonable was intended to result . . . ." However, the bottom line is that the FPCD does not support the inclusion of intended loss.

Definition of "actual loss." The FPCD stated that they prefer option one because option two does not place a limitation of reasonable foreseeability. However, the FPCD believes that there needs to be some sort of remoteness limitation on the loss for which a defendant is accountable. Virtually anything is reasonably foreseeable, so a reasonable foreseeability test does not really place a boundary on loss. The FPCD stated that some notion of legal causation must go along with but-for causation.

Time for measurement. The FPCD does not support either option for time of measurement. In the FPCD's opinion, the time to measure loss is when the offense is committed. A time-of-detection rule has no apparent rationale and, in any event, is too subjective and invites litigation. Time of sentencing lacks a rationale other than ease of application. Time of sentencing, however, is preferable to time of detection because it is not subjective and therefore does not invite litigation. The FPCD believes that time of offense will usually be as easy to apply as time of sentencing.

Exclusion of interest. The FPCD supports option one because the inclusion of bargained-for interest would invite litigation. Furthermore, including interest rarely is likely to make a difference in punishment, and loss-determination for guideline purposes is not intended to be a precise accounting of the fiscal impact of the offense; therefore, there is little reason to require the additional work necessary to gather information about bargained-for interest.

Economic benefit conferred on victim. The FPCD supports the provision of proposed application note 2(c)(i) which excludes from loss "the value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the offense was detected." The FPCD also suggests that, with respect to the proposed application note 2(C)(iii)(IV)(1), the de minimis language in the first bracket is better than the substantially different language in the second bracket.

Ponzi schemes. The FPCD supports option one as most consistent with the approach of the consolidated guideline. Option one, by not allowing a reduction in excess of the victim's principal, ensures that one victim's "profit" will not be used to reduce another victim's loss.

Estimation of loss. Proposed application note 2(D) would state that the sentencing court "need only make a reasonable estimate of the loss." The FPCD does not object to that part of the proposed commentary. But proposed application note 2(D) then goes no to state that "[t]he sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence." The FPCD believes that this overstates the situation. They suggest that this sentence, and the next two, be deleted as unnecessary. If the sentences are to be retained, the FPCD recommends that "ordinarily" be inserted after "sentencing judge" in the second sentence of the first paragraph of proposed application note 2(d), quoted above.

Gain. The FPCD supports option four. The Commission's focus is on harm to the victim. Only if that harm cannot reasonably be determined should the court look to gain. Options one, two, and three would require a determination of gain in every case sentenced under the consolidated guideline – unnecessary work, in the FPCD's judgment, because in the vast majority of cases the loss to victims will exceed a defendant's gain.

Downward departure. The FPCD supports the inclusion of proposed application note 2(G)(ii)(II), but suggests some modification. The proposed commentary would indicate that a court, in determining whether to depart downward, can consider that, "The loss significantly exceeds the greater of the [defendant's] actual or intended [personal] gain, and therefore significantly overstates the culpability of the defendant." The FPCD supports inclusion of the bracketed words, but believes that the sentence should be modified by deleting "and therefore" and inserting "or otherwise."

Part D – 1-Level Increase in Several Guidelines that Refer to the Loss Table

The FPCD has no objection to this part of the proposed amendment if the Commission decides to adopt a new loss table.

Part E – Technical and Conforming Amendments

The FPCD has no objection to this part of the proposed amendment.

Part F – Circuit Conflict on the Calculation of Tax Loss

Part F adopts the approach of the Second and Seventh Circuits. The FPCD supports part F.

Proposed Amendment 13 – Aggravating and Mitigating Factors in Fraud and Theft Cases

The FPCD supports the Commission's effort to find other factors that should affect the sentencing of economic crimes, and, in this instance, the FPCD prefers option two. The FPCD believes, however, that both options are problematic to the extent that they rely on factors already accounted for in calculating the offense level. For example, in determining if there is an "aggravating" or "significantly aggravating" circumstances (option one) or a "qualifying

aggravating factor," both options call for consideration of the number of victims – a factor already accounted for in proposed §2B1.1(b)(2). Further, under each option the presence of that factor is not controlling. The court must consider the "intensity" of that factor (option one) or determine that the seriousness of the aggravating factors outweigh the mitigating effects of the mitigating factors. However, by determining that there will always be an enhancement if there are more than a specified number of victims (four in proposed §2B1.1), the Commission has determined for all cases that the factor is controlling. The result is that if an offense involves 50 victims, defendant A could receive only the four-level enhancement of proposed §2B1.1(b)(2), while defendant B – in an otherwise identical case involving 30 victims – could receive the four-level enhancement of proposed §2B1.1(b)(2) plus another two-levels for an aggravating factor (or four levels under option one for a significantly aggravating factor). The FPCD argues that no factor already accounted for by a specific offense characteristic should enter into the determination of whether there are "aggravating" or "significantly aggravating" circumstances (option one) or whether the qualifying aggravating factors outweigh the qualifying mitigating factors (option two).

Proposed Amendment 14 – Sentencing Table Amendment and Alternative to Sentencing Table Amendment

The FPCD supports option one – expanding Zones B and C of the sentencing table for criminal history categories I and II. This approach will give federal judges additional discretion to fashion a sentence that is most appropriate under all of the circumstances of the case. Option one, unlike option two, requires no additional work by the probation officer conducting the presentence investigation and does not involve additional fact-finding that could become the subject of an appeal. The FPCD believes that federal judges will not abuse the additional discretion afforded by option one but will exercise that discretion in a responsible manner.

Proposed Amendment 15 – Firearms Table

The FPCD recommends against promulgating proposed amendment 15. The synopsis of proposed amendment states that the amendment responds to a recommendation of the Bureau of Alcohol, Tobacco, and Firearms (ATF) to increase the penalties under §2K2.1 for offenses involving more than 100 guns. The FPCD believes that an increase is unwarranted, and that the present offense levels are, if anything, too high. In fiscal year 1999, more than three-quarters (76.3%) of the firearms cases were sentenced within the guideline range. Of those sentences, slightly more than half (51.3%) were at the bottom of the guideline range and another 10.1% were in the lower half of the guideline range. Downward departures occurred in 11% of the sentences, and upward departures in 1.2%. In other words, nearly half of all firearms sentences were at or below the bottom of the guideline range.

The synopsis states that, "According to the ATF, from 1995 through 1997, nearly a quarter of all defendants sentenced under §2K2.1 for trafficking in more than 50 firearms received sentences of less than one year, or no term of imprisonment whatsoever, despite the

encouraged upward departure provided in Application Note 15 to §2K2.1." The FPCD argues that the unstated assumption behind that assertion is that the sentences were inappropriately lenient, but there is no evidence to support such an assumption. The FPCD believes that federal judges generally do not impose such sentences if they are not warranted, an indication that there must have been good reasons why those defendants received the sentences they did.

Proposed Amendment 16 – Prohibited Person Definition

The FPCD has no objections to adding a definition of the term "prohibited person" to the commentary in §2K1.3 (unlawful receipt, possession, or transportation of explosive materials) and §2K2.1 (unlawful receipt, possession, or transportation of firearms or ammunition)

The FPCD supports the second change, which would specify that a defendant's status as a prohibited person for purposes of selecting the appropriate base offense level is to be determined as of the time of the commission of the instant offense. The reason a person's status as a prohibited person is a factor in determining the base offense level is that an explosives or firearms offense committed by such a person is more dangerous to public safety than an offense committed by someone who is not a prohibited person. The focus, therefore, properly belongs on the time of commission of the offense.

Proposed Amendment 17 – Prior Felonies

Proposed amendment 17 would address a split among the circuits over the interpretation of the term "prior felony conviction(s)" as used in subsection (a) of each of §2K1.3 (unlawful receipt, possession, or transportation of explosive materials) and §2K2.1 (unlawful receipt, possession, or transportation of firearms or ammunition). The issue is whether the word "prior" means before commission of the instant offense or before sentencing for the instant offense. The rationale for using a prior felony conviction for a violent crime or a drug-trafficking crime is that a person with such a conviction is more dangerous to the public than a person who has no criminal conviction or who has a conviction for a misdemeanor or felony other than a crime of violence or drug-trafficking crime. If that is so, then the relevant time, for the purpose of determining punishment, is whether the defendant had such a conviction at the time the explosives or firearms offense was committed. The FPCD, therefore, supports the amendment.

Proposed Amendment 18 – Immigration

The FPCD supports the proposed amendment and recommends that the enhancement under proposed (b)(1)((A)(i) be 10 levels. The FPCD opposes both options one and two because they would introduce a category-of-offense approach that assumes that all offenses within a given category are of equal seriousness, an assumption that the FPCD believes to be inaccurate.

Until 1988, the maximum prison term for an illegal reentry offense was two years. The Anti-Drug Abuse Act of 1988 modified the law to increase the maximum prison term to 15 years if the

defendant was deported following conviction of an aggravated felony and 5 years if the defendant was deported following conviction of a felony other than an aggravated felony. The apparent congressional policy is that the seriousness of an illegal-reentry offense is directly related to the seriousness of an offense committed by the defendant before deportation. While Congress specially defined the term "aggravated felony" for purposes of the illegal reentry offense in 8 U.S.C. § 1101(a)(43), it has expanded the definition over the years to the point that nearly any felony is an aggravated felony. Not all of the offenses encompassed by the present definition of "aggravated felony" are of equal seriousness.

The FPCD believes that the aggravated-felony enhancement should be based on the actual seriousness of the aggravated felony. It states that scoring the prior offense using the *Guidelines Manual* may be the most accurate way to measure seriousness. It concludes, however, that this method would be impractical and would result in a uniform assessment of seriousness, making it the least desirable approach. The FPCD believes that the category-of-offense approach (used in option one) is the least accurate measure of seriousness because it mistakenly assumes that all defendants who commit a given category of offense have engaged in equally serious conduct.

The FPCD believes that the punishment meted out to a defendant is the most appropriate measure of seriousness. It looks at two methods of determining the punishment meted out: by sentence imposed and by time served. The FPCD concludes that time served is the better measure because time served is the actual punishment that has been meted out. The sentence is the maximum possible and very few defendants actually serve that maximum because of parole and

The Justice Department has raised two principal objections to using time served. One is the difficulty in determining the amount of time served, and the other is that "[o]vercrowding in state prisons may result in early releases in some cases and understate the seriousness of the offense." The FPCD does not find these reasons sufficient to reject the use of time served. It argues that there will be only one conviction for which time served will have to be computed in illegal reentry cases (the aggravated felony that triggers application of the 16-level enhancement). Furthermore, the FPCD thinks that the concern about early release for overcrowding overstates the impact of such early release upon time served generally. The remedy of wholesale early release to relieve overcrowding occurs rarely; it is not the norm, and can be accounted for adequately by departure.

The Justice Department also objects to the proposed amendment because it "fails to prevent creative bases for downward departure that have arisen, particularly in districts that do not have 'fast track' policies." There can be no doubt that downward departures are frequent in illegal reentry cases. But, the FPCD argues that it is the inherent unfairness of the current aggravated-felony enhancement that leads to the high rate of downward departures in illegal reentry cases. Scaling the enhancement on the basis of the seriousness of the aggravated felony obviates the need for "creative bases for downward departure" by directly addressing the unfairness problem.

Proposed Amendment 19 – Nuclear, Biological, and Chemical Weapons

The FPCD believes that the proposed amendment sufficiently addresses offenses relating to biological and chemical weapons and threats to use such weapons.

Proposed Amendment 21 – Miscellaneous New Legislation and Technical Amendments

The FPCD has no objection to this proposed amendment.

New York Council of Defense Lawyers (NYCDL)
Statement of Brian E. Moss

Brian Moss represents the New York Council of Defense Lawyers, an organization with more than 150 attorneys whose principal area of practice is the defense of criminal cases in Federal Court.

The members of the NYCDL join the Federal Public and Community Defenders (FPCD) in their statements regarding all proposed amendments other than those discussed below.

Proposed Amendment 12 – Economic Crime Package

The NYCDL supports the consolidation of the theft and fraud guidelines with a base offense level of six. The distinction between the crimes covered by the separate guidelines is frequently artificial and the true distinctions between theft crimes and fraud crimes can be addressed through enhancements and reductions. Therefore, the NYCDL urges the Commission to adopt Part A of the Package.

The NYCDL believes that it is desirable to provide a single definition of loss for all economic crimes. In doing so, they urge the Commission both to avoid a "one size fits all" rigidity and to avoid definitions that include sufficiently vague terms as to invite undesirable subjectivity.

The NYCDL suggests that the proposal to measure loss either at the time of sentencing or at the time when the offense was detected seems to ignore the differences between a theft offense and a fraud offense and the different variations of fraud offenses. The NYCDL supports using the time of sentencing as the fairer of the two proposals for fraud cases, they suggest that this approach may not be appropriate for theft cases where the stolen object appreciates over time (artwork) so that the time of the offense would be the more appropriate time for measurement. Further, given the subjectivity of fixing the time of detention, as evidenced by the complexity of Option 2, it is probably the least desirable of the three options.

The NYCDL express great concern about both options for the definition of "actual loss." The notions of "reasonable foreseeability" in Option 1 and harm that "will result" in Option 2 create opportunities for subjective judgments of consequential damages that should be avoided. The NYCDL believes that so long as the sentencing of economic crimes is dependant primarily on the fraud table, the loss being measured should be the direct loss actually suffered by the victim and other factors should be addressed through the use of upward or downward departures.

The NYCDL opposes all three options to revise the fraud tables. This opposition derives from a belief that the harsher tables are trying to address a problem that does not exist. Economic crime defendants are not receiving the sentences they are receiving because the tables are too lenient. If that were the case, judges would utilize the upper end of the sentencing range more often our would be availing themselves of the opportunity to depart upward if the loss understates

culpability. Instead, defendants are receiving the sentences they are getting because defense lawyers and prosecutors are fashioning pleas that utilize the full scope of the Guidelines to create an offense level acceptable to the sentencing courts. NYCDL states that it is not for the Commission to decide that sentences being imposed for economic crimes are too lenient; that is the role of Congress.

Proposed Amendment 20 – Money Laundering

NYCDL stated that the money laundering amendment is a long overdue change that will rationalize both the charging and sentencing process. The proposed change will go a long way to changing an area of practice where the Guidelines tail is wagging the criminal law dog.

Proposed Amendment 14 – Sentencing Table Amendment and Alternative to Sentencing Table Amendment

The NYCDL urges the Commission to expand the range of both Zones B and C. Many defendants whose offense levels fall at 11 or 12 are receiving prison terms of a few months because of the requirement for Zone C that at least one-half of the sentence be served in prison. These terms are just long enough to cost defendants jobs and to deprive families of support without being long enough to satisfy any truly valid sentencing purpose.

Department of the Treasury
Internal Revenue Service
Charles O. Rosotti, Commissioner of Internal Revenue
Washington, D.C. 20224

In addition to IRS's comments on specific proposed amendments Charles Rosotti, Commissioner of Internal Revenue, wrote separately to express the Treasury's deep concern about some of the proposed amendments to the Guidelines. The Department of the Treasury stated that the "proposed amendments, particularly both options proposed in Amendment 14, Sentencing Table Amendment and Alternative to Sentencing Table Amendment, communicate to the American public that no matter how much you cheat on your taxes, you will not go to jail." These amendments clearly indicate that tax crimes are "less serious economic crimes." If adopted, these amendments will undermine their efforts to enforce tax laws.

The current proposal to expand Zones B and C of the sentencing table or to characterize certain tax crimes as "less serious economic crimes" is at odds with prior messages. Further, by reducing Zone D by 4 levels, the number of convicted tax offenders who may be sentenced to serve less than at least the minimum term in prison will increase dramatically.

Mr. Rosotti enclosed the Internal Revenue Service's Comments on the 2001 proposed amendments to the guidelines.

Proposed Amendment 12 – Economic Crimes Package

a. Tax Table
The IRS supports the option one Tax Table; this provides for a base offense level of six for tax loss amounts equal to or less than $2,000. The IRS stated that option one is an appropriate reflection of the seriousness of tax offenses, provides a lower base offense level loss amount and achieves the current mandatory imprisonment offense level of thirteen at a lower loss amount than option two. Additionally, they noted that while the proposed amendment is silent on the issue, there is language in the synopsis of Amendment Twelve, Part B, which discusses using one loss table for theft, property destruction, fraud and tax crimes. The IRS strongly objects to this proposal because it is wholly at odds with long-standing policies that treat tax crimes as serious crimes, warranting higher penalties than theft, property destruction, and fraud crimes.

b. Computation of Tax Loss
Regarding the proposed amendment concerning the computation of tax loss, the IRS stated that adoption of this amendment would confer an unfair sentencing advantage to the convicted tax criminal because the totality of the criminal conduct is not adequately counted. Two separate crimes are committed when an offender executes a scheme to evade taxes or files false returns that affect two taxpayers: one crime arises from the evasion of tax by the corporation. The IRS recommends that because the crimes are separate, tax losses should be calculated separately and then added together to achieve the aggregate loss to the government. Evading one's individual

tax and evading corporate tax are separate violations, and the total tax loss should not be calculated as if only one offense was committed.

c. Definition of Tax Loss

Regarding the proposed amendment concerning the definition of tax loss, the IRS opposes adoption of an amendment that would exclude state and local tax loss from consideration. In the IRS's view, basing the sentence exclusively upon federal tax losses does not adequately take all relevant conduct into consideration.

The IRS does, however, support the amendment that would include interest and penalties in the definition of tax loss for evasion of payment cases, because it accurately reflects the total harm to the government in an evasion of payment case.

d. Grouping

The IRS opposes adoption of the amendment that mandates grouping tax offenses with other crimes committed in connection with the tax crimes. The amendment in its current form eliminates any incentive to charge a tax crime separately from the crime from which the income for the tax crime was derived. Although clarification is necessary on this issue because of the circuit conflict, this proposed amendment reaches the wrong conclusion. The proposed amendment requires that tax counts be grouped with counts relating to the source of funds that were the subject of the tax crimes. This resolves the circuit conflict in favor of the defendant, because it effectively eliminates the separate tax crime conduct and harm, and only holds the individual responsible for the underlying criminal conduct from which the income was derived.

e. Sophisticated Concealment

The IRS supports the amendment that would apply "sophisticated means" to the tax guideline to conform with the fraud guideline. This amendment would provide clarity and consistency in application. As recently as two years ago, §2T1.1 had a "sophisticated means" enhancement which was changed to "sophisticated concealment." The IRS has previously advocated the need for clarification to ensure consistent application of the two terms.

Proposed Amendment 14 – Sentencing Table and Alternative to Sentencing Table

The IRS strongly opposes adoption of either alternative detailed in the proposed amendment. Both options operate to undermine the goals served by criminal tax enforcement and should not be adopted.

a. Option One

If option one is adopted, expanding Zones B and C, imprisonment would not be required until an offense level of seventeen is established. In other words, option one of amendment fourteen would raise by eight-fold the amount of tax loss (and the amounts of income involved in the criminal scheme) that would be required before imprisonment would be mandatory, at least for the minimum term. This would dramatically reduce the number of tax criminals who would face

such a term of imprisonment for their offense and would seriously undermine the deterrent effect of the criminal tax laws.

b. Option Two

The IRS stated that option two would categorize a substantial number of tax crimes as "less serious economic crimes." If a tax offender is not violent, does not use a firearm at the time of the tax offense, does not merit enhancements under §§2T1.1 and 2T1.4, has no prior criminal history, and volunteers to make restitution the offense level will be reduced by two. Although the specific offense adjustments in §§2T1.1 and 2T1.4 will operate to exclude some tax offenders from this adjustment, the fact that a first-time tax offender stands a good chance of being characterized by the guidelines as a "less serious economic offender" directly contradicts the Sentencing Commission's philosophy that tax offenses are serious offenses. Additionally, the application of the adjustment also defeats any offense level increases in the proposed Tax Tables.

Proposed Amendment 20 – Money Laundering

The IRS supports this amendment because enhancing the guidelines for violations of 18 U.S.C. § 1956(a)(1)(A(ii) by one or two levels will assist the Service in combating the tax gap by reinforcing the message that tax crimes are serious.

The IRS also attached a chart comparing base offense levels under §2T4.1 for proposed options one and two and the current tax loss table:

Loss	2T4.1 – Current	2T4.1 – Option One	2T4.1 – Option Two
$10,000.00	10	10	8
$10,001.00	10	10	10
$13,500.00	10	12	10
$13,501.00	11	12	10
$23,500.00	11	12	10
$23,501.00	12	12	10
$40,000.00	12	14	12
$40,001.00	13	14	12
$70,000.00	13	14	12
$70,001.00	14	14	14
$120,000.00	14	16	14

Bureau of Alcohol, Tobacco and Firearms (ATF)
Department of the Treasury

Proposed Amendment 15 – Firearms Table

Summary of testimony of John Malone, Assistant Director of Firearms, Explosives and Arson Directorate at the ATF:

Mr. Malone stated that he appreciates the opportunity to speak to the Commission about the proposed amendment to §2K2.1 because increasing the sentences for offenses involving large numbers of firearms is a critical part of the ATF's efforts to combat firearms trafficking and violence.

Though the ATF originally proposed option one, providing for an additional one-level increase for crimes involving 100 to 199 firearms and a two-level increase for crimes involving 200 or more firearms, the ATF supports both options one and two. However, they prefer option two for several reasons. First, it would provide for higher sentences than option one in certain cases involving less than 50 firearms. Second, option two would provide higher sentences than option one in all cases involving 100 or more firearms. Additionally, option two has the added benefit of diminishing some of the fact-finding required to determine how many firearms were involved in an offense (because it provides two-level rather than one-level increments).

Mr. Malone stated that the ATF views firearms trafficking as a serious harm which poses a large threat to the public safety and which must be punished accordingly. Trafficked firearms often are used in subsequent crimes, thereby threatening public safety. Therefore, shutting down a trafficker's activity is an ounce of prevention which yields several pounds of cure to the community. The proposed amendments, particularly option two, would provide an effective tool to combat trafficking in large numbers of firearms.

Mr. Malone described significant improvements in combating firearms trafficking. ATF's improved success in combating firearms trafficking in no way removes the need for the proposed amendments. Tougher sentences are a crucial tool in the ATF's attempt to prevent firearms trafficking by sending a strong message that such behavior will not be tolerated. Mr. Malone also stated that the ATF is pleased that the Department of the Treasury joins the ATF in supporting both options, and in particular option two. Mr. Malone concluded by thanking the Commission for the opportunity to speak about this very important issue.

The ATF's Director, Bradley A. Buckles, also submitted a letter in support of Mr. Malone's testimony and statement.

Glen Boire, Esq., Executive Director
Center for Cognitive Liberty & Ethics

Proposed Amendment 1 – Ecstasy

Background: Richard Glen Boire is the director of the Alchemind Society: The International Association for Cognitive Liberty. The Alchemind Society is a nonprofit, nonpartisan 501(c)(3) public education organization which seeks to foster cognitive liberty - the basic human right to unrestrained independent thinking, including the right to control one's own mental processes and to experience the full spectrum of possible thought. The Alchemind Society operates the Center for Cognitive Liberty & Ethics (CCLE), an educational law and policy center working in the public interest to protect and promote cognitive freedom and autonomy.

Because members of the Alchemind Society view the "so-called War on Drugs" as an attack on the mental autonomy and cognitive liberty of Americans, the Society opposes any drug law that makes otherwise law-abiding Americans criminals by punishing them for decisions they make about how to operate their own minds. The CCLE analogizes drug laws to censorship of books.

The CCLE opposes increasing penalties for MDMA. They submit that MDMA is not intrinsically dangerous or harmful to society, MDMA is virtually non-addictive, and that users of MDMA do not commit crimes to support a "habit." MDMA does not produce violent behavior, and the state of mind it induces is generally accepting, empathetic, and insight-oriented. In fact, the CCLE argues that the greatest harm posed by MDMA is the distribution of other chemicals misrepresented as MDMA. Unsuspecting MDMA users are exposed to many risks by innocently ingesting an unknown substance. Increasing the punishments for genuine MDMA will encourage unscrupulous manufacturers and dealers to sell other drugs as "Ecstasy," increasing this danger to unwary users.

If MDMA penalties are to be increased, the CCLE suggests that it would be more appropriate to increase the penalties for misrepresenting a chemical as MDMA. This scheme would minimize the individual and social harms presented by counterfeit MDMA, while the current proposal would exacerbate those same harms.

Lastly, the CCLE and the members of the Alchemind Society recommend that the Commission consider a wholesale revision of Part D of the Federal Sentencing Guidelines. They argue that the drug-equivalency scheme forces the Commission to make impossible comparisons between various drugs based on arbitrary equations. The CCLE and the Alchemind Society recommend abandoning the drug offense section of the Guidelines and replacing it with a simple drug enhancement, an "upward departure," or a "specific offense characteristic" to be applied when a federal crime is committed under the influence of, or while in possession of, a controlled substance. Such a system would leave law-abiding citizen alone while increasing penalties for the those whose behavior after taking a drug causes some actual social harm.

Families Against Mandatory Minimums
Mary Price, General Counsel

Proposed Amendment 1 – Ecstasy

FAMM opposes increasing the penalties for ecstasy to the level proposed by the Commission. It believes that Commission's approach to drug equivalencies is arbitrary and unfounded. FAMM submitted a sampling of public comment, studies, and materials that have been sent to the Commission by various parties (ranging from individual doctors to the Department of Justice) to demonstrate that many of the conclusions presented in the Commission's Brief Report are in dispute. FAMM asks that the Commission recognize that the medical and scientific community is not of one mind about the dangers attendant on the use of MDMA and many in the community do not believe the drug to be as dangerous as heroin, methamphetamine, or even mescaline. Even the possible neurotoxic effects of MDMA, are disputed in the medical community.[3] If the Commission is not convinced that penalizing MDMA at or above cocaine overstates the danger, then FAMM urges the Commission to refrain from increasing penalties to such a drastic extent in light of the fundamental disagreements about the effects of the drug. FAMM does not state where the equivalency should be set, simply that the dearth of agreement counsels against unfounded increases in the penalty.

In light of the concerns expressed about how Commission arrived at the proposed penalties and the lack of consensus on the effects of MDMA, FAMM makes the following recommendations:

1. Permit members of the public to attend what have heretofore been *ex parte* briefings by DEA, NIDA, and the Customs Service. In the alternative, make those briefing materials available to those members of the public who wish to comment on proposed drug guideline amendments. FAMM believes that casting sunshine on this process will improve it and is likely to result in a more informed and confident public.

2. Actively encourage and invite experts outside the Justice Department to address the Commission when considering information beyond its expertise. For example, NACDL had hoped to secure an invitation from the Commission for Dr. James P. O'Callaghan, but was unable to do so. An invitation was necessary because he works for another federal agency. Dr. O'Callaghan is the head of the Molecular Neurotoxicology Laboratory at the Centers for Disease Control, National Institute for Occupational Safety and Health. He has conducted research and written extensively on the subject of neurotoxicity and MDMA. He has concluded that no

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[3]FAMM cites two papers that dispute the conclusion that MDMA causes brain damage: James P. O'Callaghan, Ph.D., head of the Molecular Neurotoxicology Laboratory at the Centers for Disease Control -- NIOSH, *Defining Neurotoxicity: Lessons from MDMA and Amphetamines* (attached under FAMM); and Charles S. Grob, *Deconstructing Ecstasy: The Politics of MDMA Research*, ADDICTION RESEARCH, Vol. 8, No. 6, pp. 549-88 (2000)(attached under NADCL).

definitive data exists so far indicating that MDMA and other substituted amphetamines are neurotoxic (*i.e.,* cause brain damage) to humans. The Commission would have benefitted from his testimony.

3. Revisit overall drug sentencing policy in light of the concerns raised by this proposed amendment. The Commission should use this opportunity to reassess the criteria for assigning penalty levels and judging relative penalties for different substances.

The Lindesmith Center – Drug Policy Foundation
William D. McColl, Director of Legislative Affairs

Proposed Amendment 1 – Ecstasy

While the Lindesmith Center - Drug Policy Foundation shares the desire of Congress and the Sentencing Commission for reducing the demand for MDMA, it believes that increases in penalties for MDMA are unnecessary and counterproductive. The Lindesmith Center argues that penalty increases are likely to have serious unintended consequences including: 1) increasing the number of adulterated MDMA pills sold to unsuspecting consumers, further endangering the lives of Americans who use MDMA; 2) creating a more competitive MDMA black market that will spawn more prohibition-related violence; and 3) subjecting more non-violent Americans to long prison sentences, further expanding our bulging two-million inmates prison system.

1) Adulterated MDMA: The Lindesmith Center argues that many, if not all, of the problems attributed to MDMA stem not from MDMA itself, but from the use of counterfeit drugs sold to unsuspecting buyers as MDMA. Common adulterants include caffeine, cocaine, speed and various over-the-counter drugs. Other drugs, such as PCP and ketamine, are commonly and fraudulently sold to users as MDMA. One of the most harmful adulterants is DXM (dextromethrorphan), a cheap cough suppressant that can produce hallucinations when taken in a concentrated form. DXM inhibits sweating and when coupled with dehydrating activity, such as dancing, can cause heatstroke. Another dangerous drug often fraudulently sold as MDMA is PMA (paramethoxyamphetamine), an illegal drug that is vastly more potent and hypothermic than MDMA.

2) MDMA Black Market: The MDMA black market has traditionally been composed of relatively peaceful actors. But, the Lindesmith Center argues that tougher federal penalties could drive these actors out, while encouraging a more fiercely competitive MDMA black market, more risk-prone MDMA dealers, and greater levels of violence associated with the MDMA trade.

3) Effect on the Criminal Justice System: Because the government targets the "rave" culture in its fight against MDMA (even though most MDMA use occurs outside of raves), harsher MDMA penalties will result in more low-level, non-violent youths receiving very long prison sentences.

The Lindesmith Center points to numerous studies and historical evidence indicating the safe and effective therapeutic applications for MDMA. It also presents anecdotal evidence that some of the illegal MDMA use is accounted for by individuals seeking the drug's therapeutic and spiritual benefits.

The Lindesmith Center submits that there is a large body of scientific evidence that shows that MDMA offers certain users important therapeutic benefits, but that the scientific evidence on the drug's negative effects is mixed at best. The Lindesmith Center points out serious methodological shortcomings in heavily cited research on MDMA's effects on memory and cognitive skills, including failure to control for poly-drug use, level of drug use, and other variables, as well as failing to construct an ample control group. Medical professionals still do not understand the exact impact of MDMA on aspects of serotonin neuronal architecture, and there is disagreement as to what the long-term effects of MDMA could be in this area.

Lastly, the Lindesmith Center recommends that the Commission take into account the fact that MDMA is sold in a capsule/pill form, increasing the weight of the MDMA. Any increase in MDMA-related penalties should take the extra weight of the capsule into account so as to avoid overestimating the actual amount of MDMA involved.

Julie Holland, MD
Bellevue Hospital, New York City

Proposed Amendment 1 – Ecstasy

Julie Holland is a psychiatrist who works in the psychiatric emergency room at Bellevue Hospital. She will be testifying on behalf of the Lindesmith Center.

Dr. Holland recounts that at least three quarters of the patients she sees are exacerbating, if not causing, their psychiatric illness by using alcohol and cocaine. Less than one percent of these substance induced psychiatric disorders are due to MDMA. According the DAWN data, in 1999, 19 percent of all emergency room visits which mentioned a drug or alcohol-related cause listed alcohol as the reason for the visit. Seventeen percent of drug-related visits were due to cocaine. MDMA was reported in only 0.3 percent of incidents.

Dr. Holland reports that not only are MDMA related cases a small percentage of drug-related emergency room visits, but a large percentage of these cases are not life threatening. In a recent study conducted by the physicians at the medical emergency room of Bellevue Hospital, regional hospital ecstasy cases phoned in the New York City poison control center were analyzed. There were 191 cases reported during the years 1993 to 1999 inclusive. One hundred thirty nine cases (73%) were mild and experienced minor or no toxicity. The most commonly reported symptoms were increased heart rate (22%), agitation (19%), and nausea and vomiting (12%). Over seven years, only one ecstasy-related death was reported, which was due to hyperthermia. She also argues that hyperthermia is brought about only when the user engages in vigorous activity while

on the drug (e.g. dancing at raves).

Dr. Holland believes that MDMA is a unique drug and should be treated as such. She argues that MDMA is less likely to cause violence than alcohol, less addictive than cocaine or tobacco, and less deadly than heroin. Dr. Holland is also concerned that equating MDMA with heroin based on weight is inappropriate because the dosages are not similar. She reports that one gram of heroin yields approximately 200 doses while one gram of MDMA yields only five doses.

As a psychiatrist, she is particularly interested in the potential therapeutic benefits of MDMA. She reminds the Commission that before ecstasy was made an illicit drug, it was used by psychiatrists and psychotherapists as a catalyst to enhance the efficiency and outcome of psychotherapy sessions. Thousands of people underwent MDMA-assisted psychotherapy sessions in the seventies and eighties without medical complications. Furthermore, the DEA's administrative law judge Francis Young ruled in 1986 that MDMA should be placed on Schedule III because evidence indicated that it had serious medical uses and less potential for abuse than Schedule I drugs.

National Association of Criminal Defense Lawyers
Written Statement of Edward A. Mallett, President, NACDL

Proposed Amendment 1 – Ecstasy

The NACDL opposes the proposed amendment concerning ecstasy. Mr. Mallett stated that he finds the government's likely argument for increasing ecstasy sentences specious for a number of reasons. First, he remembers a time when the government prosecuted large-scale drug cases without the current inducements to provide substantial assistance. Mr. Mallett then recounted that a colleague once observed that now the government "turns" witnesses and creates crimes that might never have occurred but for the rewards they are paying witnesses under the guidelines. Apart from this change in law enforcement practices, the government has failed to offer convincing evidence that increased sentences are necessary and appropriate to the goal of increased cooperation. Mr. Mallett stated that the proposed guideline amendment would indiscriminately increase sentences for all participants in an ecstasy conspiracy, from the very least to the most culpable. Additionally, high-level traffickers already receive harsh sentences under the current ecstasy guidelines – and the incremental increase seems unlikely to affect their willingness to cooperate.

Mr. Mallett stated that despite the government's claims that significantly harsher penalties will "send a strong signal to those who would import or traffic in ecstasy," the most obvious impact will be on low-level offenders. He further stated that the new federal ecstasy defendants will be members of the youthful user population who underestimate the consequences of their minor involvement with distributors. Another group that will be disproportionately affected is the couriers, who the DEA reports can carry up to 20,000 tablets on their person and 50,000 tablets in specially designed luggage.

Mr. Mallett reported that several prosecutors, lawyers and judges whom he has asked what they think of raising ecstasy punishments to correspond with heroine or cocaine, responded that there are so many problems with excessive punishments that the premise is wrong. That is, heroine and cocaine punishments do more harm than good and should not be a standard of correct thinking.

In conclusion, Mr. Mallett stated that the relative popularity of various illegal drugs seems to rise in advance of legislative change, and every effort to eradicate the use of a new drug through legislation seems to be followed by the invention and mass consumption of some newer drug.

Mr. Mallett attached the profile for a woman, Amy Pofahl, who was convicted of conspiracy to import and distribute MDMA and sentenced to 24 years without parole.

NACDL: Statement of David E. Nichols, Ph.D.

Mr. Nichols is a professor of Medicinal Chemistry and Molecular Pharmacology at Purdue University. His written testimony is a re-submission of the letter he sent to the Commission on February 5, 2001, for public comment.

Proposed Amendment 1 – Ecstasy

David E. Nichols wrote to state that ecstasy is simply not similar in its hallucinogenic effect on the user to mescaline. Dr. Nichols stated that ecstasy has roughly twice the psychoactive potency by weight of mescaline. Thus, based on human dosage, the equivalency for one gram of MDMA should then be equal to 20 g of marihuana. Further, MDMA has only about 1/25th the potency of heroin. There is no basis either through potency considerations or through risk assessment to equate the harm of one gram of MDMA with one gram of heroin.

Dr. Nichols stated that he understands the concern regarding large numbers of adolescents who are apparently abusing ecstasy, and supports reasonable attempts to discourage this use, but is adamantly opposed to regulations that are not based on facts or science.

NACDL: Statement of Charles S. Grob, M.D.

Dr. Grob is the Director of the Division of Child and Adolescent Psychiatry at Harbor-UCLA Medical Center and is also a Professor of Psychiatry at the UCLA School of Medicine. His written testimony consists of a re-submission of the letter he and Gary L. Bravo submitted on February 5, 2001, as well as a paper he published in the Addiction Research medical journal.

Proposed Amendment 1 – Ecstasy

Dr. Grob both strongly opposes the proposed new sentencing laws for MDMA. He predicts that the proposed sentencing laws would result in targeting low-level dealers and users and not the high-volume traffickers for which the laws are intended.

Dr. Grob stated that MDMA is more equivalent to mescaline in its behavioral and pharmacological effects than it is to heroin. Additionally, MDMA's potential for physical and psychological addiction is low. MDMA also shows potential as an alternative treatment for conditions known to be refractory, or non-responsive, to conventional treatments, including individuals with end-stage cancer who have severe psychological distress and existential alienation and also for patients with chronic post-traumatic stress disorder.

Dr. Grob also submitted a paper he authored entitled "Deconstructing Ecstasy: The Politics of

MDMA Research."[4] In this paper, Dr. Grob calls for an open and comprehensive review of the existing state of knowledge regarding MDMA, from diverse perspectives. The outcome into such an inquiry should facilitate a more effective and salutary understanding and response to the condition confronting Euro-American medicine and culture. The paper discusses the social history of MDMA, neurotoxicity of MDMA, and the current status of MDMA.

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[4]Charles S. Grob, *Deconstructing Ecstasy: The Politics of MDMA Research*, ADDICTION RESEARCH, Vol. 8, No. 6, pp. 549-88 (2000).

Rick Doblin, Ph.D.
President, Multidisciplinary Association for Psychedelic Studies (MAPS)

Proposed Amendment 1: Ecstasy

Mr. Doblin states two primary reasons for why he opposes any increases in the penalties for MDMA. First, enhanced penalties will increase the difficulties in obtaining FDA and DEA permission to conduct legitimate scientific research into the risks and benefits of the therapeutic use of MDMA as an adjunct to psychotherapy. Second, while MDMA does have its risks, as does any other drug or even any non-drug recreational activity, these risks have greatly exaggerated, particularly the risk of serious functional or behavioral consequences from MDMA neurotoxicity.

Mr. Doblin stated that he recently completed a dissertation on the regulation of the medical uses of Schedule 1 drugs, primarily MDMA and marijuana, for a Ph.D. in Public Policy from the Kennedy School of Government, Harvard University. Additionally, he recently participated as a subject in human spinal tap studies of MDMA neurotoxicity.

He stated that scientists associated with MAPS will submit a protocol to FDA in April, 2001 seeking permission to study the use of MDMA-assisted psychotherapy in the treatment of patients suffering from Post-Traumatic Stress Disorder (PTSD). This protocol, if approved, will be the first opportunity that scientists have had to study the therapeutic use of MDMA since DEA placed MDMA in Schedule 1 in 1985.

Mr. Doblin suggests that, historically, as the penalties for the non-medical uses of a drug are increased, political pressure develops to suppress or restrict research into the beneficial uses of that drug. This has been the case with heroin, marijuana and the psychedelics. There is also a tendency for government agencies and anti-drug groups to overestimate the risks of drugs that have been criminalized. Examples include the LSD chromosome damage scare, which was supposedly going to result in a generation of children born with birth defects to users of LSD, and the crack baby phenomenon, which was shown in later research to be vastly overstated. Mr. Doblin submits that the likely risks of MDMA neurotoxicity have also been dramatically exaggerated.

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, DC 20226

MAR 9 2001

ASSISTANT
DIRECTOR

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002

Attn: Public Information

Dear Commissioners:

My name is John Malone and I'm the Assistant Director of Firearms, Explosives and Arson Directorate at the Bureau of Alcohol, Tobacco and Firearms (ATF). I want to thank you for giving me the opportunity to speak today about the two proposals to amend United States Sentencing Guideline 2K2.1 to increase the number of levels added to offenses involving certain numbers of firearms. The reason I appreciate having the chance to speak about this issue is because increasing the sentences for offenses involving large numbers of firearms is a critical part of ATF's efforts to combat firearms trafficking and violence.

As you are aware, the guidelines for firearms violations currently provide for a 1 to 6 level increase of the base offense level if the crime involved 3 or more firearms. For example, if a crime involved 3 to 4 firearms, 1 level is added, and if a crime involved 5 to 7 firearms, 2 levels are added. This incremental one-level increase continues up to crimes involving 50 or more firearms, where 6 levels are added. Unfortunately, the current guidelines reach their peak at 50 firearms. Therefore, if a person is sentenced for trafficking 50 firearms, he or she receives a 6 level increase. If a person is sentenced for trafficking 250 firearms, he or she would receive this same 6 level increase. There is little incentive for a trafficker to cease his or her activities once the 50-firearms threshold had been met.

Accordingly, it is not surprising that statistics prepared by the Department of Justice (DOJ) demonstrate that defendants sentenced under 2K2.1 in cases involving 50 or more firearms frequently received low sentences. For example, in 1997, 4.9 percent of defendants who were convicted in cases involving 50 or more firearms received less than 1-year imprisonment and 10 percent received no prison sentence. Similarly, in 1998, 3.8 percent of defendants who were convicted in cases involving 50 or more firearms received less than 1-year imprisonment and 24.4 percent received no imprisonment. In 1999, 4.9 percent received less than 1-year imprisonment and 9.8 percent received no imprisonment. These low sentences do not reflect the seriousness of trafficking in a large number of firearms and the threat that it poses to public safety. The sentences also do not serve as a deterrent against trafficking in large numbers of firearms. In addition, many traffickers are able to continue trafficking firearms after a short time in jail.

The Commission has put forward 2 options for amending Guideline 2K2.1. Option 1, originally proposed by ATF, would provide an additional 1 level increase for crimes involving 100 to 199 firearms and a 2 level increase for crimes involving 200 or more firearms. Option 2 would restructure the present format for adding levels based on the number of firearms involved, by providing increases in two-level increments, rather than one-level increments. This would result in 2 levels being added for offenses involving 3-7 guns; 4 levels added for offenses involving 8-24 guns; and 6 levels added for offenses involving 25-99 guns. It also would lift the 50 firearm cap so that 8 levels would be added for offenses involving 100-199 guns and 10 levels would be added for offenses involving 200 or more guns.

Both of the proposed options would address the problems with the present guidelines which I have discussed. Therefore we support both options. However, we prefer Option 2 for several reasons. First, it would provide

higher sentences than Option 1 in certain cases involving less than 50 firearms. For example, someone being sentenced for a crime involving 4 firearms would get 2 levels added to his or her base offense, rather than the 1 level increase he or she would get under Option 1. Second, Option 2 would provide higher sentences than Option 1 in all cases involving 100 or more firearms. For example, someone trafficking 150 firearms would get a seven level increase under Option 1 and an 8 level increase under Option 2. Therefore Option 2 better reflects the serious threat firearms trafficking poses to public safety and is a more effective deterrent.

In addition, Option 2 has the added benefit of diminishing some of the fact-finding required to determine how many firearms were involved in an offense.

To get a better understanding of the effect of the different options, it is useful to calculate their impact on a defendant's sentence. Under the present guidelines, a person with a base offense level of 12 and a criminal history in category I who is being sentenced for selling 250 firearms without a license would have an offense level of 18 (12 + 6), giving him or her a sentence in the range of 27-33 months. Under Option 1, this person would have an offense level of 20 (12 + 8), giving him or her a sentence in the range of 33-41 months. Finally, under Option 2, this person would have an offense level of 22 (12 + 10), giving him or her a sentence in the range of 41-51 months. Clearly the impact of the different options is significant.

I want to explain why ATF views firearms trafficking as a serious crime which poses a large threat to the public safety and which must be punished accordingly. As we have stated in correspondence with the Commission, trafficked firearms often are used in subsequent crimes, thereby threatening public safety. In 1997, an ATF investigation of a dealer who lied on his license application and failed to maintain records was initiated in the San Francisco Field Division, where I was Division Director. More than 100 of the 446 guns the defendant bought and sold during

the short time he was in business were later seized by police investigating violent crimes. The defendant was sentenced to 2 years for lying on his license application and failing to maintain records. Similarly, in a 1999 case, a defendant pled guilty to engaging in the business of dealing in firearms without a license. To date, approximately 25 of the over 200 firearms he sold have been recovered in crimes including robberies, aggravated assaults, narcotics offenses, and firearms offenses. Several of the firearms have been recovered in the hands of juveniles. Subsequently, the defendant was sentenced to 4 1/2 years in prison.

These are just two examples. Unfortunately they reflect a pattern we see over and over again. Obviously, the greater the number of firearms that are trafficked, the greater the risk they will end up being used in crime. Therefore shutting down a trafficker's activity is an ounce of prevention which yields several pounds of cure to the community. The proposed amendments, particularly Option 2, would provide an effective tool to combat trafficking in large numbers of firearms.

As the Assistant Director of the Firearms, Explosives and Arson Directorate, I have the unique responsibility of overseeing the development and implementation of firearms enforcement initiatives which directly impact violent crime in our country. Over the last several years, ATF has sharpened the focus of its firearms enforcement efforts on identifying, investigating and preventing illegal firearms trafficking. The slight decrease in the number of cases brought in 1998 and 1999 involving 50 or more firearms is not a result of a reduced focus on firearms trafficking by ATF. In fact, it likely is a result of ATF's increased focus on identifying, investigating, and preventing firearms trafficking. ATF has added additional agents and inspectors to combat trafficking. We also have increased our use of technology in investigating trafficking. Moreover, programs such as the Youth Crime Gun Interdiction Initiative, which combines the strategic use of crime gun information with investigative activity, have enabled us to

more effectively identify and prevent trafficking. Accordingly, ATF often is able to stop trafficking violations before the trafficker has had time to acquire large numbers of firearms. However, ATF agents are continuing to perfect significant numbers of criminal cases involving quantities of firearms over the current 50-firearms threshold.

ATF's improved success in combating firearms trafficking in no way removes the need for the proposed amendments. Tougher sentences are a crucial tool, along with all the other steps we are taking, in our attempt to prevent firearms trafficking by sending a strong message that such behavior will not be tolerated. An increase in the levels added for firearms offenses involving multiple firearms will ensure a fair and uniformly applied sentence to large scale firearms traffickers, regardless of judicial district or presiding judge, and ensure adequate protection to the public from this type of conduct. We are pleased the Department of the Treasury joins us in supporting both Options, and in particular Option 2.

I want to thank you once again for giving me the opportunity to speak to you about this very important issue. I would be happy to answer any questions you might have.

Sincerely yours,

John P. Malone

John P. Malone
Assistant Director
(Firearms, Arson and Explosives)

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
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DIRECTOR

MAR - 9 2001

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Attn: Public Information

Dear Commissioners:

This letter is in response to proposals to amend the United States Sentencing Guidelines which were published in the Federal Register on January 26, 2001. Specifically, it is in response to the two proposals to amend Guideline 2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition). (We have no comment on the other firearms-related proposals contained in the January 26, 2001, edition of the Federal Register.)

As you know, in a December 1, 1998, letter to the General Counsel of the United States Sentencing Commission, the Bureau of Alcohol, Tobacco and Firearms (ATF) recommended that section 2K2.1(b)(1) be amended to provide an additional one-level increase for crimes involving 100 to 199 firearms and a two-level increase for crimes involving 200 or more firearms. Our letter noted that Mr. James E. Johnson, former Treasury Under Secretary for Enforcement, had sent you a letter on November 17, 1998, seeking the same amendment.

The January 26, 2001, edition of the Federal Register contained ATF's suggested amendment (Option 1), as well as a second proposal for amending Guideline 2K2.1, which would provide increases in two-level increments (Option 2). In relation to the current guidelines, Option 2 would result in a one-level increase for crimes involving 3-4 firearms, 8-12 firearms, and 25-49 firearms; a two-level increase for crimes involving 100-199 firearms; and a four-level increase for crimes involving 200 or more firearms.

United States Sentencing Commission

Although we support both Option 1 (our original proposal) and Option 2, we prefer Option 2. Because Option 2 would provide higher sentences than Option 1 in certain cases involving less than 50 firearms, and higher sentences than Option 1 in all cases involving 100 or more firearms, it better reflects the serious threat firearms trafficking poses to public safety. In addition, Option 2 has the added benefit, pointed out in the Federal Register notice, of diminishing some of the fact-finding required to determine how many firearms were involved in an offense.

In our December 1998, letter we explained, and provided examples to demonstrate, that trafficked firearms often are used in subsequent crimes, thereby threatening public safety. This pattern unfortunately has continued. For example, in a 1999 case where a Federal firearms licensee sold over 200 firearms to convicted felons, gang members, and juveniles through straw purchases, several of the firearms have been recovered in narcotics offenses, homicides, robberies, and assaults. (The defendant received a sentence of 6 months imprisonment and 3 years supervised release.) In another 1999 case, a defendant pled guilty to engaging in the business of dealing in firearms without a license in violation of 18 U.S.C. § 922(a)(1)(A). To date, approximately 25 of the over 200 firearms he sold have been recovered in crimes including robberies, aggravated assaults, narcotics offenses, and firearms offenses. Several of the firearms have been recovered in the hands of juveniles. The greater the number of firearms that are trafficked, the greater the risk they will end up being used in crime. The proposed amendments would acknowledge this dangerous consequence of trafficking large numbers of firearms.

The proposed amendments also would serve as more effective deterrents to trafficking large numbers of firearms than the present guidelines. As stated in our December 1, 1998, letter under the current guidelines, unless an upward departure is issued, a defendant who trafficked 200 firearms would get the same base offense level as a

defendant who trafficked 50 firearms. Therefore, there is little incentive for a trafficker to stop his or her activity once 50 firearms have been trafficked. The proposed amendments, particularly Option 2, would send a message to potential traffickers that they will pay a price if they traffic large numbers of firearms.

Moreover, increased sentences will hinder the ability of traffickers to continue their illegal activities. Presently, many firearms traffickers are able to continue trafficking firearms after a short period of incarceration.

Our December 1998, letter contained statistics prepared by the Department of Justice which showed that defendants convicted under 2K2.1 in cases involving 50 or more firearms frequently received low sentences. For example, in 1997, 4.9 percent of defendants who were convicted in cases involving 50 or more firearms received less than 1-year imprisonment and 10 percent received no prison sentence. Department of Justice statistics from 1998 and 1999 show this problematic trend continues. In 1998, 3.8 percent of defendants who were convicted in cases involving 50 or more firearms received less than 1-year imprisonment and 24.4 percent received no imprisonment. In 1999, 4.9 percent received less than 1-year imprisonment and 9.8 percent receiving no imprisonment. (In 1999, 77 percent of defendants who were convicted in cases involving 50 or more firearms received imprisonment in the range of 1 to 5 years.)

Department of Justice statistics also show that slightly less cases involving 50 or more firearms were brought in 1998 and 1999 than had been brought in 1995-1997, both in terms of raw numbers and percentages. For example, 79 cases were brought in 1998 and 61 cases were brought in 1999, versus 81 in 1995, 113 in 1996, and 82 in 1997. Similarly, 3.5 percent of the cases brought in 1998 and 2.5 percent of the cases brought in 1999 involved 50 or more firearms, versus 3.6 percent, 5.1 percent, and 3.9 percent in 1995, 1996, and 1997 respectively.

We want to emphasize that this small shift does not reflect a reduced need for the proposed amendments. As an initial matter, for the 140 cases involving 50 or more firearms that were brought in 1998 and 1999, the defendants committed serious offenses which should be punished in a manner which reflects their severity. Moreover, the shift is not a result of a reduced focus on firearms trafficking by ATF. In fact, it likely is a result of ATF's increased focus on identifying, investigating, and preventing firearms trafficking. ATF has added additional agents and inspectors to combat trafficking. We also have increased our use of technology in investigating trafficking. Moreover, programs such as the Youth Crime Gun Interdiction Initiative, which combines the strategic use of crime gun information with investigative activity, have enabled us to more effectively identify and prevent trafficking. Accordingly, ATF often is able to stop trafficking violations before the trafficker has had time to acquire large numbers of firearms. However, as stated above, that does not remove the need for the proposed amendments. Tougher sentences are a crucial tool in our attempt to prevent firearms trafficking.

Please let us know if we can provide you with any further information regarding these proposals. Mr. John P. Malone, ATF's Assistant Director of the Firearms, Explosives and Arson directorate, will be making a statement in support of these proposals (in particular, Option 2) at the public hearing on this matter. He is eager to address any questions you have. Thank you for your consideration of this important issue.

Sincerely yours,

Bradley A. Buckles
Director

SUMMARY OF THE STATEMENT OF THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS

Proposed Amendment 5 (sexual predators)

The defenders recommend deferring action on the pattern-of-activity and incest amendments and on the increase in the base offense levels in § 2A3.2 until after hearing at which Native American tribes, organizations, and individuals can testify.

Part A – If the Commission decides to proceed without hearings, the defenders prefer option 4, adding commentary language encouraging an upward departure. The defenders, however, recommend deletion of that part of option 4 that would amend § 5D1.2 to require the maximum term of supervised release if the defendant is convicted of a sex offense. The defenders believe that this part of option 4 unnecessarily restrict judicial discretion. In any event, the defenders recommend excluding acts of incest from a definition of pattern of activity. If the Commission adopts option 1, the defenders recommend a criminal history category of not less than IV (option 1A) and recommends that proposed § 4B1.5 have the same temporal limitations under § 4A1.2(e) that apply to the career offender guideline. The defenders oppose option 2 because proposed § 4B1.6 (1) would vitiate the requirement of proof beyond a reasonable doubt; (2) would be susceptible to prosecutorial manipulation (prosecutors could obtain a greater sentence by changing one count and using other allegations to seek the enhancement under proposed § 4B1.6, rather than charging all allegations); and (3) would result in disproportionate sentences among sexual offenders.

Part B – the defenders support option 1, which would call for the grouping of counts under § 3D1.2(d), because it will encourage greater uniformity in sentencing, discourage sentence manipulation by plea agreements, and promote judicial economy.

Part C – *Base offense level.* If the Commission decides to act on the base offense level without hearings, the defenders believe that the increase in the base offense levels last cycle are generally sufficient to comply with the congressional mandate, but they would support a new base offense level of 21 that would apply to an offense under 18 U.S.C. ch. 117 that involves a sexual act. A base offense level of 18 would apply to a violation of 18 U.S.C. ch. 117 that does not involve a sexual act, and a base offense level of 15 would apply in all other cases. *Incest enhancement.* The defenders oppose an incest enhancement because of the disparate impact on defendants who are Native Americans.

Proposed Amendment 6 (stalking and domestic violence)

The defenders oppose increasing the base offense level of § 2A6.2 because a higher base offense level would fail to maintain proportionality in sentencing with the more serious offense of aggravated assault, covered by § 2A2.2. An increase to level 16 or 18 as proposed would render a higher sentence, in some instances, than that which would apply to an aggravated

assault. The defenders recommend that, in the interests of proportionality, a 4-level reduction be added to § 2A6.2 that is similar to the reduction of § 2A6.1(b)(4), to address those cases in which the offense involves a single instance evincing little or no deliberation consistent.

Proposed Amendment 7 (repromulgation of amendment 608)

The defenders favor option 3. The defenders oppose options 1 and 2 because they call for double counting. The defenders believe that option 3 appropriately recognizes that there should be a gradation in the enhancement based upon harm by making the substantial-risk enhancement an alternative to the discharge and handling enhancement.

Proposed Amendment 8 (mandatory restitution for amphetamine and methamphetamine offenses)

The defenders do not oppose the amendment.

Proposed Amendment 9 (safety valve)

The defenders support that part proposed amendment 9 that would amend § 2D1.1(b)(6) to delete the requirement of a minimum offense level of 26. The defenders oppose that part of amendment 9 that would amend § 5C1.2 to provide that a defendant who meets the safety valve criteria cannot have an offense level from chapters 2 and 3 of the *Guidelines Manual* that is less than level 17. The Commission, when it first promulgated § 5C1.2 as an emergency amendment, recognized that in some cases a defendant who meets the safety valve criteria could have an offense level lower than 17 under chapters 2 and 3. The imposition of a floor of 17 would result in unjustifiable disparity resulting from the prosecutor's charging decision – a defendant's offense level can depend upon whether the prosecutor decides to charge a mandatory-minimum offense or a nonmandatory-minimum offense.

Proposed Amendment 10 (anhydrous ammonia)

The defenders do not oppose referring the new offense, codified at 21 U.S.C. § 864, to § 2D1.12. The amendment's proposed two-level enhancement at § 2D1.1(b)(1) – which applies if the defendant intended to manufacture methamphetamine or had reason to believe the equipment would be so used – is sufficient to account for the seriousness of attempting or intending to manufacture methamphetamine using anhydrous ammonia. The defenders oppose an enhancement of more than two levels for anhydrous ammonia. As a methamphetamine-manufacturing offense also results in a two-level enhancement under subsection (b)(2) based on a hazardous discharge into the environment, amending (b)(1) to include anhydrous ammonia doubles the enhancement already applicable for the use of anhydrous ammonia. No additional increase is necessary. The defenders oppose adding a cross-reference § 2D1.1 because there is no reliable basis for converting a given quantity of anhydrous ammonia into a quantity of methamphetamine.

Proposed Amendment 11 (GHB)

The defenders do not oppose eliminating the maximum base offense level of 20 in § 2D1.1 for Schedule I and II depressants, including GHB, in order to maintain proportionality with less serious Schedule III substances. The defenders do not oppose modification of the chemical quantity table in § 2D1.11 to include GBL, a precursor of GHB.

Proposed Amendment 12 (economic crime package)

The defenders believe that there is no justification for an across-the-board increase in offense levels for economic crimes because sentences for such crimes fall overwhelmingly at the bottom of, or below, the guideline range.

Part A – The defenders support a consolidation of the theft, property destruction, and fraud guidelines. They do not oppose the proposed resolution of the circuit conflict concerning the in-the-business enhancement but recommend that proposed application note 4 state that the enhancement does not apply if the defendant only distributed goods that the defendant had unlawfully acquired. The defenders support option 1 for proposed subsection (b)(14) ($1 million in gross receipts from financial institution). The defenders support proposed subsection (c)(3) without the bracketed language because the determination to use a different guideline should be made without regard to the resulting offense level, as are choice-of-guideline determinations under § 1B1.2. With regard to issue for comment 1, the defenders support the Commission's current approach of treating an inchoate offense as less serious than a completed offense. With regard to issue for comment 2, the defenders support relying on departures to deal with cases involving unique items of cultural heritage or historical or archeological significance. A fixed enhancement will be too little in some cases, too much in others, and drafting a graded enhancement would be difficult. The defenders recommend waiting to see how courts deal with such cases before attempting to draft an enhancement.

Part B – The defenders oppose rewriting the loss tables because the increased punishment that they call for is neither necessary, desirable, nor appropriate. A new loss table is not a prerequisite for consolidation of the theft, property destruction, and fraud guidelines. The defenders recommend that the consolidated guideline use the loss table in the current fraud guideline.

Part C – The defenders support a comprehensive definition of loss, and suggest adoption of such a definition even if the Commission decides not to consolidate the theft, property destruction, and fraud guidelines. *Intended loss*. The defenders oppose use of intended loss in the general rule. If the Commission decides to include intended loss, the proposed commentary on intended loss needs to be revised . The defenders oppose holding a defendant accountable for what another defendant intended. In addition, the defenders suggest modifying the commentary to state that the standard is "the pecuniary harm that

the defendant purposely intended to cause." The defenders support excluding from intended loss a loss that was not reasonably intended to result. *Actual loss.* The defenders prefer the definition in option 1 but recommend the adoption of a remoteness limitation on the loss for which a defendant is accountable because virtually anything is reasonably foreseeable. The defenders believe that some notion of legal causation must go along with but-for causation. *Time of measurement.* The defenders do not support either option 1 (time of sentencing) or option 2 (time of detection) but recommend the adoption of time of the offense, which is when the victim's loss occurs. *Exclusion of interest.* The defenders support option 1 because interest will only rarely make a difference in loss calculation, so to require its determination in every case not only calls for needless work but invites litigation. *Economic benefit conferred on victim.* The defenders do not object to proposed application note 2(C)(iii) and support the use of the de minimis language in the first bracket of proposed application note 2(C)(IV)(1). *Ponzi schemes.* The defenders support option 1 as the most consistent with the purpose of the Commission to have sentences ordinarily "reflect the nature and magnitude of the pecuniary harm caused." *Evaluation of loss.* The defenders oppose the inclusion in proposed application note 2(D) of "[t]he sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence" because that language is too broad. There can be cases in which the loss will be determined solely on the basis of records that the sentencing judge's position with regard to determining loss is not unique. The defenders recommend inserting "ordinarily" after "sentencing judge." *Gain.* The defenders support option 4 as the most consistent with the Commission's goal in economic-crime cases that sentences ordinarily "should reflect the nature and magnitude of the pecuniary harm caused." Options 2, 3, and 4 would require the determination of gain in every case, unnecessary work in the view of the defenders because in the vast majority of cases loss to the victims will exceed gain to the defendant. *Downward departure.* The defenders support including proposed application note 2(G)(ii)(II) but suggest modifying it by including the bracketed language in the sentence, "The loss significantly exceeds the greater of the [defendant's] actual or intended [personal] gain, and therefore significantly overstates the culpability of the defendant." The defenders also recommend replacing "and therefore" in that sentence with "or otherwise."

Part D – The defenders have no objection to part D.

Part E – The defenders have no objection to part E.

Part F – The defenders support part F.

Proposed Amendment 13 (aggravating and mitigating factors in fraud and theft cases)

The defenders prefer option two. The defenders object to both options insofar as they include in their calculus a factor otherwise accounted for in the guideline by another specific offense characteristic. They believe that no factor already accounted for by the guideline should

enter into a determination of whether the proposed specific offense characteristic applies.

Proposed Amendment 14 (sentencing table amendment and alternative to sentencing table amendment)

The defenders support option one because it will afford sentencing judges additional discretion to fashion an appropriate sentence based on all the circumstances of the case. This option requires no additional work by the probation office and does not necessitate additional fact-finding that could become the subject of an appeal.

Proposed Amendment 15 (firearms table)

The defenders oppose both options for amending the firearms table of § 2K2.1(b)(1) to add entries for 100-199 weapons and 200 or more weapons. They believe that an increase is not warranted because nearly half of all firearms sentences were at or below the bottom of the guideline range. The defenders believe that the ATF data does not support an increase because there is no evidence that the sentences cited were inappropriately low. It is the defenders' view that federal judges would not have imposed the sentences cited if they were not warranted and appropriate.

Proposed Amendment 16 (prohibited person definition)

The defenders do not oppose the changes in the commentary defining "prohibited person" in § 2K1.3 and § 2K2.1. The defenders support that part of the amendment that would specify that a defendant's status as a prohibited person relative to the base offense level is to be determined as of the time of the commission of the instant offense. The defenders believe that the focus properly belongs on the defendant's status at the time of the commission of the offense because the reason an individual's status as a prohibited person is significant is that a gun or explosives offense committed by a prohibited person is more dangerous to public safety than an offense committed by someone who is not a prohibited person.

Proposed Amendment 17 (prior felonies)

The defenders support the amendment to §2K1.3 and § 2K2.1, which would interpret "prior felony conviction(s)" to mean the defendant had such a conviction at the time the explosives or firearms offense was committed. The defenders believe that because the reason an individual's status as a prohibited person is significant is that a gun or explosives offense committed by a prohibited person is more dangerous to public safety than an offense committed by someone who is not a prohibited person, the relevant time to consider for purposes of determining sentence is the time the gun or explosives offense was committed.

Proposed Amendment 18 (immigration)

The defenders support amendment 18 without the bracketed language because they consider that unfair disparity is the hallmark of sentencing in illegal reentry cases in which the aggravated-felony enhancement applies. Not all offenses that meet the statutory definition of aggravated felony are of equal seriousness. The defenders believe that time served in prison is the best way to measure seriousness. Relying on category of offense, as is done in the bracketed language of option 1, is the least accurate measure of seriousness because such an approach incorrectly assumes that all defendants who have committed a given type of offense have engaged in equally serious conduct. A drug distribution offense may be for transporting 500 grams of cocaine powder or for being the head of an organization that distributed 250 kilograms of cocaine powder, for example. The defenders believe that time served is better than time imposed to measure seriousness because time served measures the punishment actually meted out. The defenders respond to the Justice Department's criticisms of time served by agreeing that in some situations time served can be difficult to compute, but that the problem is overstated because the time served need be computed only for one prior, not for all. Further, in the defenders view, the kind of problems that give rise to difficulty in computing time served ordinarily will not arise if the defendant is an alien because an alien convicted of a serious offense usually is deported upon release from imprisonment for that offense. In addition, the concern about shortened periods of incarceration due to prison overcrowding overstates the impact of such early release upon time served generally. The remedy of early release occurs rarely, and if it is a factor in time served for a prior aggravated felony could be the basis for a departure. In response to the Justice Department's concern that the proposed amendment does not "prevent creative bases for downward departure that have arisen, particularly in districts that do not have 'fast track' policies," the defenders point out that the need for such departures is created by the unfairness of the present 16-level enhancement. With regard to the extent of the enhancement under proposed subsection (b)(1)(A)(i), the defenders recommend level 10. The defenders oppose the proposed commentary in option 2.

Proposed Amendment 19 (nuclear, biological, and chemical weapons)

The defenders have no objection to the proposed amendment.

Proposed Amendment 21 (miscellaneous new legislation and technical amendments)

The defenders have no objection to the proposed amendment.

STATEMENT

of the

FEDERAL PUBLIC AND COMMUNITY DEFENDERS

on

Proposed Amendments to the Sentencing Guidelines published on January 26, 2001

Submitted by
Jon Sands
Assistant Federal Public Defender,
District of Arizona
Chair, Sentencing Guidelines Committee of the
Federal Public and Community Defenders

March 9, 2001

Table of Contents

PROPOSED AMENDMENT 5
Sexual Predators

Last amendment cycle, the Commission, in response to the Protection of Children From Sexual Predators Act of 1998,[1] added enhancements to § 2A3.1 (criminal sexual abuse), § 2A3.2 (criminal sexual abuse of a minor under the age of sixteen years), § 2A3.3 (criminal sexual abuse of a ward), and § 2A3.4 (abusive sexual contact) to increase sentences in cases involving the use of computers or the knowing misrepresentation of the actual identity of the defendant, if the use of the computer or misrepresentation was done with intent to persuade, induce, entice, coerce, or facilitate the transportation of a child to engage in prohibited sexual activity. The Commission also broadened the term "distribution" in § 2G2.2 (trafficking in material involving the sexual exploitation of a minor) to include distribution for nonpecuniary gain. Moreover, the Commission amended § 2G2.2 to require increased punishment in cases involving distribution of child pornography for nonpecuniary gain, to a minor, to a minor with intent to persuade the minor to engage in prohibited sexual conduct, as well as for all distribution cases that do not otherwise receive an enhancement for distribution.

A major concern of the Protection of Children from Sexual Predators Act was a perception that sentences under § 2A3.2 both for consensual sex convictions and for convictions for offenses prosecuted under 18 U.S.C. § 2243(a) or 18 U.S.C. ch. 117 were inappropriate. When initially drafted, § 2A3.2 was designed to apply to those defendants who engage in consensual sexual acts that would be legal but for the age difference between the participants. Historically, the majority of such cases in federal court have involved Native American defendants from the reservation. However, with the advent of the internet and special federal investigation initiatives, such as "Innocent Images," an increasing number of defendants are now being charged under 18 U.S.C. ch. 117 and sentenced under § 2A3.2. The number of Native Americans sentenced under the § 2A3.2 has remained relatively constant.[2]

To provide appropriate punishment for the two different types of cases now being sentenced under § 2A3.2, the Commission made several modifications to that guideline last amendment cycle. As previously noted, the Commission added an enhancement for the use of a computer or internet access device and raised the base offense level to 18 if the offense involved a violation of 18 U.S.C. ch. 117. The Commission also added an enhancement for undue influence to address those cases in which the defendant took advantage of their status as an older

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[1]Pub. L. No. 105-314, §§ 502-07, 112 Stat. 2974.

[2]*See* Sexual Predators Act Policy Team, U.S. Sentencing Com'n, Sentencing Federal Sexual Offenders: Protection of Children From Sexual Predators Act of 1998, at 13, table 2 (Jan. 24, 2000). The number of Native Americans sentenced under § 2A3.2 was 32, 27 and 29 in fiscal 1998, 1997 and 1996, respectively. *Id.*

person. There is now a rebuttable presumption of undue influence if there is a ten-year age difference between the defendant and the victim.

The Commission deferred action on the directive in the Act for an enhancement if the defendant engaged in a "pattern of activity of sexual abuse of exploitation of a minor." The Commission also deferred action on the grouping of multiple counts of possession and distribution of child pornography, an issue over which there is a circuit conflict. Proposed amendment 5 is a three-part amendment that would implement two directives in the Protection of Children From Sexual Predators Act of 1998[3] and call for grouping of certain child pornography counts of conviction.

At the outset, it must be stated that proposed amendment 5 would have a huge impact on Native Americans. The majority of sex offenders sentenced under §§ 2A3.1, 2A3.2 and 2A3.4 are Native Americans. In fiscal year 1999, Native Americans represented approximately 61% of sex offenders sentenced under the guidelines (165 out of 271). The numbers in fiscal 1999 are consistent with previous years.[4] Native American groups are becoming concerned about the application of the sentencing guidelines on the individuals in their community. As noted by the South Dakota Advisory Committee to the United States Commission on Civil Rights, there is a perception of unjust treatment that is based upon the view that federal courts applying the sentencing guidelines impose harsher punishment than state courts.[5] In New Mexico and South Dakota, offenses occurring off the reservation often have a lesser presumptive sentence than called for under the United States Sentencing Guidelines. Additionally, plea practices in federal and state court can result in unequal treatment between reservation and non-reservation cases.

It is against a background of abject poverty, unemployment, and physical isolation, all contributing to distressingly high rates of alcoholism and substance abuse, that the Commission must consider what changes to make in the guidelines. In an article relied upon by the United States Probation Office, *The American Indian Sexual Offender*, author Dewey Ertz cautions that "[t]he most important issue to keep in mind when treating the American Indian sexual offender is that the American Indian people are victims by nature of their history and life experience, and they are offenders with respect to inappropriate behavior patterns." Those behavior patterns

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[3]*See* Pub. L. No. 105-314, § 505, 112 Stat. 2974. One directive concerns "pattern of activity" and the other an enhancement for transportation offenses under 18 U.S.C. ch. 117.

[4]*See* Sexual Predators Act Policy Team, U.S. Sentencing Com'n, Sentencing Federal Sexual Offenders: Protection of Children From Sexual Predators Act of 1998, at 9, 13, 17, tables 1, 2, 4 (Jan. 24, 2000).

[5]*See generally* South Dakota Advisory Committee to the United States Commission on Civil Rights, *Native Americans in South Dakota: An Erosion of Confidence in the Justice System* (Mar. 2000).

often find their roots in substance abuse and dependancy, attention deficit and impulse control disorders, and affective disorders such as depression. Mr. Ertz emphasizes that therapy addressing the roots of the behavior patterns and integrating tribal and community concepts can positively treat the offender.[6]

Physical isolation and poverty is typical on a reservation. Defendants often come from homes with no running water, electricity, or telephone. They may have to walk for miles or hitchhike for days to make court appearances. Lack of education is common, particularly among the middle-aged and elderly population, who have been the victims of "forced" boarding schools.[7] It is not uncommon for Native American defendants, especially middle-aged and older, to have little or no English language skills. In New Mexico, there is a full-time Navajo court interpreter, and a significant minority of defendants speak little or no English.[8]

In reviewing our cases, we note that a Native American defendant was frequently a victim or witness of sex abuse as a child. It would not be surprising that a victim of sexual abuse as a child, who never had an opportunity for treatment, would become part of the cycle of abuse as an adult. The issue of incest is not so straight-forward when the adult offender was victimized as a child.

The Assistant Secretary of the Interior for Indian Affairs summed up the situation this

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[6]Dewey Ertz, *The American Indian Sex Offender, in* 2 The Sex Offender: New Insights, Treatment Innovations, and Legal Developments (Barbara K Schwartz & Henry R. Cellini eds. 1997).

[7]Historically, a major trauma for Native Americans was the boarding school operated by the government or a religious organization. Often children were taken from their parents and taught the "values" of the dominant society. The Native American culture was prohibited in these schools, which added to the loss of social structure, community and personal identity of the Native Americans. *See* David Wallace Adams, Education for Extinction: American Indians and the Boarding School Experience 1875-1928 (Univ. of Kansas 1995); M. Irwin & Samuel Roll, *The Psychological Impact of Sexual Abuse of Native American Boarding School Children*, 23 J. Am. Psychoanalysis 461 (1995).

[8]A Native American defendant prosecuted in federal court suffer the additional hardship, at least in New Mexico and South Dakota, of serving the sentence outside away from the defendant's home state and family. Few reservation families have the resources to travel to another state, so a Native American inmate in federal prison suffers a greater isolation from family and culture than a Native Americans inmate of a state prison. For a Native American inmate from a small tribe or pueblo, there is a good likelihood that the inmate may be the only tribal or pueblo member in the federal institution.

way in remarks on the 175th anniversary of the establishment of the Bureau of Indian Affairs. The Assistant Secretary reviewed the history of relations between the Indian tribes and the dominant society since 1875, candidly pointing out the failures of policy that have contributed to the state of life in Indian communities today. After noting the impact of the wars with Indians, he pointed out that

> it must be acknowledged that the deliberate spread of disease, the decimation of the mighty bison herds, the use of the poison alcohol to destroy mind and body, and the cowardly killing of women and children made for tragedy on a scale so ghastly that it cannot be dismissed as merely the inevitable consequence of the clash of competing ways of life. . . . Nor did the consequences of war have to include the futile and destructive efforts to annihilate Indian culture. After the devastation of tribal economies and the deliberate creation of tribal dependence on the services provided by this agency, this agency set out to destroy all things Indian.
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> This agency forbade the speaking of Indian languages, prohibited the conduct of traditional religious activities, outlawed traditional government, and made Indian people ashamed of who they were. Worst of all, the Bureau of Indian Affairs committed these acts against the children entrusted to its boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually. . . . The trauma of shame, fear and anger has passed from one generation to the next, and manifests itself in the rampant alcoholism, drug abuse, and domestic violence that plague Indian country. Many of our people live lives of unrelenting tragedy as Indian families suffer the ruin of lives by alcoholism, suicides made of shame and despair, and violent death at the hands of one another.[9]

We recommend that the Commission, before promulgating guideline amendments that will have a substantial impact on Native Americans, hear from Native Americans tribes, organizations, and individuals. The Commission should not fail to hear from the Native American community. The dynamic between Native Americans and the dominant society is complex. We suggest that the Commission hold hearings at least in South Dakota and New Mexico or Arizona before promulgating a pattern of activity and incest enhancement.

Based upon the data from fiscal 1999, approximately one in ten (17 out of 165) Native Americans defendants convicted of sex offenses could be subject to proposed § 4B1.5 (repeat and dangerous sex offender).[10] Native Americans would be the majority of persons subject to the

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[9]Remarks of Kevin Gover, Assistant Secretary-Indian Affairs, at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs (Sept. 8, 2000), available at www.doi.gov/bia/as-ia/175gover.htm.

[10]*See* Sexual Predators Act Policy Team, U.S. Sentencing Com'n, Sentencing Federal Sexual Offenders: Protection of Children From Sexual Predators Act of 1998, at 3, table 1 (Jan.

proposed guideline (17 Native Americans out of a total of 32).[11] If the Commission were to adopt the broadest proposals for a pattern of activity enhancement, under which an offender would qualify for an enhancement if there were multiple contacts with the same victim, contacts with multiple victims, prior convictions, or prior episodes that did not result in convictions, nearly two-in-three Native American defendants (108 out of 165) would receive an enhancement.[12] Additionally, 61% of all offenders subject to the enhancement would be Native Americans (108 out of 177).[13] The proposed pattern of activity enhancements would have a disproportional impact on Native Americans.

Similarly, the proposed special offense characteristic for incest would almost exclusively be imposed upon Native Americans. In fiscal 1999, 51 out of 60 eligible offenders (85%) would have been Native Americans.[14] Moreover, nearly one-in-three (51 out of 165) of the Native American sex offenders would have been eligible for the enhancement.[15]

The proposed amendment increasing the base offense level of § 2A3.2 for non-18 U.S.C. ch. 117 offenses would mainly affect the Native American population. In fiscal 1999, 28 out of 36 defendants convicted of an age-differential sex offense were Native Americans.[16] Cases involving Native American offenders are the most appropriate for a base offense level of 15. The Native American defendants sentenced under § 2A3.2 tend to have committed sexual acts that are truly consensual and would be legal but for the age disparity. Undue influence is rare. For such cases, a base offense level of 15 is appropriate.

The congressional directives contained in the Protection of Children from Sexual Predators Act of 1998 were for the most part aimed at the internet sexual predator. However, these individuals who troll the internet to prey on children are a minority of the sexual offenders in the federal system. We believe that the guidelines should be written to deal with offenders who make up the majority of the sex-offense defendants in the federal court system–sadly, Native Americans. Thus, we believe that the Commission should not incapacitate Native

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24, 2000).

[11]*See id.*

[12]*See id.* at 6, table 3.

[13]*See id.*

[14]*See id.* at 7, table 4.

[15]*See id.*

[16]*See id.* at 9, table 5.

American sex offenders until they have had an opportunity for education and treatment. As Mr. Ertz emphasizes in his article, Native American sex offenders, unlike pedophiles, are the most amenable to treatment and have the lowest rates of recidivism. We therefore recommend that the Commission defer acting on the pattern-of-activity and incest amendments and on the increase in the base offense levels in § 2A3.2 until after the Commission has heard from Native American tribes, organizations, and individuals to determine the best approach to dealing with Native Americans who commit sex offenses.

Part A - Pattern of Activity

Part A of proposed amendment 5 seeks to implement the Congressional directive for a sentencing increase if the defendant has engaged in a "pattern of activity."[17] There are four options that could be promulgated alone or in combination to implement the directive. In addition, proposed amendment 5 would revise the guideline covering terms of supervised release, § 5D1.2, to provide that the term of supervised release for a defendant convicted of a sex crime is the maximum term authorized by statute.

The first option would establish a new chapter 4 guideline, § 4B1.5 (repeat and dangerous sex offender), that would operate in a manner similar to the career offender guideline, § 4B1.1. The second option also would establish a new chapter 4 guideline, § 4B1.6 (sexual predator), that would provide a five-level enhancement (with a floor of level of 30 or 32, to be decided) for sex-offense defendants who engage in a pattern of activity involving prohibited sexual conduct. The third option would provide a new specific offense characteristic in §§ 2A3.1, 2A3.2, 2A3.3, and 2A3.4 similar to the current pattern-of-activity adjustment of § 2G2.2(b)(4). Finally, the fourth option would add to the commentary to §§ 2A3.1, 2A3.2, 2A3.3, and 2A3.4. language encouraging an upward departure for defendants who commit repeated acts of sexual abuse of the same minor over a period of time.

As noted above, we recommend that the Commission not promulgate any of the current proposals until after holding hearings with the Native American community. However, if the Commission decides to proceed without such a hearing, we recommend promulgating the fourth option – an encouraged upward departure for a defendant who commits repeated acts of sexual abuse of minors.

The most serious repeat child abuse sex offenders currently face a mandatory life sentence, regardless of the application of the guidelines. If the defendant has a prior conviction for aggravated sexual abuse of a child or a similar state offense, 18 U.S.C. § 2241(c) provides

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[17]Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 505, 112 Stat. 2974.

that "the defendant shall be sentenced to life in prison." A defendant can also be subject to a mandatory life sentence for a sex conviction under the three strikes provision of 18 U.S.C. § 3559(c) if the defendant has two or more serious violent felonies or serious drug offenses, without regard to whether the prior convictions are for a sex offense. Moreover, the career offender guideline (§ 4B1.1) applies to sex offenders.

The proposed guideline for repeat and dangerous sex offenders (§ 4B1.5) is unnecessary and has the potential to impose an unwarrantedly harsh sentence. An encouraged upward departure would allow a court to incapacitate those defendants who posed a high risk of recidivism or a danger to the community who was not already subject to a mandatory life sentence or a career offender enhancement.

If the Commission adopts § 4B1.5, it should only increase a defendant's criminal history category to not less than IV. The guidelines should distinguish between those defendants who have a criminal history category of IV or below and V and above.

Since § 4B1.5 will only apply to those defendants who are not already facing a mandatory life sentence, the Commission should adopt a departure provision that allows a court to depart when the application of the guideline significantly overstates the future risk to the community or the seriousness of the defendant's criminal history. There may be situations, especially in cases involving statutory rape or a prior state conviction, in which a defendant might not have received appropriate education and counseling. A court should also be allowed to depart upward, if warranted, in cases involving a defendant who is clearly a pedophile and a high risk to the community.

We have grave concerns about enhancements or departures that are based on psycho-sexual evaluations. Often, psycho-sexual evaluations base a determination of the risk of recidivism upon inappropriate sentencing characteristics, such as age, education, and employment history. Moreover, there is no national uniformity concerning the availability of testing or testing protocols. Thus, generic psycho-sexual evaluations could lead to unwarranted sentencing disparities. However, an individual's amenability to treatment in determining risk assessment for the purposes of sentencing should be considered.

It is also unclear from the proposed guideline, whether the limitation on the age of convictions under § 4A1.2(e) would apply to § 4B1.5. We recommend that § 4B1.5 have the same § 4A1.2(e) limitations as the career offender guideline (§ 4B1.1) as to the age of applicable convictions.

We also oppose the proposed sexual predator enhancement (§ 4B1.6). Section 4B1.6 would allow a five level enhancement, with a floor of level 30 or 32 (to be decided), if the court finds either that the defendant committed the crime as a part of a pattern of activity involving prohibited sexual conduct or that the defendant is a sexual predator. A sexual predator conclusion would be based upon the court's determination, under the totality of circumstances,

that a defendant is likely to continue to engage in prohibited sexual conduct with minors in the future. A pattern of activity is any combination of two or more prior separate instances of prohibited sexual conduct with a minor, other than the victim of the instant offense, whether or not the conduct resulted in a conviction.

The sexual predator enhancement proposed in § 4B1.6 would vitiate the requirement of proof beyond a reasonable doubt. Prosecutors could obtain a greater sentence by simply charging one count and using the other allegations to seek a sexual predator enhancement. For example, if a defendant was accused of three separate acts of sexual abuse with two victims, a prosecutor could obtain a greater sentence by simply charging one act and using the other allegations as a pattern of activity than by charging all three acts, which would only result in a three level increase under § 3D1.4. The guidelines should not remove the burden on prosecutors to prove criminal conduct beyond a reasonable doubt.

The standard for determining a sexual predator would be totally subjective and result in inconsistent application of the guidelines. What legal standard would a court use for a finding of "likely" under the totality of the circumstances? Clearly, a five level enhancement should be proved by clear and convincing evidence, not by a standard less than a preponderance of evidence. Additionally, "likely" is not defined. Does it require a 50% probability, a 10% probability, or less? In practice, the standard would shift the burden from the prosecutor to the defendant to prove that he was not a sexual predator.

If the Commission adopts § 4B1.6, § 4B1.6(b), it should require a finding that the offense was committed as part of a pattern of activity and the defendant is a sexual predator. A requirement that both be found would limit some of the concerns of the sexual predator determination. Moreover, § 4B1.6 should only be imposed on those sex offenders who have committed multiple acts of abuse with multiple victims.

Section 4B1.6 would result in disproportionate sentences among sexual offenders. For example, a five level increase in § 2A3.1 would result in a level of 32 before the addition of any other specific offense characteristics. The impact in § 2A3.1 is clearly disproportionate in comparison to its impact in other guidelines such as § 2A3.2 and § 2A3.4.

If the Commission rejects our recommendation for an encouraged upward departure and decides to impose a pattern-of-activity enhancement, we recommend option three–a chapter 2 specific offense characteristic in the sexual abuse guidelines. This would be consistent with the pattern of activity adjustment currently in § 2G2.2. Moreover, it would eliminate the need for an arbitrary floor of 30 or 32 by allowing a tailored increase in each guideline. Furthermore, an increase of two levels would bring to the guidelines the proportionality sought by Congress.

Any pattern of activity enhancement should be limited to defendants whose instant offense of conviction is a sex crime involving the sexual abuse of a child, not including trafficking or receipt of child pornography or possession of child pornography, and who have

prior convictions for the sexual abuse of a minor. If the Commission does not limit pattern of activity to prior sex abuse convictions, pattern of activity should require clear and convincing evidence of prior conduct involving the combination of two or more separate instances of prohibited conduct involving a minor different from the victim of the instant offense of conviction. The Commission should require clear and convincing evidence of the prior sexual conduct to deter prosecutors from manipulating the guidelines to circumvent the requirement of proof beyond a reasonable doubt.

Defendants are entitled to have charges against them proved before a jury and beyond a reasonable doubt. Therefore, if the Commission allows the pattern of activity to be proved by something less than conviction based on reasonable doubt, the standard of proof should be clear and convincing evidence. This would also be consistent with the case law requiring the significant sentence enhancements to be proved by greater than a preponderance of evidence.

We oppose the proposed amendment to § 5D1.2 that would require the maximum term of supervised release for sex offenses. Since Congress did not take away the court's discretion to determine the length of supervised release in sex offenses, the Commission should not. A sentencing judge can be trusted to review the facts and circumstances of the case before the court and make the appropriate determination. For example, a 19-year-old Native American who is convicted of a nonforcible sex offense involving his 14-year-old girlfriend may not need the maximum term of supervised release. There can be little fear that sentencing courts would not be inclined to impose the maximum term of supervised release in sex abuse cases, unless there was significant factors militating against it. While the Commission may encourage a maximum term of supervised release, the imposition of it should be left in the sound discretion of the sentencing court.

Part B - Grouping

Part B of the proposed amendments 5 would resolve a circuit conflict regarding who is the "victim" in a child pornography case for the purpose of grouping the multiple counts. Option one would group counts covered by § 2G2.2 (trafficking in material involving the sexual exploitation of a minor) and § 2G2.4 (possession of materials depicting a minor engaged in sexually explicit conduct) under § 3D1.2(d). Option two would add commentary to those guidelines that would expressly preclude the grouping of counts covered by those guidelines.

We recommend that the Commission adopt option one. Offenses sentenced under § 2G2.1 (manufacturing of child pornography) would still be specifically excluded from grouping under § 3D1.2.

If offenses concerning the trafficking, receipt, and possession of child pornography were grouped under § 3D1.2, the offenses would be subject to the broader relevant-conduct rules of

§ 1B1.3(a)(2). Section 1B1.3(a)(2) allows the sentencing court to consider any act the defendant committed, or any reasonably foreseeable act of another in a jointly undertaken criminal activity, that was part of the "same course of conduct or common scheme or plan as the offense of conviction" for purposes of determining the defendant's relevant conduct for sentencing. Specifically, this would allow courts to consider images of child pornography that are outside those images listed in the count or counts of conviction. If the Commission promulgates option two, so that these offenses would not group together, additional images outside of the offenses of conviction could not be considered for guideline application purposes.

If trafficking, receipt and possession of child pornography convictions were grouped under § 3D1.2(d), the court would not be required to determine who is the victim. The determination of a victim, especially if the pictures had been computer generated or morphed, can be complex and time consuming for the court. Grouping will alleviate the need for this determination, but it will still permit the sentencing court to consider a wide range of conduct in determining the appropriate sentence.

We believe option one will encourage greater uniformity in sentencing, discourage sentencing manipulation by plea agreements, and promote judicial economy.

Part C - Enhancement for Transportation Offenses and Other Amendments

Part C responds to a directive in the Protection of Children from Sexual Predators Act of 1998 dealing with offenses under 18 U.S.C. ch. 117 (transportation for illegal sexual activity and related crimes) that involve transporting minors for prostitution or prohibited sexual conduct.[18] Relying on that directive and the Commission's general authority in 28 U.S.C. § 994, part C would make a number of changes in § 2A3.2 (criminal sexual abuse of a minor under the age of sixteen years) and § 2A3.4 (abusive sexual contact). Part C would amend § 2A3.2 to (1) add a new base level of 24 for violations of 18 U.S.C. ch. 117 that involve the commission or attempted commission of a sexual act and increase the existing base offense levels by three levels; and (2) add a two-level enhancement if the offense involved incest (which would apply in addition to the care, custody, or control enhancement). Part C would amend § 2A3.4 by adding a two-level enhancement if the offense involved incest and a three-level enhancement if the offense involved a violation of 18 U.S.C. ch. 117. Part C would also add the two-level incest enhancement to § 2A3.1 (criminal sexual abuse). Finally, part C would amend the statutory index of Appendix A to refer violations of 18 U.S.C. ch. 117 to § 2A3.2.

Base-offense level increase. As noted above, the Commission last year promulgated major changes to § 2A3.2, resulting in significant increases for most offenders. The Commission

[18] *Id.*

raised the base offense level for violations of 18 U.S.C. ch. 117 to level 18 and added a two-level enhancement for the use of computer or other internet access device. Moreover, to enhance the sentences for the more culpable and manipulative defendants, the Commission added a two-level enhancement for using undue influence or knowingly misrepresenting identity. There is a rebuttable presumption of undue influence if there is more than 10 years difference between the defendant and the victim.

These increases last cycle, together with the proposed increases for pattern of activity, are sufficient to comply with Congressional directives in the Protection of Children from Sexual Predators Act of 1998. Before adding a pattern-of-activity enhancement, the Commission's previous amendment of § 2A3.2 raised the offense level from 15 to 22 for most 18 U.S.C. ch. 117 violations. This, in effect, doubled the sentence for most of those cases.

An increase in the base offense level for non-18 U.S.C. ch. 117 violations is unwarranted. In fiscal year 1999, approximately 78% of the non-18 U.S.C. ch. 117 defendants (28 out of 36 defendants) were Native Americans. These are individuals who have been convicted of a nonforcible offense made criminal under 18 U.S.C. § 2243 because of difference in ages. If there has been no undue influence, an offense level 15, or 13 with acceptance of responsibility, is an appropriate sentence, especially given the dynamics of reservation life. Unlike individuals who troll the internet looking for victims, a defendant living in the isolation of the reservation is often limited in choice of partner. Moreover, on those pockets on the reservation where there is a cluster of housing, the individuals interact often and get to know each other well. Thus, the harm to society is less in a typical reservation statutory rape case than in a case involving an individual who trafficks in child pornography.

If the Commission concludes that there must be an increase for those individuals who commit an offense under 18 U.S.C. ch. 117 involving a sexual act, we would propose the following: A base offense level of 21 for an offense under 18 U.S.C. ch. 117 involving a sexual act; a base offense level of 18 if the violation of 18 U.S.C. ch. 117 did not involve the commission of a sexual act; and a base offense level of 15 in all other cases. The majority of offenders under 18 U.S.C. ch. 117 would be subject to other enhancements in § 2A3.2. Thus, a three level across-the-board increase is neither necessary to comply with the directives of the protection of Children from Sexual Predators Act of 1998 nor warranted in terms of proportionality. Additionally, if the Commission promulgates a pattern-of-activity enhancement or encouraged-departure commentary, the most dangerous offenders would be subject to that provision.

Incest enhancement. We oppose an incest enhancement in §§ 2A3.1, 2A3.2 and 2A3.4, because it would be the equivalent of an enhancement for being a Native American. In 1999, it appears that 85% (51 out of 60) defendants convicted of sex offenses involving incest were

Native American.[19] The proposed amendment would affect overwhelmingly Native American defendants in contrast to any other group.

Reservation incest cases are often some of the most complex in the federal system. In addition to the problems of poverty, isolation, and substance abuse on the reservation, there exists the problem of incest as learned behavior. In many cases, today's defendant was yesterday's victim. Incest cases also involve defendants with the greatest amenability to treatment and the lowest chance for recidivism if afforded a competent treatment regime. We oppose any enhancement that would have such a disparate impact upon the Native American community.

We believe the current proposals are too compartmentalized and are fundamentally flawed. Congress's major concern was to incapacitate pedophiles who seek out and prey on children. True pedophiles, individuals who prefer children as sexual partners, have a high risk of recidivism and need the greatest amount of treatment. However, not all individuals, even those who, unfortunately, abuse multiple children, are pedophiles or unamenable to treatment.

The Commission's proposed amendments might allow Native American incest cases to be doubly enhanced (for pattern of activity and incest) based upon the same facts. If so, pedophiles who rarely prey on their own family would receive a lesser sentence, despite their greater risk to society, than Native Americans, who are the most amenable to treatment.[20]

The Commission should hold hearings with the Native American community before resolving these complex issues. However, if the Commission is committed to promulgating a pattern-of-activity enhancement and an incest enhancement, we strongly urge that acts of incest be prohibited from being used to impose a pattern-of-activity enhancement.

Both pattern of activity and incest are used to enhance the sentence of individuals who engage in more than a one-time act of abuse. However, the dynamics of incest verses pedophilia are different. The guidelines should set up a tiered approach recognizing each individual harm, and sentencing each appropriately.

The greatest danger to the community are those individuals who engage in a non-incestual pattern of activity of abuse. Pedophiles are the individuals who would be most appropriately punished by the proposed § 4B1.5 and § 4B1.6. Individuals who commit repeated

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[19]*See* Sexual Predators Act Policy Team, U.S. Sentencing Com'n, *Sentencing Federal Sexual Offenders: Protection of Children From Sexual Predators Act of 1998,* at 7, table 4 (Jan. 24, 2000).

[20]Dewey Ertz, *The American Indian Sex Offender, in* 2 The Sex Offender: New Insights, Treatment Innovations, and Legal Developments (Barbara K Schwartz & Henry R. Cellini eds. 1997).

acts of incest with multiple family members should receive a greater sentence than an individual who only abuses one family member. However, since in the federal system the incest enhancement will be almost exclusively used on Native Americans, the Commission should keep in mind the particular needs and realities of the Indian Reservation. While Native Americans convicted of sexual acts involving incest may deserve a sentencing increase, they should not be on a higher, or even the same, tier as the predatory pedophile.

By removing acts of incest from being used to impose § 4B1.5 and § 4B1.6, the Commission could avoid the appearance of racism and discrimination against the Native American community. Some Native American defendants might be subject to those enhancements, but only when their actions were similar to the non-Native American defendants who were subject to those enhancements. For example, those Native American defendants who traveled outside of their family compounds on the reservation to abuse children in the general community would be subject to the same enhancements as those non-Native American defendants who travel across Interstate lines to abuse children. Those Native Americans who are isolated on the reservation and act inappropriately toward family members, often while intoxicated, should not and would not be subject to the same enhancements.

Conclusion

We recommend that the Commission hold hearings at which Native American tribes, organizations, and individuals can testify, before promulgating enhancements concerning pattern of activity, incest and statutory rape, § 2A3.2. The problems on the Indian Reservations are unique and complex compared to other types of federal crime.

If the Commission proceeds with promulgating a pattern-of-activity enhancement, we recommend that the Commission adopt Option 4, an encouraged upward departure. The judges in South Dakota, New Mexico and Arizona, and other areas with a significant Native American population, have experience and expertise concerning those individuals who need to be incapacitated to protect society and those individuals who do not. The Commission should not discount the experiences of those jurisdictions who handled the majority of federal sex crimes. Likewise, we oppose the proposed enhancement for incest.

Finally, if the Commission is committed to promulgating an enhancement for pattern of activity and incest, we strongly urge that acts of incest be excluded from the definition of the acts necessary for a pattern of activity. This would reduce the possibility that Native Americans, who do not need to be incapacitated to protect the community, would receive an unwarrantedly long sentence. Moreover, it would tier sex offenders in a more appropriate manner, giving the greater sentences to those individuals who have the highest risk of recidivism.

PROPOSED AMENDMENT 6
Stalking and Domestic Violence

Proposed amendment 6 would amend § 2A6.2 (stalking or domestic violence) in response to the Victims of Trafficking and Violence Protection Act of 2000.[21] The Act amended 18 U.S.C. §§ 2261, 2261A, and 2262 by expanding their reach to include international travel to commit stalking and domestic violence or to violate a protective order. Section 2261A was also amended to include intimate partners within the category of protected persons and to provide a new offense at § 2262A(2) prohibiting use of the mail or any facility of interstate or foreign commerce to commit stalking. Congress directed the Commission to amend the guidelines to reflect these statutory changes and specifically to consider (1) whether the guidelines relating to stalking offenses should be modified in light of this amendment, and (2) whether any changes made by this amendment should also be made with respect to offenses under 18 U.S.C. ch. 110A (domestic violence and stalking).

The amendment would increase the base offense level in § 2A6.2 from level 14 to level 16 or 18 (to be decided). The amendment would treat stalking-by-mail under § 2A6.2, the same as other stalking offenses. It would also add a cross reference to § 1B1.5 (interpretation of references to other offense guidelines) and amend note 3 to § 1B1.5 to clarify that the cross reference is to be determined consistent with § 1B1.3's relevant conduct provision. The purpose is to ensure that a guideline's reference to use another guideline includes conduct that is a state or local offense but that would be a federal offense had the conduct occurred within the special territorial and maritime jurisdiction of the United States.

We oppose any increase in the base offense level of § 2A6.2. The apparent basis for the increase is that a stalking offense involving violation of a protective order and bodily injury should receive punishment equal to or greater than an offense covered by § 2A6.1 (threatening or harassing communications) that involves violation of a protective order and conduct evincing an intention to carry out the threat. The latter offense presently receives an offense level of 20 under § 2A6.1. The synopsis of proposed amendment indicates that the increase is motivated by a concern for proportionality. "Setting the base offense level at [16] or [18] for stalking and domestic violence crimes ensures that these offenses are sentenced at or above the offense levels for offenses involving threatening and harassing communications [covered by §2A6.1]." An increase to either level 16 or 18, however, would fail to maintain the necessary proportionality with the more serious, violent offense of aggravated assault, covered by § 2A2.2. That guideline carries a base offense level of 15. Thus, a defendant who commits an aggravated assault that results in bodily injury, in violation of a protective order, receives an offense level of 19 (15 + 2 + 2) under § 2A2.2, whereas a defendant who commits a stalking offense resulting in bodily injury in violation of a protective order would be subject to an offense level under § 2A6.2 of

[21]Pub. L .No. 106-386, § 1107, 114 Stat. 1464.

either 20, if a base offense level of 16 is set (16 + 2 + 2). We do not believe that there is a sound reason for an offense level for a stalking offense that is higher than the offense level for a more serious aggravated assault offense.[22] Moreover, if a base offense level of 18 is set, a stalking offense involving violation of a protective order that *does not* resulting in bodily injury would be subject to a greater punishment (18 + 2 = 20) than an aggravated assault involving violation of a protective order that *does* result in bodily injury (15 + 2 + 2 = 19).

Finally, in the interest of proportionality, § 2A6.2 ought to include the same four-level reduction provided by § 2A6.1(b)(4) to address those cases in which the offense involves a single instance evincing little or no deliberation.

PROPOSED AMENDMENT 7
Repromulgation of Amendment 608

Proposed amendment 7 would repromulgate amendment 608 that implemented the "substantial risk" directive in the Methamphetamine and Club Drug Anti-Proliferation Act of 2000.[23] Amendment 608 that took effect December 16, 2000.[24]

The Act requires the Commission to increase penalties for the manufacture of amphetamine or methamphetamine (and attempts or conspiracies to manufacture) "(A) if the offense created a substantial risk of harm to human life or the environment" or "(B) if the offense created a substantial risk of harm to the life of a minor or incompetent." Congress directed that the offense level for offenses described by (A) be increased by not less than three levels (with a floor of level 27) and that the offense level for offenses described by (B) be increased by not less than six levels (with a floor of level 30). Amendment 608 added enhancements to § 2D1.1 and § 2D1.10 to carry out this directive.[25]

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[22]Application note 2 to § 2A6.2 reflects that the cross reference of subsection (c)(1) should apply if the resulting offense level is greater in a case involving more serious conduct. "For example, § 2A2.2 (Aggravated Assault) most likely will apply pursuant to subsection (c) if the offense involved assaultive conduct in which injury more serious than bodily injury occurred or if a dangers weapon was used rather than merely possessed." However, § 2A2.2 includes the same two-level increase for "bodily injury" set forth in § 2A6.2(b)(1).

[23]Pub. L. No. 106-310, Section 201.

[24]*See* U.S.S.G. App. C, amend. 608.

[25]Amendment 608 added subsection (b)(6) to § 2D1.1. Subsection (b)(6) calls for a 3-level enhancement (with a floor of level 27) if the offense (A) involved the manufacture of amphetamine or methamphetamine and (B) created a substantial risk of either harm to human life

Neither the directive nor any other provision of the Act defines "substantial risk of harm." Amendment 608 added commentary to §§ 2D1.1 and 2D1.10 a sentencing court can consider in determining if the offense involved a substantial risk of harm. These factors include the quantity of any chemicals or hazardous or toxic substances found at the laboratory, or the manner in which the chemicals or substances were stored; the manner in which hazardous or toxic substances were disposed, or the likelihood of release into the environment of hazardous or toxic substances; the duration of the offense, or the extent of the manufacturing operation, and the location of the illicit laboratory (e.g., residential or remote area) and the number of human lives placed at substantial risk of harm.

Amendment 7 sets forth three options for promulgating a regular amendment to implement the directive. Option one would repromulgate the emergency amendment without change.

Option two would expand the amendment to apply to the manufacture of any controlled substance, rather than just amphetamine or methamphetamine. Option two would increase the alternative offense levels in subsection § 2D1.1(a)(1) from "3 plus the offense level from the Drug Quantity Table in § 2D1.1" to "6 plus the offense level from the Drug Quantity Table in § 2D1.1." Option two sets forth two alternatives for amending § 2D1.10 to address the requirement of a minimum offense level of 27. Option 2(a) would increase the base offense level § 2D1.10(a)(2) from level 20 to level 27. Option 2(b) would add an additional alternative base offense level of 27 if the offense involved the manufacture of amphetamine or methamphetamine, but maintain alternative offense levels of 6 plus the offense level from the drug quantity table of § 2D1.1 and 20. The synopsis of proposed amendment indicates that although this option has less of an impact on lower level drug offenders than option 2(a), "it is not consistent with the approach otherwise taken in Option 2 of expanding the emergency amendment to cover all controlled substances." Finally, option two would apply to all controlled substance offenses the enhancement for creating a substantial risk of harm to the life of a minor or an incompetent.

Option three assumes that the manufacturing process for amphetamine or methamphetamine necessarily creates a substantial risk of harm. Option three, therefore, would amend §§ 2D1.1 and 2D1.10 to call for the three- and six-level enhancements and the floors

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or the environment. For offenses that created a substantial risk of harm to the life of a minor or an incompetent, subsection (b)(6) calls for a 6-level increase (with a floor of level of 30). Subsection (b)(1) that amendment 608 added to § 2D1.10 is slightly different. Subsection (b)(1) provides a 3-level increase (with a floor of level 27) if the offense involved the manufacture of amphetamine or methamphetamine. There is no requirement that the court find a substantial risk of harm to human life or the environment. Such a finding is unnecessary because § 2D1.10 applies only to convictions under 21 U.S.C. § 858, for which a substantial risk of harm to human life is an element of the offense.

required by Congress if the offense involved manufacture of amphetamine or methamphetamine. The enhancements and floors would apply to manufacture of other controlled substances if the sentencing court finds a substantial risk of harm. Option three puts the substantial- risk enhancement in § 2D1.1(b)(5) and makes it an alternative to the environmental-harm enhancement.

We support option three. We oppose both options one and two because they call for double counting. Congress determined that a substantial risk of harm to human life required at least a three-level enhancement. Under options one and two, the enhancement under § 2D1.1 is going to be five levels in virtually every instance – two levels under subsection (b)(5) for discharge or handling of a hazardous or toxic substance and three levels under subsection (b)(6) for a substantial risk to human life. Option three appropriately recognizes that there should be a gradation in the enhancement based upon harm by making the substantial-risk enhancement an alternative to the discharge and handling enhancement.

PROPOSED AMENDMENT 8
Mandatory Restitution for Amphetamine and Methamphetamine Offenses

The amendment responds to an amendment to 21 U.S.C. § 853(q) that provides for mandatory restitution for offenses involving manufacture of methamphetamine.[26] Proposed amendment 8 would amend § 5E1.1(a)(1) to include a reference to 21 U.S.C. § 853(q). We do not oppose the amendment.

PROPOSED AMENDMENT 9
Safety Valve

Proposed amendment 9 would amend the safety-valve provisions of § 5C1.2 and § 2D1.1(b)(6). The Violent Crime Control and Law Enforcement Act of 1994 authorized the Commission to amend the guidelines to permit judges to impose sentence without regard to a mandatory-minium term of imprisonment if the defendant met five specified criteria.[27] The Commission's initial response to that authorization was amendment 509, which promulgated § 5C1.2 as a temporary, emergency guideline effective September 23, 1994. The Commission

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[26]Methamphetamine Anti-Proliferation Act of 2000, Pub. L. No. 106–310, § 3613, 114 Stat. 1229.

[27]Pub. L. No. 103-322, § 80001, 108 Stat. 1985.

repromulgated § 5C1.2 as a regular amendment in amendment 515, effective November 1, 1995. Amendment 515 also added what is now designated subsection (b)(6) of § 2D1.1.[28]

Section 5C1.2 provides, in language taken from statute, that "the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence" if the defendant meets five criteria. The five criteria are taken from the legislation almost verbatim. As a result of amendment 509, a defendant subject to a five-year mandatory minimum who met the criteria of § 5C1.2 could have received a sentence of 30 months.[29] The legislation, however, stated that "[i]n the case of a defendant for whom that statutorily-required minimum sentence is 5 years," the guidelines "shall call for a guideline range in which the lowest term of imprisonment is at least 24 months."[30] Amendment 515 added § 2D1.1(b)(6) to authorize a two-level reduction for a defendant who met the five criteria of § 5C1.2.[31] As a consequence, a defendant subject to a five-year mandatory minimum who meets the criteria of § 5C1.2 can receive a sentence of 24 months.[32]

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[28]Amendment 515 designated the provision as subsection (b)(4). Amendment 555 redesignated it subsection (b)(6), effective November 1, 1997.

[29]Offense level of 26 for quantity, less 4 levels for minimal role, less 3 levels for acceptance of responsibility, resulting in a final offense level of 19. The applicable range for offense level 19, criminal history category I is 30-37 months.

[30]Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001(b)(1)(B), 108 Stat. 1986.

[31]The reduction under § 2D1.1(b)(6) is available to any defendant who meets the five criteria of § 5C1.2, even if that defendant is not subject to a mandatory minimum. The Commission has not set forth the rationale, but the rationale would seem to be to avoid unfair disparity. As the Second Circuit pointed out in a case involving a plea agreement,

> [h]ad Osei failed to obtain a plea bargain promise from the government that he would not be subject to a mandatory minimum sentence, he would have received a two-level reduction under § 2D1.1(b)[(6)]. To subject Osei to a longer sentence as a result of his attorney's ability to secure such a promise in the plea agreement makes little sense, and does not comport with the fundamental principle underlying the Guidelines that like cases be treated alike.

United States v. Osei, 107 F.3d 101, 104 (2d Cir. 1997) (rejecting argument that subsection (b)(6) applies only to a defendant subject to a mandatory minimum).

[32]Offense level of 26 for quantity, less 2 levels under subsection (b)(6), less 4 levels for minimal role, less 3 levels for acceptance of responsibility, resulting in a final offense level of

There are, however, some cases in which the guideline sentence may be lower than 24 months. This can occur if the case involves a drug for which the guideline formula for determining quantity differs from the statutory formula for determining quantity. The Commission pointed this out when it first promulgated § 5C1.2 as a temporary, emergency guideline, and stated that

> [t]he Commission believes that it has the authority to authorize such minor variations from the literal language of the Congressional instruction to ensure consistency with the guidelines as a whole. In the Conference Report accompanying this legislation, the Congress expressly noted that the Commission should interpret Congressional instructions to the Commission in a manner that "shall assure reasonable consistency with other guidelines" and "take into account any mitigating circumstances which might justify exceptions." H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess 388 (title X) (1994); see also *id.*, sec. 28003 at 312 (directing Commission to carry out a specific instruction regarding sentencing enhancements for hate crimes in a manner to ensure reasonable consistency with other guidelines). The Commission similarly believes its interpretation of section 80001(b)(1)(B), within the overall context of a clearly ameliorative sentencing provision for qualified defendants is consistent with past Congressional directives to the Commission and Congress's rationale for employing such directives as a more flexible means of effecting sentencing policy in particular situations.[33]

Proposed amendment 9 would amend both § 5C1.2 and § 2D1.1(b)(6). First, the amendment would add a new subsection to § 5C1.2, stating that a defendant who meets the five criteria and who is subject to a mandatory minimum of at least five years, cannot have an offense level from chapters two and three of the *Guidelines Manual* that is less than level 17. Next, the amendment would amend § 2D1.1(b)(6) to eliminate the requirement that the offense level be at least level 26, thus making the two-level reduction available to any defendant who meets the five criteria of § 5C1.2.

We support the second part of the amendment, which will help ameliorate the harshness of the drug penalties for defendants whom Congress has identified at the least culpable (those who meet the five criteria in § 5C1.2). We oppose part one of the amendment as unnecessary and unsupported by logic or policy. Indeed, part one will result in unjustifiable disparity of treatment.

There can be no question about the Commission's authority to have in place a safety-valve provision that can result in a guideline range with a bottom of less than 24 months. The Commission's rationale quoted above, in our judgment, is correct. More importantly, if Congress thought that the Commission had not complied with the legislation, Congress would

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17. The applicable range for offense level 17, criminal history category I is 24-30 months.

[33] 59 Fed. Reg. 52,210, 52,211-12 (1994).

have rejected what the Commission had promulgated. If part one is adopted, the Commission will be treating defendants differently solely on the basis of whether the defendant is subject to a mandatory minimum. Assume, for example, that a level-24 LSD defendant meets the five criteria of § 5C1.2 and is entitled to reductions for minimal role and acceptance of responsibility. If that defendant is not subject to a mandatory minimum (because, for example, the government chooses to charge an offense under 21 U.S.C. § 841(a)(1) and (b)(1)(C)), the defendant's final offense level will be 15. If that defendant is subject to a five-year mandatory minimum (because the government chooses to charge under 21 U.S.C. § 841(a)(1) and (b)(1)(B)), the defendant's final offense level will be 17. In effect, then, the second defendant is being penalized more severely because of the prosecutor's charging decision.

PROPOSED AMENDMENT 10
Anhydrous Ammonia

Proposed Amendment 10 addresses a new offense, stealing anhydrous ammonia or transporting it across a state line, knowing, intending, or having reasonable cause to believe that it will be used to manufacture a controlled substance (codified at 21 U.S.C. § 864), that was established by the Methamphetamine Anti-Proliferation Act of 2000.[34] The maximum prison term for the offense is 4 years (8 years if the defendant has a prior conviction for certain offenses), or 10 years (20 years if the defendant has a prior conviction for certain offenses) if the offense involved the manufacture of methamphetamine.

Proposed amendment 10 would assign § 2D1.12 (unlawful possession, manufacture, distribution, or importation of prohibited flask or equipment; attempt or conspiracy) on the basis that the new crime is similar to other offenses referenced to § 2D1.12. We do not oppose referring the new offense to § 2D1.12.

Proposed amendment 10 seeks comment about whether the two-level enhancement of § 2D1.12(b)(1) – which applies if the defendant intended to manufacture methamphetamine or had reason to believe that the equipment would be so used – is sufficient to account for the seriousness of attempting or intending to manufacture methamphetamine using anhydrous ammonia. The issue for comment also asks whether the seriousness of using anhydrous ammonia should be accounted for by an enhancement in §2D1.12(b)(1) of up to 10 levels or by an alternative method, such as a cross reference to § 2D1.11 using a conversion to methamphetamine.

We believe that the amendment as proposed, which will result in a two-level enhancement under § 2D1.12(b)(1), is appropriate. Under the present guideline, an offense involving an attempt to manufacture methamphetamine using anhydrous ammonia results in a 2-level enhancement under subsection (b)(2) because of a release into the environment of a

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[34]Pub. L. No. 106-310, § 3653, 114 Stat. 1101. Anhydrous ammonia is used in one method of methamphetamine production. It is typically stored as a liquid under pressure but becomes a toxic gas when released to the environment. Anhydrous ammonia can be harmful to individuals who come into contact with it or inhale the gas at high concentrations. The gas can, of course, be released unintentionally. The risk from release of anhydrous ammonia into the air can be mitigated by other factors, such as a rain which knocks down the vapor, preventing it from rising into the air and dispersing. The EPA, as required by the Risk Management Program under the Clean Air Act, has determined that the concentration below which it is believed nearly all individuals could be exposed for up to one hour without irreversible or serious health effects is 200 parts per million (ppm). The National Institute of Occupational Safety and Health has established 300 ppm as the Immediately Dangerous to Life and Health Level.

hazardous or toxic substance. The Commission has thus determined that the hazardous or toxic nature of a substance calls for a two-level increase. The effect of amending subsection (b)(1) to cover anhydrous ammonia is to double the enhancement already applicable to an offense involving anhydrous ammonia. and that there is not need for increasing the enhancement if anhydrous ammonia is involved. We oppose cross-referencing from § 2D1.12 to § 2D1.1 using a conversion to methamphetamine from anhydrous ammonia. We do not believe that there is an established conversion ratio based on any scientific or other reliable data that will specify the quantity of methamphetamine that could reasonably be expected to have been made from a given quantity of anhydrous ammonia. Absent such data, expected yield would have to be litigated case-by-case, which undoubtedly would protract sentencing proceedings, if for no other reason than the necessity to present expert testimony.

PROPOSED AMENDMENT 11
GHB

Proposed amendment 11 responds to the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000.[35] That Act provides emergency scheduling of GHB as a Schedule I controlled substance under the Controlled Substances Act when used illicitly.[36] The Act also (1) amended 21 U.S.C. § 841(b)(1)(C) and 21 U.S.C. § 960(b)(3) to provide a maximum prison term of 20 years for an offense that involves GHB and (2) added GBL as a List I chemical in section 401(b)(1)(C) of the Controlled Substances Act, 21 U.S.C. § 841(b)(1)(C).[37]

The guidelines currently treat GHB and other Schedule I and II depressants with a statutory maximum prison term of 20 years identically to Schedule III substances that have a five-year statutory maximum. Section 2D1.1 provides a maximum offense level 20 for these substances, resulting in a guideline range of 33 to 44 months for defendants in criminal history category I. The proposed amendment eliminates the maximum base offense level of 20 in § 2D1.1 for Schedule I and II depressants, including GHB, because "the lack of penalty distinctions between offenses with such divergent statutory maximum raises proportionality concerns." The same change is proposed for o flunitrazepam, which is tied to Schedule I and II depressants for sentencing. We recognize there is no basis for treating GHB any differently in § 2D1.1 from other Schedule I and II depressants. We agree with the Commission that, given the statutory maximums, proportionality concerns dictate that the less serious Schedule III

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[35]Pub. L. No. 106–172, 114 Stat.7.

[36]GHB is gamma hydroxybutyric acid.

[37]GBL is gamma butyrolactone.

substances should not be sentenced comparably to those in Schedules I and II.

Amendment 11 also would modify the chemical quantity table of § 2D1.11 to include as a list I chemical the substance GBL, which is a precursor in the production of GHB. Offense levels for GBL were established in the same fashion as other list I chemicals. The offense level for a specific quantity of GHB that can be produced from a given quantity of GBL, assuming a 50 percent yield, was determined using the drug quantity table of § 2D1.1. From this offense level, six levels were subtracted and the result identifies the corresponding offense level in the chemical quantity table of § 2D1.11. We do not oppose this part of the amendment.

PROPOSED AMENDMENT 12
Economic Crime Package

Proposed amendment 12 makes extensive changes to a number of guidelines. There are six parts to the amendment. Part A of proposed amendment 12 would consolidate § 2B1.1 (larceny, embezzlement, and other forms of theft; receiving, transporting, transferring, transmitting, or possessing stolen property), § 2B1.3 (property damage or destruction), and § 2F1.1 (fraud and deceit; forgery; offenses involving altered or counterfeit instruments other than counterfeit bearer obligations of the United States). Part B would add a loss table to the consolidated guideline. Part C would add to the consolidated guideline commentary defining the term "loss." Part D would amend guideline provisions that utilize the loss table of § 2B1.1 or § 2F1.1. Part E would make technical and conforming changes necessitated by the other parts of the amendment. Part F would address a circuit split about how tax loss is to be calculated in a case in which a defendant underreports on individual and corporate tax returns.

We are concerned that the economic crime package not be used as a vehicle for an across-the-board increase in punishment for the offenses covered by those three guidelines. The sentences for those offenses fall overwhelmingly below or at the bottom of the applicable guideline range. Commission data for fiscal year 1999 indicates that 9.7% of fraud defendants received a downward departures for other than substantial assistance.[38] Of those fraud defendants who did not receive a departure, 61.9% of them received a sentence at the bottom of the guideline range.[39] The data is similar for larceny in fiscal year 1999 – 7.0% of the defendants received a downward departure for other than substantial assistance, and 68.8% of the defendants

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[38]U.S. Sentencing Com'n, 1999 Sourcebook of Federal Sentencing Statistics table 27.

[39]*Id.* at table 29. An additional 10.8% received a sentence below the midpoint of the applicable guideline range. *Id.*

who did not receive a departure were sentenced at the bottom of the guideline range.[40] This pattern has held true over the years.[41] There is, in short, no need – or justification – for an increase in penalties for the offenses covered by §§ 2B1.1, 2B1.3, and 2F1.1.

Part A

We support the consolidation of §§ 2B1.1, 2B1.3, and 2F1.1. The Commission considers that the severity of the property offenses covered by those guidelines is related principally to the economic harm caused. It makes sense, therefore, that a single guideline be used to determine offense level.

The base offense level of six for the consolidated guideline seems appropriate if proposed specific offense characteristic (b)(7) is adopted. At very low loss amounts, the current theft and fraud guidelines produce different offense levels. A theft involving $150 in loss produces an offense level of five; a fraud involving the same amount produces an offense level of six. To treat theft and fraud the same, the Commission must choose between higher offense levels for small-loss thefts and lower offense levels for small-loss frauds. Given the sentencing patterns noted above for offenses covered by the theft and fraud guidelines, we believe that the lower offense levels produced by the theft guideline should be used. At the low end of the offense severity scale, one level can be the difference between Zone A and Zone B, Zone B and Zone C, or Zone C and Zone D.

We support the elimination of the more-than-minimal planning enhancement. The expansive definition assured application of the enhancement in the vast majority of cases.[42] We

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[40]*Id.* at table 27, 29.

[41]Indeed, the trend seems to be for sentences to fall below or at the bottom of the guideline range more frequently. Thus, Commission data for fiscal year 1995 indicates that 7.6% of fraud defendants received a downward departure other than for substantial assistance, and that 47.2% of the fraud defendants who did not receive a departure received a sentence within the first quarter of the guideline range. U.S. Sentencing Com'n, Annual Report 1995, at table 32. Similarly, the fiscal year 1995 data indicates that 4.4% of larceny defendants received a downward departure, and that 64.4% of the larceny defendants who did not receive a departure received a sentence in the first quarter of the guideline range. *Id.*

[42]The basic definition is straight-forward – "more planning than is typical for commission of the offense in a simple form." U.S.S.G. § 1B1.1, comment. (n.1(f)). The definition goes on, however, to state that "'more than minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. Consequently, this adjustment will apply especially frequently in property offenses."

also support the proposed amendment's treatment of offenses involving several victims. The fraud guideline, as an alternative to more-than-minimal planning, currently calls for a two-level enhancement if the offense involved more than one victim. The fraud guideline also has a two-level enhancement if the offense was committed through mass marketing. The theft guideline has provision similar to either. The proposed amendment would replace both of those provisions in the current fraud guideline with an enhancement based upon the number of victims. There would be a two-level enhancement if there were more than 4 but fewer than 50 victims or if the offense was committed through mass marketing. There would be a four-level increase if the offense involved 50 or more victims.

The current theft guideline has a two-level enhancement if the offense was receiving stolen property and the defendant was "in the business of receiving and selling stolen property." That enhancement derives from a provision in guideline that was merged with § 2B1.1.[43] The Commission set forth the rationale for the enhancement in commentary to the superceded provision. "Persons who receive stolen property for resale receive a sentence enhancement because the amount of property is likely to underrepresent the scope of their criminality and the extent to which they encourage or facilitate other crimes."[44] This explanation was not carried forward, however. Although the amendment merging the guidelines does not indicate why the explanation was not added to § 2B1.1, it seems unlikely that the Commission was repudiating that purpose.

The circuits developed two approaches to the in-the-business enhancement. One approach (the "fence test") requires that the government prove that the defendant buys and sells stolen property, thereby encouraging others to commit property crimes. The other approach calls upon the sentencing court to "weigh[] the totality of the circumstances, with particular emphasis on the regularity and sophistication of a defendant's operation, in order to determine whether a defendant is 'in the business' of receiving and selling stolen property."[45] The Commission has opted for the totality approach, which is consistent with the originally-described purpose of the enhancement. We do not oppose doing that, but we believe that proposed application note 4 should be modified to give a better indication of the activity that the enhancement is aimed at.

The enhancement, in our judgment, should not apply merely because the defendant sold what he or she stole. As the Seventh Circuit (a fence test circuit) has pointed out, "[o]ther than

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[43]*See* U.S.S.G. § 2B1.2(b)(2)(A). The Commission merged § 2B1.2 into § 2B1.1, effective November 1, 1993. U.S.S.G. App. C, amend. 481.

[44]U.S.S.G § 2B1.2, comment. (backg'd).

[45]United States v. St.Cyr, 977 F.2d 698, 703 (1st Cir. 1992).

using them himself, about the only thing a thief can do with his stolen goods is to sell them."[46] If selling what has been stolen is sufficient, then the enhancement will be applied in virtually every case. The First Circuit (a totality-of-circumstances circuit) has also recognized this problem and has held that "a thief would not qualify for the ITB [in-the-business] enhancement if the only goods he distributed were those which he had stolen."[47] We suggest that proposed application note 4 state that the enhancement does not apply if the defendant only distributed goods that the defendant had unlawfully acquired.

We support option one for proposed subsection (b)(14), which would apply if, as a result of the offense, the defendant derived more than $1,000,000 in gross receipts from one or more financial institution. This enhancement derives from a directive in the Crime Control Act of 1990.[48] The directive required that defendants convicted of specified offenses involving a financial institution "be assigned not less than offense level 24 . . . if the defendant derives more than $1,000,000 in gross receipts from the offense."[49] The current enhancement not only double counts the amount of loss, but also exceeds what Congress required.

The Commission has recognized that the fraudulent-statement offense of 18 U.S.C. § 1001, or a similar general offense, can be used to prosecute conduct that another, more specific offense covers. Current application note 14, in such a circumstance, calls for the use of the offense guideline applicable to the more specific offense, rather than § 2F1.1. The cross reference in proposed subsection (c)(3) would replace current application note 14. We support proposed subsection (c)(3) without the bracketed language. The issue involved is really determining the applicable offense guideline. Under § 1B1.2, that determination is made without reference to the offense level produced by the guideline. We therefore believe that the determination under proposed subsection (c)(3) should be made without reference to the offense level produced by the guideline.

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[46]United States v. Braslawsky, 913 F.2d 466, 468 (7th Cir. 1990) (interpreting in-the-business enhancement of § 3B1.2(b)(3)(A)).

[47]United States v. McMinn, 103 F.3d 216, 222 (1st Cir. 1997). The First Circuit adopted the totality test in United States v. St.Cyr, 977 F.2d 698. The *McMinn* court distinguished *St.Cyr* on the ground that although *St.Cyr* "did define the term 'in the business,' the court never reached the question squarely presented here; *viz.*, whether a defendant need have been in the business of '*receiving and* selling' stolen property (*i.e.* acting as a fence) in order for the ITB enhancement to apply." McMinn, 103 F.3d at 222.

[48]Pub. L No. 101-647, § 2507, 104 Stat. 4862.

[49]*Id.*

Issue for comment one. We support the current approach of the Commission, which is to treated an inchoate offense as less serious than a completed one. The Commission's language in the last paragraph of current application note 2 to § 2B1.1 is virtually identical to the language in current application note 10 to § 2F1.1. We recommend that the Commission carry forward this language. We understand the concern that the method for determining the offense level in an inchoate offense be clear and relatively easy to apply. The current method requires several steps but is not unclear.[50]

Assume, for example, an uncompleted fraud offense for which the only enhancements will be for more-than-minimal planning and an enhancement for loss. Assume further that the loss from the completed portion of the offense is $30,000 and the intended loss from the uncompleted portion was an additional $400,000.

> Step one – go to § 2X1.1. Because the fraud offense was uncompleted, current application note 10 to § 2F1.1 directs the court to determine the offense level by applying § 2X1.1 (attempt, solicitation, or conspiracy (not covered by a specific offense guideline)).[51]
>
> Step two – apply § 2X1.1(a). Under § 2X1.1(a), the court uses the base offense level applicable to the offense that was the object of the inchoate offense. The base offense level for a fraud offense under § 2F1.1 is six.
>
> Step three – apply § 2X1.1(b). Under § 2X1.1(b), the court must apply the enhancements from § 2F1.1. based upon "any intended offense conduct that can be established with reasonable certainty." That calculation adds 10 levels to the base offense level (2 levels for more-than-minimal planning plus 4 levels for a $400,000 loss), yielding a total offense level of 16. Under § 2X1.1(b), the offense level of 16 will be reduced by 3 levels unless the court determines that the defendant had completed all of the acts that the defendant believed necessary to complete the offense successfully (or

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[50]The Seventh Circuit has stated about § 2X1.1(b)(1) that "the application of this guideline is straight-forward . . . ." United States v. Lamb, 207 F.3d 1006, 1009 (7th Cir. 2000) (finding plain error and remanding for resentencing).. *Lamb* involved a burglary, but the commentary to the burglary guideline contains a cross reference to the discussion of loss in the commentary to § 2B1.1. *See* § 2B2.1, comment. (n.2).

[51]The initial determination probably should be whether the offense guideline applicable to the offense that is the objective of the inchoate offense (the "substantive offense") covers inchoate offenses. If that offense guideline does cover inchoate offenses, there is no need, and it would be an error, to go to § 2X1.1. This determination is handled in § 2X1.1 by means of a cross reference in subsection (c).

would have done so but for apprehension or a similar act beyond the defendant's control).

Step four – determine the offense level applicable to the completed portion of the offense. The court does not necessarily use the reduced offense level (13 in this example). Application note 4 to § 2X1.1 directs the court to use the greater of (1) the reduced offense level (13) and (2) the offense level for that part of the offense that was completed (or would have been completed but for apprehension or a similar act beyond the defendant's control). In this example the offense level for that part of the offense that was completed is 12 (base offense level of 6, plus 2 for more-than-minimal planning, plus 4 for a $30,000 loss).

Step five – use the greater of the offense level for the inchoate offense and the offense level for the completed portion of the offense. In this example, the offense level would be 13, the offense level for the inchoate offense.

Issue for comment two. The Commission seeks comment upon how to deal with "the destruction of, or damage to, unique or irreplaceable items of cultural heritage, archeological, or historical significance." We favor reliance upon departures. Cases involving such conduct are relatively infrequent. A fixed enhancement inevitably will be too little in some instances and too much in others. Drafting a scaled enhancement would be difficult. We believe it best to see how sentencing courts deals with such cases before attempting to draft a specific offense characteristic.

Part B

We do not believe that the Commission should revise the loss table. The increased punishment called for by the three published options is neither necessary, desirable, nor appropriate. The actual sentencing practices of federal judges demonstrate that the current level of punishment is more than adequate for economic crimes. Increasing the level of punishment simply means that federal judges will be departing downward from, or sentencing at the bottom of, higher guideline ranges. The likelihood is for an increase in the number of downward departures (for other than substantial assistance) and sentences at the bottom of the guideline range. None of the published options, in our opinion, should be adopted. The table proposed by the Practitioners Advisory Group also would increase punishment levels, but the increases begin at higher loss amounts and are more modest than the increases in the published options.

Adoption of a new loss table is not a prerequisite to consolidating the theft, property destruction, and fraud guidelines. The current theft or fraud table will mesh with the proposed consolidated guideline as well as any of the options. The current theft table was constructed to work with a base offense level of four, and the current fraud table with a base offense level of six. Because the proposed consolidated guideline has a base offense level of six, we suggest

using the loss table in the current fraud guideline.

Part C

We support a comprehensive definition of loss. Even if the Commission decides not to consolidate the theft, property destruction, and fraud guidelines, there should be a single, comprehensive definition of loss applicable to those guidelines.

General rule. Proposed application note 2(A) states that "loss is the greater of actual loss or intended loss." Proposed application note 2(A) also provides that "'intended loss' means the pecuniary harm that was intended to result from the conduct for which the defendant is accountable under § 1B1.3." We do not support the inclusion of intended loss, but if the Commission does decide to include it, there needs to be some modification of proposed application note 2(A).

The definition of "intended loss" needs clarification. The present commentary refers to "an intended loss that the defendant was attempting to inflict," making clear that the defendant's subjective intention is what the court should look to.[52] The use of the passive voice in proposed application note 2(A) – "the pecuniary harm that was intended to result" – masks whether the test remains the defendant's subjective intention ("was intended" by whom?). The proposed commentary appears to be trying to hold a defendant accountable for the defendant's own intention and for the intention of others for whose *conduct* the defendant is accountable under the relevant conduct rules of § 1B1.3. We believe it to be inappropriate to attribute to the defendant the loss that another participant in the offense intended to inflict. A defendant should be held accountable only for the defendant's intention.

We also believe it would be good for the proposed commentary to note that "intended" means more than merely knowing something would result. As then-Justice Rehnquist has written, "a person who causes a particular result is said to act purposefully (intentionally) 'when he consciously desires that result, whatever the likelihood of that result happening from his conduct'; while he is said to act knowingly if he is aware 'that the result is practically certain to follow from his conduct, whatever his desire may be as to that result.'"[53] There also is a

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[52]*See* United States v. Haggert, 980 F.2d 8, 12-13 (1st Cir. 1991); United States v. Yeaman, 194 F.3d 442, 460 (3d Cir. 1999); United States v. Henderson, 19 F.3d 917, 928 (5th Cir.), *cert. denied*, 513 U.S. 877, 115 S.Ct. 207 (1994); United States v. Moored, 38 F.3d 1419, 1423-27 (6th Cir. 1994); United States v. Wells, 127 F.3d 739, 745-47 (8th Cir. 1997); United States v. Lorenzo, 995 F.2d 1448, 1460 (9th Cir.), *cert. denied*, 510 U.S. 882, 114 S.Ct. 227 (1993).

[53]United States v. Bailey, 444 U.S. 394, 404, 100 S.Ct. 624, 631-32 (1980).

difference between something that is intended and something that is reasonably foreseeable. We support the suggestion of the Practitioners Advisory Group that, if intended loss is to be considered, the standard be "the pecuniary harm that the defendant purposely intended to cause."

We believe that, if intended loss is to be considered, the proposed commentary should address intended losses that cannot occur – the filing of an insurance claim for $10,000 for a stolen car whose blue book value is $5,000. The proposed commentary addresses the matter in bracketed language. While the bracketed language would work, we think it would be better if the proposed commentary also defined intended loss to be "the pecuniary harm that *reasonably* was intended to result . . . ."

At bottom, however, we do not support the inclusion of intended loss. Except in unusual circumstance, a thief does not have a fixed amount in mind. The thief's goal is to get as much as possible. Since a thief also does not intend (or expect) to get caught, the intended loss is virtually limitless. Applied rigorously, a requirement of including intended loss would put most loss amounts at or near the top of the loss table. We believe that intended loss can apply to inchoate offenses, but § 2X1.1 already deals with those. If the Commission decides to have an intended-loss rule for the consolidated guideline, we recommend that the Commission, rather than adopting proposed application note 2(A), adopt the proposal made by the Practitioners Advisory Group. That proposal is: "For all offense except inchoate offenses, loss means actual loss. For inchoate offenses, loss is the greater of actual loss and intended loss. 'Inchoate offenses' are those offenses in which the defendant is apprehended before the offense has been completed."

Definition of "actual loss." There are two options associated with the general rule. Option one would define "actual loss" to mean "reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable" under the relevant conduct rules. Option two has a similar definition but, significantly, no reasonable foreseeability limitation, making option two, in effect, a strict liability provision. We prefer option one, but believe that there needs to be some sort of remoteness limitation on the loss for which a defendant is accountable. Virtually anything is reasonably foreseeable, so a reasonable foreseeability test does not really place a boundary on loss. Some notion of legal causation must go along with but-for causation.

A Seventh Circuit case discusses the relationship between but-for causation and legal causation. The defendant owned a title company that issued title insurance through Ticor Title Insurance Company. The defendant bought a resort hotel and sold time-share condominium units in it, representing that the titles were clear. His title company issued the purchasers title insurance through Ticor. In reality, as defendant knew, the titles were not clear, but were encumbered. Ticor discovered this and spent some $476,000 to clear the titles. In addition, however, the value of the condominium units declined greatly, and the condominium-unit owners were unhappy and threatening to sue Ticor. Ticor eventually bought the condominium units from the purchasers for about $565,000. The defendant was convicted of mail fraud, and

the district court concluded that the loss was $1,041,000 (the money spent to clear title and to purchase the condominium units). The Seventh Circuit reversed.[54] The court distinguished between "but for" causation and causation "in the legal sense."

> The loss [incurred by Ticor in purchasing the condominium units] was not a consequence of the fraud, however, other than in the sense, irrelevant here as we shall explain, of "but for" causality. Ticor had made good the only loss caused in a legal sense by the defendant's fraudulent concealment of the defects in the titles it had insured. We do not know the cause of the loss of which the purchasers complained. . . . All we know for sure is that the loss in value was not caused by the defective titles. . . . The fact that the purchasers would not have purchased the time shares had it not been for the title insurance policies issued by Ticor would not make Ticor an insurer against a drop in the real estate market. . . . That is the difference between "but for" causation and the causation – for which the presence of but-for causation is ordinarily a necessary condition but rarely a sufficient one – that imposes legal liability. The distinction runs throughout the law. Criminal law is no exception. A man rapes a woman and she is hospitalized. Her injuries are not serious but the hospital burns down and she dies. The rapist would not be responsible for the death, because the rape did not make it more likely that the victim would die as a result of a fire. The rape therefore did not, in either a legal or an ordinary-language sense, "cause" her death, though she would not have died in the hospital fire but for the rape.[55]

Under either option one or option two, Ticor's cost of purchasing the condominium units would be a part of loss, for as the Seventh Circuit notes, there is but-for causation. But-for causation is all that is required by option two. Option one requires reasonable foreseeability, but is it not reasonable to expect that purchasers, upon finding that they have bought property with encumbered title, would want a refund and that Ticor, whose agent sold them the property, would refund the purchase price to avoid litigation or as a matter of business goodwill?

Time of measurement. Proposed application note 2(B) has two options for when to measure loss. Option one would measure the loss as of the time of sentencing, and option two would measure loss at the time the offense is detected. We do not support either option. In our judgment, the time to measure loss is when the offense is committed. Suppose, for example, that a defendant steals a new car worth $50,000 from a dealer. The loss is discovered a month later, and the defendant is convicted and sentenced two years after the theft. The value of the car at the

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[54]United States v. Marlatt, 24 F.3d 1005 (7th Cir. 1994).

[55]*Id.* at 1007. The court of appeals did not hold that Ticor was wrong to buy the condominium units. "We have no reason to doubt the prudence of Ticor's expenditure. But that expenditure was not a loss caused by the defendant in the legal sense." *Id.* The court also indicated that, even if the $565,000 were part of loss, it was a consequential damage excluded from loss. *Id.* at 1007-08.

time of the theft was $50,000. The value a month later, when the car no longer is new, is less than that, probably by one-third (the usual depreciation in value once a new car leaves the dealer's lot). The value two years later may less than half the $50,000 that the car was worth on the dealer's lot.

The amount of loss should be determined as of the time when the loss occurs. Use of any other time is artificial and should be supported by a strong rationale. A time-of-detection rule has no apparent rationale and, in any event, is too subjective and invites litigation. Time of sentencing lacks a rationale other than ease of application. Time of sentencing, however, is preferable to time of detection because it is not subjective and therefore does not invite litigation. We believe that time of offense will usually be as easy to apply as time of sentencing.

Exclusion of interest. Proposed application note 2(C)(i) contains two options for excluding interest. Option one would exclude "interest of any kind, finance charges, late fees, penalties, amounts based upon an agreed-upon return or rate of return, or other opportunity costs." Option two would exclude interest other than bargained-for interest. We support option one. Inclusion of bargained-for interest would invite litigation. Because including interest rarely is likely to make a difference in punishment, and because loss-determination for guideline purposes is not intended to be a precise accounting of the fiscal impact of the offense, there is little reason to require the additional work necessary to gather information about bargained-for interest.

Economic benefit conferred on victim. Proposed application note 2(C)(iii) would exclude from loss "the value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the offense was detected." We support this provision. The proposed application note contains bracketed language that would not count the value of two kinds of benefit – (1) benefit of slight value, and (2) services rendered by a person falsely posing as a licensed professional, goods falsely represented as approved by a governmental regulatory agency, or goods for which governmental regulatory approval was fraudulently obtained. We do not object to these exclusions. With respect to proposed application note 2(C)(iii)(IV)(1), we believe that the de minimis language in the first brackets is better than the substantially different language in the second brackets.

Ponzi schemes. Proposed application note 2(C)(iii)(V) contains two proposals for dealing with Ponzi schemes. Option one would preclude reducing loss "by the value of the economic benefit transferred to any individual investor in the scheme in excess of that investor's principal investment." Option two would preclude reducing loss "by the benefit transferred to victims designed to lure additional 'investments' in the scheme." We support option one as most consistent with the approach of the consolidated guideline, which as stated in the proposed background commentary is that sentences ordinarily "should reflect the nature and magnitude of the pecuniary harm caused . . . ." Ponzi-scheme victims who have had their principal returned have not been harmed pecuniarily. Option one, by not allowing a reduction in excess of the victim's principal, ensures that one victim's "profit" will not be used to reduce another victim's

loss.

Estimation of loss. Proposed application note 2(D) would state that the sentencing court "need only make a reasonable estimate of the loss." We do not object to that part of the proposed commentary. But proposed application note 2(D) then goes no to state that "[t]he sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence." We believe that this overstates the situation. There can be cases in which the loss will be determined principally from documents. With regard to reading and interpreting those documents, the sentencing court may not be in a better position than an appellate court. We suggest that this sentence, and the next two, be deleted as unnecessary. An appellate court is required by 18 U.S.C. § 3742 to give due deference to the trial court's application of the guidelines to the facts. If they are to be retained, we recommend that "ordinarily" be inserted after "sentencing judge" in the second sentence of the first paragraph of proposed application note 2(d), quoted above.

Gain. The proposed commentary contains four options for dealing with gain. Option one would permit the court to consider the gain from the offense in estimating the loss. Option two would require the court to use the gain if the gain is greater than loss. Option three would require the court to use the gain if loss cannot reasonably be determined or gain is greater than loss. Option four would require the use of gain if loss cannot reasonably be determined.

As noted above, the Commission's view, set forth in the proposed background commentary, is that sentences under the consolidated guideline "should reflect the nature and magnitude of the pecuniary harm caused" by the crime. We support option four. The Commission's focus in on harm to the victim. Only if that harm cannot reasonably be determined should the court look to gain. Options one, two, and three would require a determination of gain in every case sentenced under the consolidated guideline – unnecessary work, in our judgment, because in the vast majority of cases the loss to victims will exceed a defendant's gain.

Downward departure. We support the inclusion of proposed application note 2(G)(ii)(II), but suggest some modification of it. The proposed commentary would indicate that a court, in determining whether to depart downward, can consider that, "The loss significantly exceeds the greater of the [defendant's] actual or intended [personal] gain, and therefore significantly overstates the culpability of the defendant." We support inclusion of the bracketed words, but we believe that the sentence should be modified by deleting "and therefore" and inserting "or otherwise."

Part D

We have no objection to this part of the proposed amendment if the Commission decides to adopt a new loss table.

Part E

We have no objection to this part of the proposed amendment.

Part F

Part F of proposed amendment 12 addresses a circuit split involving the computation of tax loss when a case involves underreporting of both business and personal tax. For example, a defendant, an officer and main stockholder in a corporation, diverts for personal use $100,000 of corporate funds. The Sixth Circuit applies both the individual rate and the corporate rate to the amount diverted.[56] With an individual rate of 28% and a corporate rate of 34 %, the tax loss in the example would be $62,000. The Second and Seventh Circuits applies the corporate rate to the amount diverted from the corporation and the personal rate to the amount diverted from the corporation less the corporate-rate tax.[57] In the example, the tax loss would be $52,480 (34% of $100,000, or $34,000; plus 28% of $66,000, or $18,480).

Part F adopts the approach of the Second and Seventh Circuits. We support part F.

PROPOSED AMENDMENT 13
Aggravating and Mitigating Factors in Fraud and Theft Cases

Proposed amendment 13 contains two options "to provide for the consideration of a number of aggravating and mitigating factors that may be present in theft and fraud cases." The options are drafted to fit into the consolidated guideline set forth in proposed amendment 12. Option one would add a specific offense characteristic calling for a range of adjustments, from a four-level enhancement to a four-level reduction, dependent upon the presence of aggravating and mitigating circumstances. New commentary would set forth factors to consider in determining if aggravating, or significantly aggravating, circumstances are present and if mitigating, or significantly mitigating, circumstances are present. Option two would add a specific offense characteristic calling for a two-level enhancement or a two-level reduction. The two-level enhancement would apply if there was a qualifying aggravating factor and no qualifying mitigating factor or if the seriousness of the qualifying aggravating factors outweigh

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[56]United States v. Cseplo, 42 F.3d 360, 364-65 (6th Cir. 1994).

[57]United States v. Martinez-Rios, 143 F.3d 662, 672 (2d Cir. 1998); United States v. Harvey, 996 F.2d 919, 920-21 (7th Cir. 1993).

the seriousness of the qualifying mitigating factors. The same balancing approach would be used to determine whether to apply the two-level reduction.

We applaud the Commission's effort to find other factors that should affect the sentencing of economic crimes. We prefer option two.

Both options, however, present a problem to the extent that they rely on factors already accounted for in calculating the offense level. In determining if there is an "aggravating" or "significantly aggravating" circumstances (option one) or a "qualifying aggravating factor," both options, for example, call for consideration of the number of victims – a factor already accounted for in proposed § 2B1.1(b)(2). Further, under each option the presence of that factor is not controlling. The court must consider the "intensity" of that factor (option one) or determine that the seriousness of the aggravating factors outweigh the mitigating effects of the mitigating factors. However, by determining that there will always be an enhancement if there are more than a specified number of victims (four in proposed § 2B1.1), the Commission has determined for all cases that the factor is controlling. The result is that if an offense involves 50 victims, defendant A could receive only the four-level enhancement of proposed § 2B1.1(b)(2), while defendant B – in an otherwise identical case involving 30 victims – could receive the four-level enhancement of proposed § 2B1.1(b)(2) plus another two-levels for an aggravating factor (or four levels under option one for a significantly aggravating factor). No factor already accounted for by a specific offense characteristic should enter into the determination of whether there are "aggravating" or "significantly aggravating" circumstances (option one) or whether the qualifying aggravating factors outweigh the qualifying mitigating factors (option two).

PROPOSED AMENDMENT 14
Sentencing Table Amendment and Alternative to Sentencing Table Amendment

Proposed amendment 14 sets forth two alternatives. Option one would expand Zones B and C of the sentencing table for criminal history categories I and II. Option two would add a new guideline to chapter five of the *Guidelines Manual* that would authorize a two level reduction for defendants convicted of certain economic crimes who meet specified criteria. The criteria are (1) the defendant has no criminal history points, (2) the defendant did not use violence or threats of violence and did not possess or use a gun or other dangerous weapon, (3) the offense did not involve bodily injury or a conscious or reckless risk of serious bodily injury, (4) the defendant did not receive an enhancement under any of several specified provisions, and (5) before sentencing, the defendant voluntarily makes full restitution or notifies the government and the court that the defendant agrees to make full restitution as determined by the court, fully cooperates in determining the amount of full restitution, and makes partial restitution to the extent able to do so.

We support option one, which will give federal judges additional discretion to fashion a

sentence that is most appropriate under all of the circumstances of the case. Option one, unlike option two, requires no additional work by the probation officer conducting the presentence investigation and does not involve additional fact-finding that could become the subject of an appeal. We believe that federal judges will not abuse the additional discretion afforded by option one but will exercise that discretion in a responsible manner.

PROPOSED AMENDMENT 15
Firearms Table

Proposed amendment 15 would amend the firearms table of § 2K2.1(b)(1) to add entries for 100-199 weapons and 200 or more weapons. Two options are presented. Option 1 would continue to use the one-level increments of the current table. Option 2 would convert the entire table to two-level increments. We oppose the amendment.

The synopsis of proposed amendment states that the amendment responds to a recommendation of the Bureau of Alcohol, Tobacco, and Firearms to increase the penalties under § 2K2.1 for offenses involving more than 100 guns. There is nothing to suggest that an increase is warranted. Indeed, the Commission data indicates that the present offense levels are, if anything, too high. In fiscal year 1999, more than three-quarters (76.3%) of the firearms cases were sentenced within the guideline range.[58] Of those sentences, slightly more than half (51.3%) were at the bottom of the guideline range and another 10.1% were in the lower half of the guideline range.[59] Downward departures occurred in 11% of the sentences, and upward departures in 1.2%.[60] In other words, nearly half of all firearms sentences were at or below the bottom of the guideline range. That data does not suggest a need to increase offense levels under § 2K2.1.

The synopsis states that, "According to the ATF, from 1995 through 1997, nearly a quarter of all defendants sentenced under § 2K2.1 for trafficking in more than 50 firearms received sentences of less than one year, or no term of imprisonment whatsoever, despite the encouraged upward departure provided in Application Note 15 to § 2K2.1." This assertion is not as alarming as ATF may have intended it to be. The unstated assumption behind that assertion is that the sentences were inappropriately lenient, but there is no evidence to support such an assumption. There has to have been good reasons why the defendants sentenced to probation or to imprisonment for less than a year received those sentences. Federal judges, in our experience,

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[58]U.S. Sentencing Com'n, 1999 Sourcebook of Federal Sentencing Statistics table 27.

[59]*Id.* at table 29.

[60]*Id.* at table 27. There are substantial assistance departures in 11.5% of the cases. *Id.*

are not going to impose such sentences if they are not warranted.

We recommend not promulgating proposed amendment 15.

PROPOSED AMENDMENT 16
Prohibited Person Definition

Proposed amendment 16 would amend § 2K1.3 (unlawful receipt, possession, or transportation of explosive materials) and § 2K2.1 (unlawful receipt, possession, or transportation of firearms or ammunition) in two respects. Both guidelines require the court to select from among several base offense levels. Several variables are involved, including whether the defendant was a "prohibited person." Thus, for example, § 2K2.1(a)(6) calls for a base offense level of 14 if the defendant is a prohibited person. Both guidelines define the term "prohibited person" in commentary. The definition in the commentary to § 2K1.3 tracks the definition in 18 U.S.C. § 842(i), which sets forth the classes of persons forbidden to ship, transport, or possess an explosive device in interstate or foreign commerce. The definition in the commentary to § 2K2.1 is similar to, but not identical with, the definition in 18 U.S.C. § 922(g).

Proposed amendment 16 would make two principal changes in these guidelines. First, the amendment would add a definition of the term "prohibited person" to the commentary to each guideline. The amendment would change the definition in the commentary to § 2K1.3 to incorporate by reference the definition in 18 U.S.C. § 842(i), and would change the definition in the commentary to § 2K2.1 to that "a 'prohibited person' is any person designated in 18 U.S.C. § 922(g) or § 922(n)." We have no objections to this change.

The second part of the amendment would specify that a defendant's status as a prohibited person for purposes of selecting the appropriate base offense level is to be determined as of the time of the commission of the instant offense. We support this change. The reason a person's status as a prohibited person is a factor in determining the base offense level is that an explosives or firearms offense committed by such a person is more dangerous to public safety than an offense committed by someone who is not a prohibited person. The focus, therefore, properly belongs on the time of commission of the offense.

PROPOSED AMENDMENT 17
Prior Felonies

Proposed amendment 17 would amend § 2K1.3 (unlawful receipt, possession, or transportation of explosive materials) and § 2K2.1 (unlawful receipt, possession, or transportation of firearms or ammunition). Both guidelines have several base offense levels to

select from, and a variable used in both is whether the defendant has a prior felony conviction, or more than one prior felony conviction, for a crime of violence or a controlled substance offense. The amendment would address a split among the circuits over the interpretation of the term "prior felony conviction(s)" as used in subsection (a) of each of those guidelines.

The issue is whether the word "prior" means before commission of the instant offense or before sentencing for the instant offense.[61] The rationale for using a prior felony conviction for a violent crime or a drug-trafficking crime is that a person with such a conviction is more dangerous to the public than a person who has no criminal conviction or who has a conviction for a misdemeanor or felony other than a crime of violence or drug-trafficking crime. If that is so, then the relevant time, for the purpose of determining punishment, is whether the defendant had such a conviction at the time the explosives or firearms offense was committed. We therefore support the amendment.

PROPOSED AMENDMENT 18
Immigration

Unfair disparity is the hallmark of sentencing in illegal reentry cases in which the aggravated-felony enhancement of § 2L1.2(b)(1) is applicable. The unfair disparity arises from treating similar defendants differently, as well as from treating dissimilar defendants the same. A defendant convicted of illegal reentry following deportation for possession of a gram of cocaine (a felony under state law) will receive a significantly shorter sentence in a district in which the United States attorney has a fast-track policy than in a district in which the United States attorney does not have such a policy. Further, a defendant whose aggravated felony is a conviction for passing a bad check gets the same 16-level enhancement as the defendant whose aggravated felony is murder.

Proposed amendment 18 seeks to address the unfair-disparity problem by modifying the aggravated-felony enhancement. The purpose, in the words of the synopsis of proposed amendment, is "to provide more graduated enhancements based on the seriousness of the prior aggravated felony." We recommend promulgation of amendment 18. We do not support either

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[61] *Compare* United States v. Barton, 100 F.3d 43, 45-46 (6th Cir. 1996) (prior to commission), *with* United States v. Gooden, 116 F.3d 721, 724-25 (5th Cir. 1997) (prior to sentencing); United States v. McCary, 14 F.3d 1502-1505–6 (10th Cir. 1994) (same); United States v. Laihben, 167 F.3d 1364 (11th Cir. 1999) (same); United States v. Pugh, 158 F.3d 1308 (D.C. Cir. 1998) (same). The cases have arisen in the context of construing the language of § 2K2.1. The same result should be reached under § 2K1.3 because the language of that provision is identical to the language of § 2K2.1.

option 1 or option 2.

Until 1988, the maximum prison term for an illegal reentry offense was two years. The Anti-Drug Abuse Act of 1988 modified the law to increase the maximum prison term to 15 years if the defendant was deported following conviction of an aggravated felony and 5 years if the defendant was deported following conviction of a felony other than an aggravated felony.[62] The apparent congressional policy is that the seriousness of an illegal-reentry offense is directly related to the seriousness of an offense committed by the defendant before deportation. If the defendant has no criminal record or was convicted of a misdemeanor before deportation, the statutory maximum is the lowest. If the defendant was convicted of an "aggravated felony," the statutory maximum is the highest. The statutory maximum is in the middle if the defendant was convicted before deportation of a felony other than an aggravated felony.

Congress specially defined the term "aggravated felony" for purposes of the illegal reentry offense in 8 U.S.C. § 1101(a)(43). Unfortunately, Congress has expanded the definition over the years to the point that nearly any felony is an aggravated felony. The original definition specified murder, a drug-trafficking offense with a maximum prison term of at least 10 years, illicit trafficking in a firearm or destructive device, and an attempt or conspiracy to commit any of those offenses.[63] Congress subsequently expanded the definition on several occasions, resulting in a definition with 20 parts, some of which have two or three subparts.

Not all of the offenses encompassed by the present definition of "aggravated felony" are of equal seriousness. A receipt of stolen property offense for which the defendant received a prison term of one year is not as serious as an aggravated sexual abuse offense. Nevertheless, the aggravated-felony enhancement of § 2L1.2(b)(1) treats all aggravated felonies as if they are of equal seriousness. We believe that a better policy is to base the extent of the aggravated-felony enhancement on the actual seriousness of the aggravated felony.

The question, then, is how best to measure seriousness. Perhaps the most accurate way to measure seriousness would be to score the prior offense using the *Guidelines Manual*. Although that method would result in a uniform assessment of seriousness, that method is also the highly impractical and, therefore, the least desirable.

The least accurate measure of seriousness is the category-of-offense approach, which is used in option one. Relying on a category of offense assumes – wrongly – that all defendants who commit a given category of offense have engaged in equally serious conduct. A conviction for drug distribution, however, may have been for serving as a courier transporting 500 grams of cocaine powder or for having been the head of an organization responsible for distributing 250

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[62]Pub. L. No. 1000-690, § 7345, 102 Stat. 2023.

[63]*Id.* at § 7342, 102 Stat. 4469.

kilograms of cocaine powder. Because an offense category encompasses a broad range of conduct, treating all violations of a particular type, such as drug distribution, does not accurately measure the seriousness of a particular violation.

We believe that the punishment meted out to a defendant is the most appropriate measure of seriousness. There are two ways to determine the punishment meted out, one is by sentence imposed and the other is by time served. We believe time served is the better measure because time served is the actual punishment that has been meted out. Sentence imposed sets the maximum time that will be served, but most defendants do not serve the maximum because of good time credits or parole. Thus, a four-year prison term in one state may result in the same time served as a six-year term in another state. If five years is a cut point, persons who are imprisoned for four years in those states will receive different enhancements.

The Justice Department has raised two principal objections to using time served. One is the difficulty in determining the amount of time served, and the other is that "[o]vercrowding in state prisons may result in early releases in some cases and understate the seriousness of the offense." We do not find these reasons sufficient to reject the use of time served. We acknowledge that computing the time served can be difficult in some situations. When the calculation of time served is necessary for each and every conviction, the ease of computation can support a determination to use sentence imposed. In illegal reentry cases, however, there will be only one conviction for which time served will have to be computed, namely the aggravated felony that triggers application of the 16-level enhancement. Moreover, the kind of problems that give rise to the difficulty in computing time served ordinarily will not arise if the defendant is an alien because an alien convicted of a serious offense usually is deported upon release from imprisonment for that offense.

We think that the concern about early release for overcrowding overstates the impact of such early release upon time served generally. It is not simply overcrowding that compels courts to order early release, but overcrowding to such an extent that there is a violation of the Constitution. The remedy of wholesale early release to relieve overcrowding occurs rarely; it is not the norm, and can be accounted for adequately by departure.

The Justice Department also objects to the proposed amendment because it "fails to prevent creative bases for downward departure that have arisen, particularly in districts that do not have 'fast track' policies." There can be no doubt that downward departures are frequent in illegal reentry cases. In fiscal year 1999, downward departures (for other than substantial assistance) occurred in 36.1% of the cases under § 2L1.2.[64] By comparison, the overall rate of downward departure (for other than substantial assistance) is 15.8%, less than half the rate in

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[64]U.S. Sentencing Com'n, 1999 Sourcebook of Federal Sentencing Statistics table 28.

illegal reentry cases.[65] The reason, we believe, is the unfairness of the current aggravated-felony enhancement. Not all aggravated felonies are serious enough to warrant a 16-level enhancement. Scaling the enhancement on the basis of the seriousness of the aggravated felony addresses the unfairness problem directly and obviates the need for "creative bases for downward departure."

As indicated above, we support the proposed amendment. We recommend that the enhancement under proposed (b)(1)((A)(i) be 10 levels. We oppose options 1 and 2. Both options would introduce a category-of-offense approach that assumes that all offenses within a given category are of equal seriousness, an assumption that we believe to be inaccurate. That the aggravated felony involved use of a firearm, for example, will be taken into account by the court sentencing the defendant for the aggravated felony. Suppose, for example, that the aggravated felony involved the use of a gun and that the time served for that aggravated felony was four years. To require a 16-level enhancement because a gun was used, instead of the eight levels otherwise called for, not only treats identically offenses that are of different degrees of seriousness, but also questions the wisdom and appropriateness of the sentence imposed in the aggravated-felony case (and does so as a general matter, not based upon the totality of the circumstances of the particular aggravated felony).

PROPOSED AMENDMENT 19
Nuclear, Biological, and Chemical Weapons

Proposed amendment 19 would amend § 2M5.1 (evasion of export controls), § 2M5.2 (exportation of arms, munitions, or military equipment or services without required validated export license), and § 2M6.1 (unlawful acquisition, alteration, use transfer, or possession of nuclear material, weapons, or facilities). The changes to § 2M5.1 and § 2M5.2 respond to hortatory language in a provision of the National Defense Authorization Act for Fiscal Year 1997.[66] The amendment increases by four levels the base offense levels in § 2M5.1 (evasion of export controls) and § 2M5.2 (exportation of arms, munitions, or military equipment or services without required validated export license). The amendment also would revise § 2M6.1 (unlawful acquisition, alteration, use, transfer, or possession of nuclear material, weapons, or facilities) to incorporate two new offenses at 18 U.S.C. § 175 (prohibitions with respect to biological weapons) and 18 U.S.C. § 229 (prohibited activities with respect to chemical weapons). We believe that the amendment sufficiently addresses offenses relating to biological and chemical weapons and threats to use such weapons.

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[65]*Id.* at table 27.

[66]Pub. L. No. 104-201, § 1423, 110 Stat. 2725.

PROPOSED AMENDMENT 21
Miscellaneous New Legislation and Technical Amendments

Proposed amendment 21 would (1) respond to legislation enacted during the 106th Congress and (2) make technical and conforming changes to § 2J1.6 (failure to appear by defendant), and to the commentary to § 2K1.3 (unlawful receipt, possession, or transportation of explosive material) and § 2N2.1 (violations of statutes and regulations dealing with any food, drug, biological product, device, cosmetic, or agricultural product). We have no objection to the amendment.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

COMMISSIONER

March 12, 2001

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

Dear Madam Chairman:

I am writing to express my deep concern about proposed amendments to the United States Sentencing Guidelines. In my view and that of the officials in the IRS responsible for enforcing the criminal tax laws, adoption of amendments that lessen the likelihood that convicted tax offenders will be incarcerated will undermine our efforts to promote and achieve voluntary compliance with the tax laws. The criminal tax laws play a crucial role in deterring unlawful tax evaders and assuring the honest taxpayers that those who willfully and deliberately evade paying their fair share face very serious criminal sanctions. Unless the punishment meted out to those found guilty of violating those laws adequately reflects the gravity of criminal tax offenses, this vital message will be lost.

The proposed amendments, particularly both options proposed in amendment 14, communicate to the American public that no matter how much you cheat on your taxes, you will not go to jail. These amendments clearly indicate that tax crimes are "less serious economic crimes." If adopted, these amendments will undermine our efforts to enforce the tax laws.

There could not be a more dangerous time for the United States Sentencing Commission to devalue tax law enforcement. The most recent estimate of the tax gap is $195 billion dollars; this gap represents a hidden surcharge of $1,625 with respect to each return filed. The Sentencing Commission has, from its inception, recognized the special deterrence issues associated with tax crimes: the need to encourage over 200 million taxpayers to comply voluntarily with their affirmative tax obligations by seeking meaningful punishment for willful evasion. The Commission further recognized that priority by enhancing the tax loss table in 1993 (see, U.S.S.G. Appendix C, amendment 491 (2000).

The current proposal to expand Zones B and C of the sentencing table or to characterize certain tax crimes as "less serious economic crimes" is wholly at odds with those prior messages. According to your most recent data, almost 70 percent of convicted tax

offenders are sentenced within the currently configured Zones A, B, and C of the sentencing table. (See, *Sourcebook of Federal Sentencing Statistics*, Table 12, 1999.)

By reducing Zone D by 4 levels, the number of convicted tax offenders who may be sentenced to serve less than at least the minimum term in prison will increase dramatically. The tax loss required for such a sentence of imprisonment will rise more than eight-fold (from $40,000 to $325,000), requiring evasion of taxes on approximately $1.1 million in income. This result is unconscionable given our current compliance predicament.

I have enclosed "Internal Revenue Service Comments On: 2001 Proposed Amendments to Federal Sentencing Guidelines," that sets forth our views on pending proposed amendments that will affect tax administration. I sincerely hope that you will consider the potentially devastating effect adoption of some of the proposed amendments will have on our tax compliance effort. I also ask that you consider the testimony of my Chief, Criminal Investigation, Mark E. Matthews, during your hearings on March 19 and 20, 2001.

Sincerely,

Charles O. Rossotti

Enclosure

Internal Revenue Service Comments On:
2001 Proposed Amendments to Federal Sentencing Guidelines

As the Sentencing Commission itself has recognized:

> The criminal tax laws are designed to protect the public interest in preserving the integrity of the nations's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines.[1]

Proposed Amendment Twelve: Economic Crime Package
Part B: Loss Tables for Consolidated Guideline and § 2T4.1 (Tax Table)

The amendment proposes three options for a consolidated loss table[2] and two options for a new Tax Table. Our discussion is limited to the proposed Tax Table options.

There are two options proposed to replace the current Tax Table, § 2T4.1. See Attachment One. Each option attempts to compress the current Tax Table by moving from one level to two level increments, thus increasing the range of losses that correspond to an individual increment. We support the Option One Tax Table. Option One provides a base offense level of six for tax loss amounts equal to or less than $2,000. The offense levels increase by two levels thereafter, depending on the tax loss amount. For example, a tax loss amount greater than $2,000 but less than $5,000 would receive an offense level of eight. The highest offense level for the Option One Tax Table is thirty-two, corresponding to tax loss amounts of more than $100,000,000. Option One is an appropriate reflection of the seriousness of tax offenses[3], provides a lower base offense level loss amount ($2,000 or less) and achieves the current

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[1] U.S.S.G. § 2T1.1, intro. commentary.

[2] The consolidated loss table is consistent with Amendment Twelve Part A, which consolidates the offenses of theft, property destruction and fraud offenses under one guideline.

[3]The Guidelines state that "[t]ax offenses, in and of themselves, are serious offenses." U.S.S.G. § 2T1.1, commentary.

mandatory imprisonment offense level of thirteen at a lower loss amount (more than $30,000) than Option Two.[4]

In addition, we note that while the proposed amendment is silent on this issue, there is language in the synopsis of Amendment Twelve, Part B, which discusses using one loss table for theft, property destruction, fraud and tax crimes.[5] We strongly object to this proposal because it is wholly at odds with long-standing policies that treat tax crimes as serious crimes, warranting higher penalties than theft, property destruction, and fraud crimes.

Part F: Computing Tax Loss

A. Computation

This amendment resolves the circuit conflict regarding the method of calculating aggregate tax loss in accord with the decisions of the Second and Seventh Circuits[6] and rejecting the contrary conclusion reached by the Sixth Circuit. Adoption of this amendment would confer an unfair sentencing advantage to the convicted tax criminal because the totality of the criminal conduct is not adequately counted. The amendment proposes to calculate tax loss as though an offender who failed to report diverted corporate funds on both the corporate return and his or her own individual return had obeyed the law and filed appropriate returns upon which he reported the income properly, even though he did not. The Seventh Circuit reasoned that the corporate tax should be deducted from the diverted monies before the individual tax was calculated,

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[4] Option Two Tax Table starts with a loss amount of $5,000 or less and achieves the current mandatory imprisonment offense level of thirteen at a loss amount of more than $70,000. Option Two also provides a base offense level of six, but establishes the base level at a tax loss amount of $5,000. The offense levels increase by two levels thereafter, with tax loss amounts greater than $5,000 but less than $10,000 establishing an offense level of eight. The highest offense level for Option Two is also thirty-two, corresponding to tax loss amounts of more than $100,000,000. 66 Fed. Reg. 7992 (Jan. 26, 2001).

[5] The synopsis of this amendment provides: "If a decision is made to use the same table, the effect would be to sentence the offenses under both guidelines in a similar manner. This would represent a change from the current relationship in which tax offenses generally face slightly higher offense levels for a given loss amount than fraud and theft offenses." 66 Fed. Reg. 7992 (Jan. 26, 2001).

[6] United States v. Martinez-Rios, 142 F.3d 662 (2d Cir. 1998); United States v. Harvey, 996 F.2d 919 (7th Cir. 1993).

because to do otherwise would overstate the loss to the government.[7] However, that analysis gives the defendant the benefit of an assumption that defies the reality of the evasion scheme.

U.S.S.G. § 2T1.1(c)(1) provides that ". . . tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed)."[8] § 2T1.1 also states that "[i]n determining the total tax loss attributable to the offense, all conduct violating the tax laws should be considered as part of the same course of conduct..."[9] Two separate crimes are committed when an offender executes a scheme to evade taxes or files false returns that affect two taxpayers: one crime arises from the individual income tax being defeated and the second crime arises from the evasion of tax by the corporation. Therefore, since the crimes are separate, the tax losses should be calculated separately and then added together to achieve the aggregate loss to the government.

Evading one's individual tax and evading corporate tax are separate violations, and the total tax loss should not be calculated as if only one offense was committed. In our view, the Sixth Circuit properly concluded in United States v. Cseplo, 42 F.3d 360 (6th Cir. 1994), that – "Mr. Cseplo had the opportunity and ability to limit the criminal consequences to one or other of the returns...[B]y choosing to falsify both returns, Cseplo made the deliberate decision to produce separate harm to the government with respect to both tax liabilities."[10] Even the Court in Harvey noted that "the Sentencing Commission wants the judge to consider the entire tax loss produced by the defendant's criminal conduct. If one person causes two taxpayers to understate their incomes, both underpayments count."[11] The Sixth Circuit's methodology results in a higher aggregate tax loss which is the more accurate reflection of the criminal behavior.

The Statutory Mission of the Sentencing Reform Act of 1984 is to provide "for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."[12] In order to accomplish that mission the tax guideline uses tax loss to determine the seriousness of

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[7] Harvey, at 921.

[8] U.S.S.G. § 2T1.1(c)(1).

[9] Id., at application note 2.

[10] Cseplo, at 364-365.

[11] Harvey, at 921.

[12] U.S.S.G. Ch.1, Pt. A.2.

the offense and appropriate punishment, not to determine what the loss to the government would actually have been if the taxpayer had properly filed. See U.S.S.G. § 2T1.1, commentary. Moreover, the tax guideline provides that if the court is unable to calculate the exact tax loss, it should use "any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed."[13] Clearly, the Guidelines prioritize determining an appropriate offense level to reflect the criminal behavior of the tax offender over determining the actual loss to the government.

B. Definition of Tax Loss

We also oppose adoption of an amendment that would except state and local tax loss from consideration. In our view, basing the sentence exclusively upon federal tax losses does not adequately take all relevant conduct into consideration. Currently, the Guidelines do not limit the computation of tax loss to federal tax loss, nor do the Guidelines limit relevant conduct to federal offenses. Where federal tax and state tax violations have occurred in the same years and for the same type of tax, the state and local tax loss is relevant conduct and therefore should properly be included in computing the base offense level. *See* United States v. Powell, 124 F.3d 655 (5th Cir. 1997)(the text of the Guidelines permit consideration of state taxes evaded if they constitute relevant conduct), *cert. denied*, 522 U.S. 1130, 140 L. Ed. 2d 139, 118 S. Ct. 1082 (1998); United States v. Fitzgerald, 232 F.3d 315 (2nd Cir. 2000)(state and city tax losses included as relevant conduct to determine base offense level).

On the other hand, and for the same reasons outlined above, we support the amendment that would include interest and penalties in the definition of tax loss for evasion of payment tax cases, because it accurately reflects the total harm to the government in an evasion of payment case. *See* United States v. Pollen, 978 F.2d 78, at 91, n.29 (3d Cir. 1992)("while such a limitation [not to include interest or penalties in calculating tax loss] may be appropriate in an evasion of assessment case, it is not always so when imposing sentence for tax evasion committed through evasion of payment." Id.).

C. Grouping

We also oppose adoption of the amendment that mandates grouping tax offenses with other crimes committed in connection with the tax crimes. The amendment in its current form eliminates any incentive to charge a tax crime separately from the crime from which the income for the tax crime was derived, and we oppose it. Although

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[13] U.S.S.G. § 2T1.1, application note 1.

clarification is necessary on this issue because of the circuit conflict, this proposed amendment reaches the wrong conclusion.[14]

The purpose of grouping is to limit double counting while at the same time provide incremental punishment for significant additional criminal conduct.[15] The proposed amendment requires that tax counts be grouped with counts relating to the source of funds that were the subject of the tax crimes. This resolves the circuit conflict in favor of the defendant, because it effectively eliminates the separate tax crime conduct and harm, and only holds the defendant responsible for the underlying criminal conduct from which income was derived. In Vitale, for example, the court did not group the tax evasion count and the wire fraud count, because if the counts were grouped, the offense level would be determined by the higher offense level applicable to the wire fraud count and would result in the tax conviction having no effect on the sentencing.[16] A tax crime is significant additional criminal conduct which would be completely ignored under the proposed amendment.

D. Sophisticated Concealment

We support the amendment that would apply "sophisticated means" to the tax guideline to conform with the fraud guideline. This amendment would provide clarity and consistency in application. As recently as two years ago, § 2T1.1 had a "sophisticated means" enhancement which was changed to "sophisticated concealment." We have previously advocated the need for clarification to ensure consistent application of the two terms.

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[14] For case law reflecting the circuit conflict on this issue, *compare* United States v. Vitale, 159 F.3d 810 (3d Cir. 1998)(grouping separate wire fraud and tax evasion convictions was improper; the two counts were not so closely related that such grouping was required under the Sentencing Guidelines); United States v. Haltom, 113 F.3d 43 (5th Cir. 1997) (separate mail fraud and tax evasion convictions should have been grouped for sentencing purposes, as the offenses could be said to have caused substantially the same harm as required under the Guidelines). *See also* United States v. Astorri, 923 F.2d 1052 (3d Cir. 1991); United States v. Morris, 229 F.3d 1145 (4th Cir. 2000)(Table); United States v. McCormick, No. 98 CR 416, 1998 U.S. Dist. LEXIS 18010 (S.D.N.Y. Nov. 16, 1998).

[15] U.S.S.G. Ch. 3, Part D, Intro. Commentary, P 2).

[16] United States v. Vitale, 159 F.3d at 813-16.

Proposed Amendment Fourteen: Sentencing Table Amendment and Alternative to Sentencing Table Amendment

For reasons set forth in the transmittal letter, we strongly oppose adoption of either alternative detailed in proposed amendment fourteen. They each operate to undermine the goals served by criminal tax enforcement and should not be adopted.

A. Option One

Option One expands Zones B and C of the sentencing tables, increasing the offense level at which Zone D starts to seventeen in Criminal History Category I. Currently, imprisonment for at least the minimum term[17] would be required at offense level thirteen for a Criminal History Category I offender. If adopted, such imprisonment would not be required until an offense level of seventeen is established.

Under the current Sentencing and Tax Tables, a Criminal History Category I tax offender would face imprisonment for at least the minimum term in Zone D if his or her conduct resulted in a tax loss of greater than $40,000 -- a tax loss that would result from evasion of tax on taxable income of approximately $142,857.[18] Under the new proposed Sentencing Table, a convicted tax criminal would not face such imprisonment unless his or her conduct resulted in a tax loss greater than $325,000 -- a tax loss that would only result if the offender evaded taxation on approximately $1.16 million in income.

In other words, Option A of amendment fourteen would **raise by eight-fold the amount of the tax loss (and the amounts of income involved the criminal scheme) that would support mandatory imprisonment for at least the minimum term.** Adoption of this amendment would dramatically reduce the number of tax criminals who would face such a term of imprisonment for their offenses and would seriously undermine the deterrent effect of the criminal tax laws.

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[17] By illustration, currently a level 13 offender must be imprisoned for at least 12 months. Any additional sentence can be served through the varying alternatives set forth in U.S.S.G. § 5C1.1.

[18] We addressed a proposal to change the Tax Table (effectively changing the offense levels and relative loss amounts) in 1999 and noted then that, according to the Statistics Of Income Bulletin (Summer 1998) approximately four percent of all returns filed had an adjusted gross income of greater than $100,000. Thus, according to 1996 filing data, only four percent of Americans risk mandatory jail time for evading taxes under the current sentencing table. Under the proposed change (amendment 14 option one) that number would drop to less than one percent.

B. Option Two

The second option set forth in amendment fourteen would categorize a substantial number of tax crimes as "less serious economic crimes."[19] If a tax offender is not violent, does not use a firearm at the time of the tax offense, does not merit enhancements under 2T1.1 and 2T1.4, has no prior criminal history, and volunteers to make restitution, then the offense level will be reduced by two. Although the specific offense adjustments in 2T1.1 and 2T1.4 will operate to exclude some tax offenders from this adjustment, the fact that a first time tax offender stands a good chance of being characterized by the guidelines as a "less serious economic offender" directly contradicts the Sentencing Commission's philosophy that tax offenses are serious offenses.[20] In addition, the application of the adjustment also defeats any offense level increases in the proposed Tax Tables.

Proposed Amendment Twenty: Money Laundering

Proposed Amendment Twenty would enhance the guidelines for violations of 18 U.S.C. § 1956(a)(1)(A)(ii) by one or two levels. This subsection of the Money Laundering laws concerns conducting financial transactions with proceeds of specified unlawful activity "with the intent to engage in conduct constituting a violation of section 7201 (tax evasion) or 7206 (filing false return) of the Internal Revenue Code of 1986."[21] We support this proposed Amendment.

All money laundering offenses are serious, and the guidelines treat them as such. Unlike the other types of money laundering addressed in Section 1956, the conduct proscribed in (A)(ii) is directed at violations of laws which are not necessarily related to the specified unlawful activity. By contrast, (A)(i) is directed at promoting the very specified unlawful activity that gave rise to the proceeds; (B)(i) is directed at concealment which is not necessarily separate criminal conduct; and, (B)(ii) is similarly directed at avoiding (as contrasted from evading) transaction reporting violations, which would also not necessarily constitute separate criminal conduct. Treating (A)(ii) more seriously would be consistent with its unique character.

Moreover, as discussed above, the Internal Revenue Service is attempting to address a

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[19] The Chapter Five, Part A would be titled "§ 5A1.2 Adjustment for Certain Less Serious Economic Crimes." 66 Fed. Reg. 8005 (Jan. 26, 2001).

[20] U.S.S.G. § 2T1.1, commentary, background.

[21] 66 Fed. Reg. 8013 (Jan. 26, 2001).

burgeoning tax gap currently estimated at $195 billion. Increasing the sentencing level for this part of the money laundering crimes will assist the Service in combating the tax gap by reinforcing the message that tax crimes are serious.

Attachment

PROPOSED TESTIMONY OF BRIAN E. MAAS

I am appearing here as a representative of the New York Council of Defense Lawyers, an organization comprised of more than 150 attorneys whose principal area of practice is the defense of criminal cases in Federal Court. Our organization was formed in 1986 and has over the past 15 years actively sought a voice in the development of policies and practices that affect our clients. Operating through its various committees, the NYCDL interacts regularly and constructively with the judges and prosecutors in the Districts in which our practice is concentrated on a wide range of criminal justice issues.

One of the areas of primary concern to our organization, and to all defense lawyers who practice in the Federal Courts, is the evolution of the Sentencing Guidelines. To that end, the NYCDL has for the past ten years or so maintained a Sentencing Guidelines committee comprising approximately ten members, of which I am currently the chairperson. This committee has, among other things, generally submitted written comments on proposed amendments to the Guidelines and appeared before the Commission to testify about issues of particular importance to our members and their clients.

The Economic Crime Package and the related amendments which are currently before the Commission present issues of such importance. Although the package of proposed amendments also include significant amendments relating to the sentencing of defendants convicted of non-economic crimes, and our written submission includes comments about some of these, our written submission focused on the Economic Crime Package as the bulk of the work of our members involves representing defendants accused of economic crimes. My testimony this morning shall maintain that focus. As to the remainder of the proposed amendments, our committee has reviewed

the positions taken by the Federal Defenders organization and we join in their comments.

As to the Economic Crime Package, the NYCDL believes that several of the specific proposals are beneficial both in terms of providing clarification of ambiguous concepts and in terms of promoting uniformity in the application of the Guidelines. Thus, we support the consolidation of the theft and fraud guidelines with a base offense level of six. The distinction between the crimes covered by the separate guidelines is frequently artificial and the true distinctions between theft crimes and fraud crimes can be addressed through enhancements and reductions. Therefore, we urge the commission to adopt Part A of the Package.

We also believe that regardless of whether the theft and fraud guidelines are consolidated, it is desirable to provide a single definition of loss for all economic crimes. In doing so, we urge the Commission both to avoid a "one size fits all" rigidity and to avoid definitions that include sufficiently vague terms as to invite undesirable subjectivity. With respect to the former concern, the proposal to measure loss either at the time of sentencing or at the time when the offense was detected seems to ignore the differences between a theft offense and a fraud offense and the different variations of fraud offenses. Although we support the time of sentencing as the fairer of the two proposals for fraud cases, we recognize that this approach may not be appropriate for theft cases where the stolen object appreciates over time (artwork) so that the time of the offense would be the more appropriate time for measurement. Given the subjectivity of fixing the time of detection, as evidenced by the complexity of Option 2, it is probably the least desirable or relevant of the three options.

As to our concern over unnecessarily vague terminology, we are quite concerned about both options for the definition of "actual loss." The notions of "reasonable foreseeability" in

Option 1 and harm that "will result" in Option 2 create opportunities for subjective judgments of consequential damages that should be avoided. We believe that so long as the sentencing of economic crimes is dependant primarily on the fraud table, the loss being measured should be the direct loss actually suffered by the victim and other factors should be addressed through the use of upward or downward departures. As soon as the system becomes involved in determining the level of reasonable foreseeability or intent for a particular defendant, or ascertaining future harm, an unacceptable level of speculation has been added to the sentencing process.

As to the other nuances of the definitions included in Part C of the Economic Crime Package, we have addressed the significant ones in our written submission and will not address them here. Instead, I would like to address the remainder of my comments on the Economic Crime Package to explaining our opposition to all three options to revise the fraud tables. On one level, our opposition is probably predictable: each of the proposed tables increases the offense level for all economic crimes with losses greater than $40,000 (options 1 and 3) or $120,000 (option 2) and would have a corresponding negative effect on our clients. However, our opposition also derives from our belief that the harsher tables are trying to address a problem that does not exist. Economic crime defendants are not receiving the sentences they are receiving because the tables are too lenient: if that were the case, judges would utilize the upper end of the sentencing range more often or would be availing themselves of the opportunity to depart upward if the loss understates culpability. Instead, defendants are receiving the sentences they are getting because defense lawyers and prosecutors are fashioning pleas that utilize the full scope of the Guidelines to create an offense level acceptable to the sentencing courts.

It is not for the Commission to decide that the sentences being imposed for economic

crimes are too lenient; that is the role of Congress. Rather, the Commission should be concerned with the clarity of the Guidelines and with the uniformity of their application to certain crimes. Given that the data presented concerning the sentencing of Economic Crime defendants does not raise concerns of uniformity, except that sentences are too uniformly at the bottom of the sentencing range, the Commission should resist the temptation merely to tinker with the tables in order to increase sentences. Although the creation of two level increases and, therefore, fewer categories, responds in some small part to criticism of the tables as micromanaging the sentencing process, the incremental changes set out in these three options seem only intended to increase sentences without allowing the sentencing judge to exercise the sort of discretion favored by those who support substantially reducing the number of categories in the tables.

The last two amendments that I wish to address are the money laundering amendment and the amendment to expand Zones B and C. The money laundering amendment is a long overdue change that will rationalize both the charging and sentencing process. Given that the money laundering statutes are worded sufficiently broadly to encompass a wide range of behavior, prosecutors have been able to use the threat of a money laundering charge to force pleas to other, less seriously sentenced offenses. In addition, defendants who have resisted the threat have found themselves facing guidelines mandated sentences greater than the sentence for the underlying crime. Thus, this proposed change will go a long way to changing an area of practice where the Guidelines tail is wagging the criminal law dog.

Finally, I would like to urge the Commission to expand the range of both Zones B and C. Many defendants whose offense levels fall at 11 and 12 are receiving prison terms of a few months because of the requirement for Zone C that at least one-half of the sentence be served in

prison. These terms are just long enough to cost defendants jobs and to deprive families of support without being long enough to satisfy any truly valid sentencing purpose. These defendants are often first offenders for whom house arrest and probation would be appropriate.

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EXECUTIVE DIRECTOR
Stuart M. Statler

March 9, 2001

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

Dear Mr. Courlander:

I request that Edward A. Mallett, David E. Nichols, Ph.D. and Charles S. Grob, M.D., be added to the list of people presenting testimony to the Commission on March 19, 2001 on behalf of NACDL. Their statements are attached.

Thank you.

Sincerely,

Kyle O'Dowd
Legislative Director

1025 Connecticut Avenue NW, Suite 901 Washington, DC 20036
Tel: (202) 872-8600 *E-mail: assist@nacdl.org*
Fax: (202) 872-8690 *Website: www.criminaljustice.org*

Written Statement of
Edward A. Mallett
President, National Association of Criminal Defense Lawyers

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
United States Sentencing Commission

Re: Proposed Amendment to Ecstasy Guidelines
March 19, 2001

Judge Murphy and Distinguished Members of the Commission. Thank you for allowing the National Association of Criminal Defense Lawyers to comment on the proposed amendment to increase the penalties applicable to MDA, MDMA and MDEA (hereinafter "ecstasy" for ease of reference).

I am here as the president of a forty-three-year-old, 10,000-member organization of criminal defense lawyers, so I will leave science to the scientists, whose statements and testimony we submit for your consideration. Instead, I will speak from my own perspective as a defense lawyer.

For thirty years I have represented ordinary people in criminal cases. I know the defendants, their mothers and fathers, sons and daughters, brothers and sisters and others affected by criminal punishments. They are all of us and probably include many in this room. For every increase in punishment, there is a cost to individuals, and that cost is not limited to the defendant. Every parent who goes to prison leaves children in a house without a mother or father, less likely to be productive and successful as an adult. Perhaps even more relevant to the issue at hand, every child who goes to jail leaves a mother and father with a sense of sublime loss, in some cases more profound than would follow death.

And so I begin by saying to you that — with all of your professional training, your commitment to public service, your willingness to accept public sector employment in service to the American people — I wish we were here today discussing how to review prisoners sentenced under the Guidelines for early release, rather than how much to increase ecstasy sentences.

Undoubtedly, the government will argue the need for higher ecstasy sentences to induce cooperation, an argument I find specious for a number of reasons. First, having practiced in

federal court before the sentencing sea change of the mid-1980's, I remember a time when the government prosecuted large-scale drug cases without the current inducements to provide substantial assistance. One day after explaining the Guidelines to a client, he commented that we have a "barter system" of criminal justice in America. Another lawyer once observed that the day has passed when officers look for the fingerprints to solve a crime — now they "turn" witnesses and create crimes that might never have occurred but for the rewards they are paying witnesses under the guidelines.

Apart from how one views this change in law enforcement practices, the government has failed to offer convincing evidence that increased sentences are necessary and appropriate to the goal of increased cooperation. The proposed guideline amendment would indiscriminately increase sentences for all participants in an ecstasy conspiracy, from the least to the most culpable. But high-level traffickers already receive harsh sentences under the current ecstasy guidelines — and the incremental increase seems unlikely to affect their willingness to cooperate.[1] Is a defendant who conspires to distribute 500,000 grams of ecstasy (approximately 2 million pills)[2] more likely to cooperate if facing a 188-month sentence as compared to a 235-month sentence? In the 9-million pill conspiracy described in the Customs Service's testimony before Congress, defendants held accountable for the entire quantity would receive the same

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[1] See attached description of Amy Pofahl's case.

[2] Calculations are based on an average pill weight of 250 mg as per Michael Horowitz's letter to the Commission dated February 9, 2001. We note that the Commission's MDMA Brief Report, dated February 2001, specifies a slightly greater weight, 300 mg per pill.

sentence with or without the proposed increase.[3]

Despite the government's claims that significantly harsher penalties will "send a strong signal to those who would import or traffic in Ecstasy,"[4] the most obvious impact will be on low-level offenders, those who have the least to trade for a sentencing discount and who, more often than not, should be in state court (or better yet, treatment). Popular media, such as *Time* magazine and the *New York Times* Sunday magazine, has explained that on every weekend night, in every city in America, hundreds of young people are consuming this drug at "raves." These are your new federal ecstasy defendants — members of the youthful user population who underestimate the consequences of their minor involvement with distributors. Only after enactment of the sentencing guidelines have we come to see small quantity cases filed in federal court, most conspicuously crack cases because of the greater punishments there. If the Commission passes this amendment, ecstasy prosecutions will follow suit.

Another group that will be disproportionately affected is the couriers, who the DEA reports can carry up to 20,000 tablets on their person and 50,000 in specially designed luggage. Based on the revised proposal of a 500-to-1 equivalency, this one-trip courier's base offense level would be 34 (151-188 months).[5] To put this in perspective, consider that in one smuggling operation, the couriers were payed a flat fee of approximately $1,500 and might have believed

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[3] Remarks by John C. Varrone, United States Customs Service, before the House Subcommittee on Crime, June 15, 2000, at 7.

[4] See Letter to the Commission from Michael Horowitz, dated Feb. 9, 2001.

[5] Remarks by Lewis Rice, Jr., Drug Enforcement Administration, before the House Subcommittee on Crime, June 15, 2000, at 3.

they were smuggling diamonds.[6] Other smuggling operations, according to the Customs Service, have recruited teenagers as couriers.[7]

I have asked several prosecutors, lawyers and judges what they think of raising the ecstasy punishments to correspond to heroin or cocaine punishments. The overwhelming response is that there are so many problems with excessive punishments that the premise is wrong. That is, these heroin and cocaine punishments clearly do more harm than good and should hardly be a standard of correct thinking.

Finally, the relative popularity of various illegal drugs seems to rise in advance of legislative change, and every effort to eradicate the use of a new drug through legislation seems to be followed by the invention and mass consumption of some newer drug. Did harsh laws eliminate the popularity of heroin? Apparently not; indeed, we read that heroin use is once again on the rise. Did harsh laws stop crack cocaine in the inner-cities? Well, we certainly locked up a lot of people, but then methamphetamine and ecstasy grew in popularity. Raising punishments for ecstasy today is simply another step on the treadmill. It may provide some short-term gratification for the legislators who enacted this directive, but it will impose devastating costs on the future prisoners and their families.

The scope of the conspiracy laws and the law of parties under 18 U.S.C. § 2 is extremely broad, allowing the net of law enforcement to fall upon many who never imagined the potential consequences of their acts. This is compounded by the relevant conduct guideline and the fact

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[6] *Id.* at 8.

[7] Remarks by John C. Varrone, United States Customs Service, before the House Subcommittee on Crime, June 15, 2000, at 4.

that mitigation available under the guidelines' role adjustment and safety valve is insufficient to allow federal judges to adequately distinguish between those who stand to gain the most from a successful criminal enterprise and those who are marginal participants.

A recent issue of *Rolling Stone* describes cases of excessive guideline sentences that were commuted after they were brought to the attention of the President of the United States.[8] Julie Stewart, the founder and President of Families Against Mandatory Minimums, is quoted as saying that she lies in bed at night thinking of all the people who are just as worthy of reconsideration who got nothing.

We hope you will find the scientific evidence helpful, but in the end, you need to be most concerned about who will be punished by this guideline amendment, and at what cost to their families, friends and communities. I thank you for keeping these ideas in mind as you determine what to do about ecstasy, and whether a significant increase in punishments is really in the interest of justice.

* * *

NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 10,000 direct members — and 80 state and local affiliate organizations with another 28,000 members — include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

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[8] Erika Casriel, *Twenty-one Drug Offenders Freed by Clinton*, Rolling Stone, Mar. 2001, at 42.

AMY POFAHL
95559-012

Offense: Conspiracy to import and distribute MDMA (Ecstasy)
Sentence: 24 years without parole
Priors: None
Date of Sentencing: 1990

Nature of Offense:
In 1989, Amy's estranged husband Charles was arrested in Germany for manufacturing and distributing MDMA (Ecstasy). German authorities prosecuted him there and refused to extradite him to the United States for additional prosecution arguing that it would be double jeopardy. During Charles' trial in Germany, Amy went there several times to help him. In the United States, Amy was questioned by the DEA about her involvement in her husband's drug dealing. She denied that she was involved in selling drugs. She also refused to testify against her husband or other co-defendants because she didn't know anything about it. She was subsequently charged with and convicted of conspiracy to manufacture and import MDMA and money laundering.

Personal Background:
In 1985, Amy married Charles, a 45-year old Stanford Law school graduate and a successful and well-respected businessman. Charles owned at least 12 different businesses and Amy worked in one of them for 2 ½ years. She said she had little knowledge of the rest of Charles' business dealings. The couple separated in 1988 because of Charles' alcoholism.

Guideline Sentence:
Amy is serving the guideline sentence for the entire amount of MDMA involved in the conspiracy. She was also labeled a leader/manager which increased her sentence.

Sentences of Others Involved:
Two of Amy's co-defendants testified against her and received drastic reductions in their sentences. Both are free today. Amy's husband, Charles, was sentenced to six years in German prison. Charles served four years of his sentence and is now free in Germany.

Lawyer:
David Parker 972/771-1991

6/96

STATEMENT OF DAVID E. NICHOLS, PH.D.

PURDUE UNIVERSITY

SCHOOL OF PHARMACY AND
PHARMACAL SCIENCES

February 5, 2001

Michael Courlander
Public Affairs Officer
U.S. Sentencing Commission

Re: Sentencing guidelines for methylenedioxymethamphetamine (MDMA)

Dear Mr. Courlander:

I received word today that the Commission proposes to equate 1 g of MDMA, MDA, and MDEA to 1 kg of marijuana, rather than 35 g, 50 g and 30 g of marijuana, respectively. I also understand that 1 gram of mescaline is presently equated to 10 grams of marijuana, 1 gram of powder cocaine equated to 200 g of marijuana, and 1 gram of methamphetamine to 2 kg of marijuana.

One basis for this reconsideration is the assertion that "ecstasy..... is similar in its hallucinogenic effect on the user to mescaline." This statement is simply incorrect. Extensive literature published on this subject, some of it from my own laboratory and listed later, clearly shows that MDMA is in no way comparable to mescaline in its effect. MDMA does not act by the same pharmacological mechanism as does mescaline, nor does it have the ability to produce the profound sensory disruptions and hallucinations that are characteristic of mescaline. Similarly, while high doses of mescaline can provoke psychosis in labile individuals, there is no evidence that MDMA has similar potential. Whereas MDMA does have a stimulant effect, it is approximately only one-tenth that of methamphetamine, based on human dosage.

Based on reported human dosages I estimate that MDMA has roughly twice the psychoactive potency by weight of mescaline. Thus, based on human dosage, the equivalency for one gram of MDMA should then be equal to 20 g of marijuana.

MDMA has only about 1/25th (doses: 5 mg heroin vs 125 mg MDMA) the potency of heroin. There is no basis either through potency considerations or through risk assessment to equate the harm of one gram of MDMA with one gram of heroin.

In my professional opinion, based on my own 25 years of research into the action of psychoactive drugs of abuse, and extensive reading of the literature, one gram of MDMA can in no way be equated to one gram of heroin, either based on dosage, or upon the degree of harm that can result from use of these two very different substances. Heroin is highly addictive, and in overdose leads directly to death; MDMA is not. The degree of toxicity of heroin and MDMA is not comparable by any standard. Heroin is used by intravenous injection, accompanied by risks of infection with a variety of microorganisms and viruses, whereas MDMA is taken orally with none of those risks. One gram of pure heroin would be a sufficient quantity to lead to overdose death in perhaps as many as 20 drug-naïve individuals, whereas one gram of MDMA taken orally might be sufficient to cause fatality of one drug-naïve person.

DEPARTMENT OF MEDICINAL CHEMISTRY AND MOLECULAR PHARMACOLOGY
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Whereas I do understand the concern regarding large numbers of adolescents who are apparently abusing ecstasy, and support reasonable attempts to discourage this use, I am adamantly opposed to regulations that are not based on facts or science. If the guidelines are to be arbitrary, and based on political whims, then the sentencing commission should so state, but should not attempt to justify the guidelines by misrepresentation of the facts or the science so as to create the public impression that the dangers of MDMA are actually comparable to those of heroin when they demonstrably are not. That is, *there is absolutely no medical or scientific basis* upon which to support guidelines that would purport to equate one gram of MDMA with one gram of heroin.

Sincerely,

David E. Nichols

David E. Nichols, Ph.D.
Professor of Medicinal Chemistry
And Molecular Pharmacology

Relevant Scientific Literature Published by My Laboratory.

D.E. Nichols, "Differences Between the Mechanism of Action of MDMA, MBDB, and the Classical Hallucinogens: Identification of a New Therapeutic Class: Entactogens." *J. Psychoactive Drugs*, 18, 305-313 (1986).

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STATEMENT OF CHARLES S. GROB, MD

specmind

From: <Csgrob@aol.com>
To: <rgb@cognitiveliberty.org>; <Glbravo@aol.com>
Sent: Monday, February 05, 2001 1:08 AM
Subject: MDMA Sentencing Commission Letter

February 4, 2001

U.S. Sentencing Commission

Dear Sirs/Madams:

As two psychiatrists who have conducted clinical research and have written extensively about the effects of MDMA (3,4-methylenedioxymethamphetamine), we would like to take this opportunity to express our strong opposition to the proposed new sentencing laws for MDMA.

It has become increasingly evident that raising penalties for MDMA offenses is an unfortunate perpetuation of ineffectual drug war legislation that will ultimately be counterproductive to the government's well-intentioned mission to stem the tide of MDMA use, and will only make a bad situation worse. Most MDMA users are in fact functional citizens, often young adults in our communities, and incarcerating them for longer periods of time would not only fail to be beneficial for society, but would regrettably inflict excessive degrees of punishment and injury to individuals caught within the web of illicit drug war activity, and to their families. We predict that the proposed sentencing laws would only result in targeting low-level dealers and users and not the high volume traffickers for which the laws are intended. Inevitably, the most pronounced consequence would be to push the world's MDMA supply increasingly into the hands of highly organized, unscrupulous, and profit-oriented crime syndicates.

The issue of MDMA has suffered from a persistent pattern of media misinformation. In fact, MDMA's potential for physical and psychological addiction is low. Relevant to the Sentencing Commission's inquiries, MDMA is more equivalent to mescaline in its behavioral and pharmacological effects than it is to heroin. Although there are a small proportion of users who have developed excessive use patterns, they were likely highly vulnerable individuals to begin with who under different circumstances would develop severe problems with other drugs and behaviors. We recognize and deplore the degree to which MDMA abuse does occur, and we readily acknowledge that there other potentially dangerous adverse effects, particularly when the drug is used under high-risk conditions. However, this proposed change in sentencing will not remedy the situation. Indeed, we predict that the numbers of

adverse events as well as fatalities will only increase subsequent to the enactment of the proposed change in sentencing law. Education and harm-reduction programs along with treatment on demand for problematic MDMA users will ultimately serve as far more effective and humane solutions for these problems.

To date, little public attention has been directed to MDMA's potential as a therapeutic medicine. It is our strong contention that MDMA's current placement as a Schedule 1 drug is highly inappropriate. Indeed, in 1986 the DEA's own administrative law judge recommended that the drug be placed in Schedule 3, which is for drugs with putative medical application. Entirely on political grounds, the DEA Director authorized that his own administrative law judge's recommendation be disregarded, and summarily placed MDMA in Schedule 1. It has remained there since, its legal status effectively preventing any approved clinical research from occurring. Well-controlled psychiatric research investigations on MDMA's potential safety and efficacy as an alternative treatment for conditions known to be refractory or non-responsive to conventional treatments, including individuals with end-stage cancer who have severe psychological distress and existential alienation and also for patients with chronic persistent post-traumatic stress disorder, need to be approved and funded.

Great alarm has been expressed about MDMA and its effect on the human brain. Unfortunately, debate has been stifled by the intrusion of a political agenda into the funding and reporting of neuroscience. Pivotal studies attesting to MDMA's "neurotoxic" nature have suffered from a pattern of serious flaws in methodology and problems in data interpretation. To an unfortunate degree, how studies were actually conducted was not honestly represented in formal publication. Ultimately, such practices not only erode scientific credibility, but also obfuscate our understanding of the true range of effects of MDMA.

One unintended result from the proposed sentencing changes will be the psychological, spiritual and material injury inflicted on the families of young people arrested for MDMA crimes. Most victims of these new sentencing guidelines will be young men and women, who will be caught providing friends and acquaintances with the drug. For the vast majority, these will have been activities of low entrepreneurial value.

For the reasons discussed above, we are concerned that the proposal to increase the MDMA sentencing laws will not only fail to reduce criminal activity, but will also lead to compounded degrees of injury to individuals, families and society. There are far more effective and responsible strategies available.

A complete list of our publications on MDMA in the medical literature is appended below.

We are happy to provide any further information or consultation if you so desire.

[35]

Sincerely,

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Sonoma County Mental Health
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Charles S. Grob, M.D.
Director, Division of Child and Adolescent Psychiatry
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DECONSTRUCTING ECSTASY: THE POLITICS OF MDMA RESEARCH

CHARLES S. GROB

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What is *Ecstasy*? Defined by the New Webster's Dictionary as a state of intense overpowering emotion, a condition of exultation or mental rapture induced by beauty, music, artistic creation or the contemplation of the divine, ecstasy derives etymologically from the ancient Greek *ekstasis*, which means flight of the soul from the body. The anthropologist, Mircea Eliade, who explored the roots of religious experience in his book *Shamanism: Archaic Techniques of Ecstasy*, has described the function of this intense state of mind among aboriginal peoples. Select individuals are called to become shamans, a role specializing in inducing ecstatic states of trance where the soul is believed to leave the body and ascend to the sky or descend to the underworld. The shaman is thus considered a "technician of the sacred", having been initiated through a process of isolation, ritual solitude, suffering and the imminence of death. Such initiation into the function of ecstatic states of consciousness, always accompanied by comprehensive tutelage from tribal elders, allows the shaman to assume for his tribal group the vital role of intermediary, or conduit, between the profane world of everyday existence and the sacred domains of alternative reality (Eliade, 1951; Schultes and Hofmann, 1992).

Modern conceptualizations of ecstasy, however, have expanded far beyond the realm of scholarly inquiry on archaic religions to the reach of contemporary cultural politics and scientific inquiry. As a cultural

commodity, ecstasy has become emblematic of a social movement attracting increasing numbers of disaffected youth in Europe and North America. Meeting together in the hundreds and the thousands, large groups of young people have congregated to engage in collective *trance dances*, or *raves*, often fueled by the ingestion of a synthetic psychoactive substance, known as *Ecstasy*. Arousing apprehension among parents and civic authorities, perplexed by this changing pattern of behavior among youth, the phenomenon of *ecstasy* culture has riveted societal concern on the potential dangers of its increasingly notorious chemical sacrament. In spite of substantial media coverage, along with millions of federal dollars for basic science research on neural mechanisms for possible brain injury caused by *Ecstasy*, however, full understanding of both its medical consequences and cultural impact have remained elusive.

Even within the current social context of harsh Drug War era legal penalties, *Ecstasy* use has climbed sharply among young people. A vast and unanticipated social experiment has occurred, with millions of adolescents and young adults worldwide consuming a drug which has eluded definitive understanding and over which societal and medical controversies persist. Given the magnitude of public health and cultural implications, an open and comprehensive review of the existing state of knowledge, from diverse perspectives, needs to be pursued. The outcome of such an inquiry into this modern rendering of the archaic technique of ecstasy should facilitate a more effective and salutary understanding and response to the condition Euro-American medicine and culture currently confront.

SOCIAL HISTORY

Since the early 1980s, the drug *Ecstasy* has commonly been considered to be 3,4-methylenedioxymethamphetamine (MDMA), though this identification has become increasingly problematic over the last decade. Classified as a phenethylamine, MDMA chemically has been noted to have structural similarities to both amphetamine and the hallucinogen, mescaline, as well as the essential oil safrole, found in sassafras and nutmeg. Though patented by Merck Pharmaceuticals in Germany prior to the First World War, MDMA was not explored

in animal models until the 1950s, when the U.S. Army Intelligence undertook the serial investigation of a variety of psychoactive compounds with potential "brain washing" application. MDMA itself was never administered to humans during this Cold War inspired phase of investigation, and remained unexplored until the 1970s. Its more hallucinogenic and longer acting analogue, 3,4-methylenedioxyamphetamine (MDA), however, was the object of official investigation as part of the infamous MK-ULTRA program of the fifties and sixties and had been administered to Army "volunteers", including one who was inadvertently overdosed and killed. Initial scientific investigations of MDMA itself occurred during the 1970s following the termination of military involvement, and were conducted by university and industry based medicinal chemists. Researchers, extending their inquiries to the effects on humans, were enthusiastic over the drug's unique psychoactive profile. The development of a new class of centrally active compounds was proposed, one with suggested therapeutic capacities, which would be named Entactogens, after a salient psychological feature of the drug, its capacity "to touch within". (Shulgin, 1986; Shulgin, 1990; Shulgin and Nichols, 1978; Shulgin and Shulgin, 1991).

Early scientific investigators, though without formal psychological schooling, were struck by MDMA's capacity to help people open up and talk honestly about themselves and their relationships, without defensive conditioning intervening. For several hours anxiety and fear appeared to melt away, even in subjects who were chronically constricted and apprehensive. By the late 1970s, a small number of mental health professionals had been introduced to the drug's range of psychoactive effects. Particularly impressed by MDMA's capacity to induce profound states of empathy, one of the strongest predictors of positive psychotherapeutic outcome, these first psychologists and psychiatrists who encountered the drug believed they had come across a valuable new treatment. First called *Adam*, to signify "the condition of primal innocence and unity with all life", MDMA augmented therapy functioned by reducing defensive barriers, while enhancing communication and intimacy. Hailed as a "penicillin for the soul", MDMA was said to be useful in treating a wide range of conditions, including post-traumatic stress, phobias, psychosomatic disorders, depression, suicidality, drug addiction, relationship difficulties and the psychological distress of terminal illness (Adamson, 1985; Adamson

and Metzner, 1988; Grinspoon and Bakalar, 1986; Greer and Tolbert, 1986; Downing, 1986; Riedlinger and Riedlinger, 1994).

Conscious of the lessons of history from the 1950s to the early 1970s, when researchers had been prevented from continuing their promising investigations of hallucinogen treatment models because of the cultural reaction to their spread among young people, efforts were initially undertaken to restrict the flow of information on MDMA. Hoping to avoid the fate of LSD and maintain MDMA's still legal status, its use for several years remained limited to a relatively small group of pharmacologists and health professionals. MDMA's advantages over the better-known hallucinogens as a putative psychotherapeutic adjunct were also noted. Compared to LSD, the prototype hallucinogen of the twentieth century, MDMA was a relatively mild, short-acting drug capable of facilitating heightened states of introspection and intimacy along with temporary freedom from anxiety and depression, yet without distracting alterations in perception, body image and sense of self. MDMA had neither the pharmacological profile nor the provocative reputation of LSD and, so they hoped, would not suffer the fate of political reaction and legal censure as the hallucinogens had in the late 1960s (Grof, 1990; Bakalar and Grinspoon, 1990; Grob, 1998).

It proved difficult, however, to keep MDMA a secret. Catalyzed by the call for hearings challenging the proposed scheduling of MDMA by the DEA, sensationalized media reports about a new psychotherapeutic "miracle medicine" began to attract the interest of drug dealers suddenly aware of the large potential profits to be made selling MDMA to young people. Soon, MDMA began to emerge as an alternative recreational drug on some college campuses, particularly in California and Texas, where for a period of time MDMA replaced cocaine as a new drug of choice. Although still popular as *Adam* among psychotherapists, MDMA now acquired a new name among youth, *Ecstasy*. In point of fact, the transformation of *Adam* into *Ecstasy* appears to have been a marketing decision reached by an enterprising distributor searching for an alternative code name, who concluded that it would not be profitable to take advantage of the drug's most salient features. "*Ecstasy* was chosen for obvious reasons," this individual later reported, "because it would sell better than calling it *Empathy*. *Empathy* would be more appropriate, but how many

people know what it means?" (Eisner, 1989; Beck and Rosenbaum, 1994).

The days of MDMA being the singular tool among an underground of informed psychotherapists were over. Now popularly known as *Ecstasy*, MDMA had been appropriated by the youth culture for use as a recreational drug. Spurred by media accounts reporting on both its suggested role in treatment and its new reputation as a "fun drug" among the young, use of MDMA spread. By the mid-1980s the inevitable political response began to take form. With the clear intention of tightening the federal regulatory controls of what was still a legal drug, the U.S. Drug Enforcement Administration (DEA) invoked the Emergency Scheduling Act and convened formal hearings in 1985 to determine the fate of MDMA. These highly publicized hearings, however, achieved the unintended effect of further raising public awareness of the new *Ecstasy* phenomenon, and led to marked increases in manufacturing and marketing of the drug. Media accounts polarized opinion, pitting enthusiastic claims of MDMA by proponents on the one hand, versus dire warnings of unknown dangers to the nation's youth on the other. Coverage of the MDMA scheduling controversy included a national daytime television talk show (the Phil Donahue program) highlighting the surprise disclosure by a prominent University of Chicago neuroscientist that recent (but as yet unpublished) research had detected "brain damage" in rats injected with large quantities of MDA (3,4-Methylenedioxyamphetamine), an analogue and metabolite of MDMA. Public debate was further confounded by the frequent confusion of MDMA with MPTP (1-Methyl-4-phenyl-1,2,3,6-tetrahydropyridine), a dopaminergic neurotoxin that had recently been shown to have induced severe Parkinson's-like disorders in opiate addicts using a new synthetic heroin substitute. With growing concerns over the dangers of new "designer drugs," public discussion took an increasingly discordant tone (Beck and Morgan, 1986).

In the spring of 1985, a series of scheduling hearings on MDMA were conducted by the DEA in several U.S. cites where a collective of physicians, psychologists, researchers and lawyers gave testimony that MDMA's healing potential should not be lost to the therapeutic community. After hearing the dueling sentiments expressed by federal regulators and by those opposed to controls, the DEA administrative

law judge presiding over the hearings determined on the weight of the evidence presented that there was in fact sufficient indication for the safe utilization of MDMA under medical supervision and recommended Schedule III status. Not obliged to follow the recommendations of his administrative law judge, however, and expressing grave concerns that MDMA's growing abuse liability posed a serious threat to public health and safety, the DEA director overruled the advisement and ordered that MDMA be placed in the most restrictive category, Schedule I. Since then, with the exception of a three month period in late 1987 and early 1988 when it was briefly unscheduled due to a court challenge, MDMA has remained classified as a Schedule I substance (Young, 1986; Lawn, 1986).

In the decade following the MDMA scheduling controversy, patterns of use experienced a marked shift. With the failure to establish official sanction for MDMA treatment, most psychotherapists who had used the drug adjunctively in their work ceased to do so, unwilling to violate the law and jeopardize their livelihood through the use of a now illegal drug. In the wake of the highly publicized scheduling hearings, however, use among young people escalated. By the late 1980s interest in *Ecstasy* had spread from the United States across the Atlantic to Europe, where it became the drug of choice at marathon dance parties called *raves*. Beginning on the Spanish island of Ibiza, spreading across the Continent, and then back to the United States, *Ecstasy*-catalyzed *raves* drew increasingly large numbers of young people, often attracting more than 10,000 participants to a single event. Although use in the United States has tended to be cyclical, waxing and waning depending upon an often erratic supply, popularity in Europe remained high through the 1990s. With multiple illicit laboratories, including pharmaceutical manufacturers in former *Iron Curtain* countries, the European youth recreational drug market has been saturated with *Ecstasy* over the past decade (Saunders, 1993; Saunders, 1995; Capdevila, 1995).

By the late 1980s, the *Ecstasy* scene had attained particular prominence among young people in the United Kingdom. Between 1990 and 1995, British authorities estimated that the use of *Ecstasy* increased by over 4,000 percent. Starting in small London dance clubs, word rapidly spread of the euphoric, mood altering properties induced by *Ecstasy*, leading to larger and larger events throughout the British

Isles. Almost overnight an enormous black market for *Ecstasy* was created. Leisure patterns among the young began to change, with *Ecstasy* to an increasing degree replacing alcohol as a generational drug of choice. By the early 1990s, the economic and social certainties of the past in Great Britain had started to change. The free market boom pursued throughout the eighties by the Thatcher government had ended in recession, with increasing unemployment and constricting opportunities, particularly for young people. The freeing of inhibitions, the peer bonding and the sense of community engendered by *Ecstasy's* dance floor pharmacology provided a release from the oppressive social atmosphere and a sense that "all could be made right in the world". The *Ecstasy* scene had become, in the eyes of many observers, the largest youth cultural phenomenon that Great Britain had ever seen (Collin, 1998).

With the rapid expansion of *Ecstasy* culture in the United Kingdom, criminal gangs began to sense the opportunity for amassing large profits and moved in on the developing drug scene, rapidly taking control of the manufacturing and marketing of *Ecstasy*. Motivated solely by financial return and disinterested in the "purity" of the phenomenon, the quality of distributed *Ecstasy* began to erode. Other drugs began to replace MDMA as the sole component of *Ecstasy* pills, including diverse phenethylamine analogues (e.g. MDA, MDE), amphetamines, cocaine, opiates and even the dissociative anesthetic ketamine. The increasing use of amphetamine, sold both openly and as adulterated *Ecstasy*, began to change *rave* culture from a context of communal celebration to one of aggressive euphoria. Ignorance and lack of available information also pervaded the youth *Ecstasy* scene, as dangerous degrees of polydrug use increasingly became the norm. Intent to "prolong the buzz", users began to "stack" multiple doses of *Ecstasy*, along with alcohol and whatever other drugs were available. In just a few years, the *Ecstasy* scene had drifted far from what its earliest proponents had extolled as the gentle opening and spiritual nature of MDMA to the faster paced, increasingly dangerous, anything goes polydrug context of the evolving dance drug industry (Ziporyn, 1986; Buchanan and Brown, 1988; Wolff *et al.*, 1996; Winstock and King, 1996; Furnari *et al.*, 1998).

Although various estimates have been given on the extent of current *Ecstasy* use in the United States and Western Europe, the exact

incidence is not known. Saunders has stated that "millions" of young people in the United Kingdom have taken *Ecstasy*. A Harris Opinion Poll for the BBC in Great Britain presented data that 31% of people between the ages of 16 and 25 admitted to taking *Ecstasy*, most often at dance clubs, and that 67% reported that their friends had tried the drug. In a survey of school children across the whole of England, 4.25% of 14 year olds and, in another survey 6.0% of those aged 14 and 15 were reported to have taken *Ecstasy*. More recently, 13% of British university students questioned about their drug histories admitted to having tried *Ecstasy*. The popular British press has reported that an estimated 500,000–1,000,000 young people in Great Britain take *Ecstasy* every weekend (Harris, 1992; Beck, 1993; Sylvester, 1995; Sharkey, 1996; Saunders and Doblin, 1996; Parrott, 1998).

In the United States, according to a 1993 National Institute on Drug Abuse survey, 2% of all United States college students had admitted to taking *Ecstasy* in the previous 12 months. By the end of the decade, 8% of high school seniors reported having tried *Ecstasy*. A well publicized 1987 interview study of Stanford University undergraduate students reported that 39% had taken *Ecstasy* at least once in their lives. Later controversy revealed, however, that the research design was flawed by using data collected at the Stanford Student Union on Friday and Saturday nights where attractive young research assistants would solicit information from students. A methodologically stronger survey at Tulane University found that 24% of over 1,200 students questioned had experimented with *Ecstasy*. By the early 1990s, *Ecstasy* was described as having the greatest growth potential among all illicit drugs in the United States, with tens of thousands of new users allegedly introduced to the drug every month, particularly within the context of the *rave* scene. (Peroutka, 1987; NIDA, 1993; NIDA, 1999; Newmeyer, 1993; Cuomo *et al.*, 1994; D. J. McKenna, pers. com.).

As *Ecstasy* culture continued to grow in the nineties, youthful adherents were deprived of accurate information about the chemical catalysts they were ingesting. From inadequately informed media and chains of improbable rumor, a number of myths remained in general circulation among young ravers, ranging from beliefs that their coveted drug of choice was entirely safe to other convictions that *Ecstasy* could induce horrific nervous system damage, including the draining of spinal fluid. While media trumpeted sensationalist

accounts of *The Agony of Ecstasy*, a lack of clarity and understanding of the drug's true effects pervaded the youth scene. The knowledge accrued during the period of underground psychotherapy in the late 1970s and early 1980s that with repeated use MDMA's positive effects attenuated and negative side effects accentuated (thus making it the ideal therapeutic agent, to be used sparingly and with minimal abuse potential) had not filtered through to the young denizens of the burgeoning *Ecstasy* culture. Coupled with the omnipotence of youth, this ignorance of the drug's basic psychopharmacology led to wide scale over-use of the drug. As participants returned to weekend dance parties repeatedly from week to week, the prolonged use of *Ecstasy* began to take its toll. Over time and repeated use, the euphoria and the empathy would lessen, to be replaced by a jittery amphetamine-like experience. For days after their night of *Ecstasy* it was not uncommon for *ravers*, particularly those with some underlying vulnerability, to report dysphoric mood and cognitive dulling. Although *Ecstasy* was not physically addictive, certain individuals would demonstrate clear patterns of psychologically compulsive behavior. A *macho ingestion syndrome* typified some young men with a proclivity for ingesting five or more doses at a single setting. Safety limits that had been appreciated by older investigators from a long ago era hoping to develop new tools for healing no longer appeared to be operative in this new post-modern world of youth recreational drug culture.

The preferred mode of *Ecstasy* experience, the dance club setting, also appeared to heighten the risks for young *ravers*. Gathered closely together in crowded environments, often with poor ventilation and high ambient temperatures, large numbers of young people would dance exuberantly late into the night. By the early-1990s, reports of individuals dying of heat stroke during *raves* began to surface. Though relatively small in number compared to the enormous degree of use among youth in the United Kingdom, around 15 fatalities per year have been reported. In each of these cases, *Ecstasy* ingestion was associated with a catastrophic hyperthermic reaction leading to disseminated intravascular coagulation (DIC), rhabdomyolysis, and acute renal and hepatic failure, culminating in death. In contrast to the long forgotten therapeutic model of relaxing in a peaceful setting with easy access to sufficient fluid replacement, many of these tragic events occurred in dance clubs where management restricted supplies

of water in order to increase the sales of soft drinks. In one particularly unscrupulous establishment, the water taps were reportedly turned off in the bathrooms while tap water was sold over the counter at the bar for the price of a beer (Henry *et al.*, 1992; Matthews and Jones, 1992; Randall, 1992).

As awareness grew that *Ecstasy* could under certain circumstances cause injury to users, a movement arose within the *rave* community to ensure greater protection from dangerous influences. Efforts to promote harm reduction practices at *Ecstasy*-fueled dances, however, were solely supported by the community and their adherents. Virtually all government and enforcement agencies, by contrast, have appeared to interpret the harm reduction process entirely through the eyes of legal censure and prohibition. Privately sponsored safe dancing campaigns developed a code of conduct for *raves*, attempting to minimize the degree of risk encountered by young *ravers*. These harm reduction efforts would emphasize the monitoring of air quality and ambient temperature, provision of *chill out* rooms, easy access to cold water taps and the distribution of drug risk information.

Another ominous development of *Ecstasy* culture was the growing awareness that to an increasing degree not all *Ecstasy* was MDMA. Over a relatively short period of time, the shift to clandestine large-scale criminal manufacture and distribution networks had led to a breakdown of quality control. Adulterated black market *Ecstasy* flowed freely through the youth culture. *Ecstasy* could be MDMA (often of low quality), or it could be any one of a variety of other drugs. By the mid-nineties, only an estimated 40% of *Ecstasy* was actually MDMA. Some of this *ersatz Ecstasy* proved to be relatively innocuous, and included aspirin, caffeine and low dosages of ephedrine. Other batches proved to be far more hazardous, however, including the emergence at the end of the decade on both sides of the Atlantic of large quantities of dextromethorphan, a cough suppressant with powerful dissociative properties at higher dosages. Sold as *Ecstasy*, dextromethorphan could induce an overwhelming and prolonged experience. Particularly within the context of a *rave*, dextromethorphan was increasingly recognized as a highly dangerous substance, capable of causing serious medical harm both when taken alone and when taken in combination with MDMA. Besides competing with MDMA for cytochrome p450 2D6 hepatic enzymes, and thus imped-

ing MDMA's metabolism and elimination, dextromethorphan's anticholinergic effects also blocked perspiration, increasing the risk of dangerous overheating. To counter this insidious threat to the health and safety of young *dance* culture aficionados, harm reduction efforts have recently been directed towards providing on-site and affordable qualitative laboratory analyses of *Ecstasy* samples (Shewan *et al.*, 1996; Doblin, 1996; King, 1998; Schifano *et al.*, 1998; Sferios, 1999).

Loathe to be perceived as providing any tacit validation of the *Ecstasy* culture movement, government and health institutions have shunned the harm reduction approach, instead relying upon the message of primary prevention. Young people should simply avoid taking *Ecstasy*, they should *just say no!* To reinforce this zero tolerance strategy, considerable outlays of funding have been directed at establishing the precise mechanisms of destructive action of the drug. The study of MDMA neurotoxicity has received millions of dollars of government research funding over the last decade and a half to elaborate the magnitude of functional and structural injury to animal neurotransmitter systems. Experimentation using human subjects has in contrast received far less support, with none provided for efforts intended to explore the long-neglected MDMA treatment paradigms. While retrospective studies of human *Ecstasy* users have fit nicely into the prevailing belief system that MDMA may cause serious brain injury, it has proved virtually impossible to conduct any investigation of its putative healing capacity. Though never disproven, the MDMA treatment model has never been given the opportunity to test its safety and efficacy in alleviating suffering under ideal controlled circumstances. Efforts to initiate treatment studies on refractory patient populations in the United States have to date not been successful in obtaining final approval from federal regulatory agencies (although the FDA has recently expressed a willingness to approve well-designed treatment studies in refractory patient populations). Three basic Phase 1 prospective studies of normal human volunteers to study psychological effects, physiologic response, pharmacokinetics and neurotransmitter mechanisms have been allowed that administered pure MDMA in hospital research settings in the United States (at Harbor-UCLA Medical Center, the University of California San Francisco School of Medicine and the Wayne State University School of Medicine) (Grob *et al.*, 1996; Tancer and Schuster, 1997; Tancer and Johanson, 1999;

Harris *et al.*, 1999). By contrast, attempts extending from the mid-1980s to the present to use MDMA in controlled treatment protocols have not as yet received approval.

Only in Europe, in Switzerland from 1988 to 1993, were a group of clinical psychiatrists granted permission from their government to treat their patients with MDMA. Although authorities had failed to insist upon the implementation of prospective research designs, a retrospective analysis of treatment outcomes was eventually conducted (Gasser, 1995a; Gasser, 1995b). That study examined MDMA augmented psychotherapy of 121 patients, providing very encouraging results, indicating high degrees of treatment response along with acceptable safety parameters. In spite of those conclusions, subsequent and better designed investigations have not been conducted. Elsewhere throughout the world there have been only two other MDMA treatment protocols which have been submitted to their respective regulatory authorities. One is a study of rape victims with post-traumatic stress disorder at the Universitat Autonoma de Madrid in Spain. The other is a proposed investigation at the Harbor-UCLA Medical Center in the United States of patients with end-stage cancer whose depression, anxiety, alienation and pain have not responded to conventional therapies. A variety of plausible explanations for the failure to initiate formal programs of MDMA treatment research could be suggested, ranging from the need to maintain a political distance from illicit *Ecstasy* use to the long entrenched aversion to associating with the old hallucinogen treatment model. The central obstacle to formal regulatory approval, however, has remained the ongoing focus on the possibility that MDMA causes brain damage. Whether pure MDMA will ever be permitted in an optimally controlled treatment research context might ultimately hinge on the question of neurotoxicity.

NEUROTOXICITY

Pharmacologically, MDMA's site of action is largely within the serotonergic neurotransmitter system. Serotonin (5-hydroxytryptamine, 5-HT) is one of the monoamine neurotransmitters of the brain, and is synthesized from tryptophan through the intermediate compound

5-hydroxytryptophan. Serotonin is synthesized within 5-HT neurons, and is stored in synaptic vesicles. It is released by these vesicles into the synaptic cleft in response to the firing of 5-HT neurons, exerts an effect upon both pre- and post-synaptic receptor sites, and is then taken back up into the 5-HT neuron where it is again stored in synaptic vesicles. The serotonin neurotransmitter system is believed to play a critical role in the regulation of mood, anxiety, sleep, appetite, aggression, sexuality and temperature regulation.

The field of amphetamine analogue neurotoxicity began in the early 1960s, with the discovery that particular drugs were capable of causing severe changes within different neurotransmitter systems. Disruptions of the serotonergic (5-HT) system was first observed to occur in animal models injected with what would become known as the prototype serotonin neurotoxin, para-chloroamphetamine (PCA) (Pletscher *et al.*, 1963). PCA was observed to cause a prolonged decrease in brain concentrations of serotonin and 5-hydroxyindole acetic acid (5-HIAA), the primary metabolite of serotonin, without altering norepineprine or dopamine concentrations. Later studies found that tryptophan hydroxylase (TPH), the rate limiting enzyme in serotonin biosynthesis, was markedly decreased for up to several months following PCA administration (Sanders-Bush *et al.*, 1975).

Since the mid-1980s, evidence has accumulated that MDMA is capable of inflicting major changes on the brain serotonin system in laboratory animals (McKenna and Peroutka, 1990). Preclinical studies have consistently demonstrated that MDMA induces an acute, but reversible, depletion of serotonin. These findings have included time limited but sustained lower levels of serotonin, decreased metabolite (5-HIAA) levels, loss of synthetic enzyme activity (TPH), loss of serotonin uptake and loss of uptake sites for serotonin. Unlike the far more toxic PCA, however, which has been demonstrated in animals to damage serotonergic cell bodies (Harvey *et al.*, 1975), MDMA's effects are limited to axonal projections, with evident sparing of cell bodies. Over time following exposure to repeated, high dose MDMA administration, regeneration of serotonin axons does occur, with a gradual yet measurable increase in axon density (Molliver *et al.*, 1990). Rate of recovery varies depending upon species studied, with rats demonstrating greater degrees of reversible depletion than monkeys.

The impact on serotonin systems in laboratory animals subjected to administration of MDMA has been divided into short and long-term effects. Some of the acute effects of MDMA, including the rapid release of intracellular stores of serotonin, are believed to mediate the psychological and behavioral profile observed in humans in the first three to four hours after drug administration, whereas in animals the presumed neurotoxic effects begin to manifest about 12–24 hours later. Consequently, it is believed that neurotoxicity is not inextricably linked to the acute effects of the drug. Further demonstrating the separation between behavioral and laboratory neurotoxicity profiles has been the observation that administration to animals of fluoxetine (a serotonin re-uptake blocker) up to six hours after MDMA injection, blocks or attenuates the development of neurotoxicity (Hekmatpanah and Peroutka, 1990), whereas in human subjects the acute effects of MDMA (psychological, neuroendocrine and temperature) occur within minutes and peak in a few hours (Grob *et al.*, 1996).

Most animal investigations of MDMA have revolved around establishing the extent and mechanisms underlying neurotoxicity. Rats administered multiple high dosages of MDMA undergo what are described as serotonergic neurotoxic changes which persist for many months before full neurochemical recovery occurs. Significant variation can occur, however, with dosage, route of administration and species. An important area of neurotoxicity research has been the histopathological study of brain sections of animals given substantial dosages of MDMA. This model was elaborated in the early 1980s at the University of Chicago by senior neuroscientists C. R. Schuster and Lewis Seiden, and their student, George Ricaurte. Their first major contribution to the MDMA literature was a 1985 (Ricaurte *et al.*) study of what they described as classic signs of serotonin neurotoxicity in rats injected subcutaneously twice daily for four consecutive days with 20 mg/kg of the longer lasting MDMA analogue, MDA. Coincident in time with the legal MDMA hearings being conducted by the DEA, the release of the University of Chicago findings accentuated the growing fears stirred by the new and only recently publicized reports of *Ecstasy* use. The introduction of the concept of serotonin neurotoxicity into the debate over MDMA's legal status has had a lasting influence on public and scientific appraisal of the problem.

Utilizing the repeated high dose MDMA administration model in most animal experiments, investigators have found sustained effects on various aspects of serotonin neuronal architecture, specifically the axonal projections. In virtually all immunohistochemical studies, the changes induced by MDMA are limited to the axons, with evident sparing of the cell bodies. Effects also appear to be contained within the smaller distal axonal projections, and not the larger more proximal axons. Resprouting and regeneration of serotonin axon terminals does occur, although the time course for full recovery may be extensive and varies significantly between different species. The question of whether the axonal reconnections observed during recovery are "normal" or are damaged, however, has not as yet been definitively answered. In squirrel monkeys administered MDMA (5 mg/kg, subcutaneous) twice daily for four consecutive days, profound reductions of brain serotonin, 5-hydroxyindole acetic acid, and serotonin uptake sites persist even at 18 months (Ali *et al.*, 1993). Interestingly, the thalamus shows full recovery, while the hypothalamus shows an (apparent) overshoot in regeneration, suggesting that under some circumstances administration of MDMA can lead to a lasting reorganization of ascending serotonin projections. In a study with more relevance to the single time or occasional use, low dose therapeutic model, a "no-effect" level in monkeys of 2.5 mg/kg MDMA administered orally every two weeks for four months (totaling eight times) was established by Ricaurte (Karel, 1993). Either because of the highly politicized nature of the MDMA neurotoxicity debate, or for reasons that have as yet not been made entirely clear, this information has to date never been published in the mainstream scientific literature.

At the center of the controversy over the central nervous system effects of MDMA has been researcher George Ricaurte, who while still a student was the lead author of the 1985 paper on MDA neurotoxicity that played such a pivotal role in the DEA scheduling decision. For the following fifteen years, first at Stanford Medical School and then at Johns Hopkins-Bayview Medical Center, Ricaurte has built one of the most influential and well funded MDMA neurotoxicity research programs. Reluctant to support investigations designed to study MDMA's therapeutic efficacy and safety, Ricaurte has steadfastly contended that "even one dose of MDMA can lead to permanent brain damage" in humans. With each new study from his

laboratory being widely publicized in the media, Ricaurte has had an instrumental role in the evolution of scientific and cultural attitudes towards MDMA. A careful examination, however, of the neurotoxicity controversy, including some of Ricaurte's key research designs and patterns of data interpretation, may lead to a clearer and more objective understanding of MDMA's full range of effects and potential to cause harm.

Investigators tracking the histopathologic changes induced by MDMA have noted substantial variability between different species' susceptibility to the phenomenon. Larger species, particularly monkey models, appeared to have far more sensitivity to the drug's neurochemical effects, and even at relatively low doses sustain persistent measurable effects (Slikker *et al.*, 1988). Compared to smaller species, including the mouse, which appeared to be far more resistant to MDMA's effects (Battaglia *et al.*, 1988; Peroutka, 1988), prolonged changes in the density of distal axon projections as seen with immunohistochemical staining were consistently observed. Given such findings, Ricaurte has given prominence to the theory of interspecies scaling (Chappell and Mordenti, 1991), which proposes that different animal groups will respond to drug effects only according to their relative size. Depending upon weight (mg/kg) and surface area (mg/m^2), different species, depending upon how large they are, will have greater or lesser susceptibility to MDMA's presumed neurotoxic effects. This argument, heavily relied upon by Ricaurte, however, is flawed in its neglect of interspecies differences in pharmacokinetics and drug metabolism.

Although animal pharmacokinetics studies have not been avidly pursued, most likely a reflection of the pharmaceutical industries' lack of interest in MDMA, a related drug, fenfluramine, has had cross-species investigations of differences in drug metabolism (Caccia *et al.*, 1982). An appetite suppressant marketed widely for years, fenfluramine was recently the subject of controversy over suggested adverse cardiac valve effects that led to its removal from the market in 1997. Although the risk of cardiac valve injury now appears to be far less than feared when the original report was published (Burger *et al.*, 1999; Schiller, 1999), the ban on the drug is not likely to be lifted any time soon, given the long-term impact of the early media reports. Interestingly, fenfluramine has also been known for years to have virtually

identical long-term effects as MDMA on serotonin neurochemistry and neuronal architecture, and has similarly been the object of interest by the Ricaurte neurotoxicity team (McCann *et al.*, 1994; McCann and Ricaurte, 1995). Although the threat of fenfluramine neurotoxicity risk was used to combat industry efforts to have its isomer D-fenfluramine released on the market in the mid-1990s, the FDA approved the drug for clinical use. A critical reason behind the decision was the fact that fenfluramine had a long history of general use as an appetite suppressant, having been taken by over 25,000,000 people worldwide for more than three decades (Derome-Tremblay and Nathan, 1989), and yet no clinical syndrome of fenfluramine neurotoxicity had ever been described.

The relevance of the fenfluramine example also extends to the issue of drug metabolism. Basic pharmacokinetic studies have established that size may not necessarily be the critical determinant in species susceptibility to the immunohistochemical effect described as serotonin neurotoxicity. It is well known that there are large species differences in the pharmacokinetics and metabolism of fenfluramine (Marchant *et al.*, 1992). Interestingly, humans metabolize fenfluramine much differently than do squirrel monkeys, and are actually far closer in pharmacokinetic profile to smaller species like the rat. Humans also deaminate the drug more extensively than other species to polar inactive compounds that are excreted in the urine as conjugates. Thus, the norfenfluramine/fenfluramine metabolite ratio is much higher in most other species, particularly in the non-human primates where the level of the metabolite is 40 times greater than in humans (Johnson and Nichols, 1990; Caccia *et al.*, 1993). If fenfluramine's primary metabolite norfenfluramine has greater neurotoxicity than fenfluramine, paralleling the relationship between MDMA and its metabolite MDA, then perhaps humans have less reason to fear MDMA neurotoxicity than the Ricaurte monkey studies appear to suggest. To the degree that MDMA is as close to fenfluramine in its pharmacokinetics as it is in its serotonergic neurochemistry, then the relevance of neurotoxicity to the human example is diminished proportionally.

Nevertheless, a cavalier attitude towards MDMA's risks would be ill-advised. A variety of serious adverse events, entirely apart from the neurotoxicity hypothesis, may potentially occur. Pioneering human pharmacokinetics research with MDMA, which was recently

conducted by investigators at the Institut Municipal d'Investigacio Medica and Universitat Autonoma de Barcelona, Spain and also in the United States at the University of California San Francisco, sheds new light on the importance of safety parameters to understanding differential drug metabolism (Harris *et al.*, 1999; Mas *et al.*, 1999). In humans, various organs, particularly the cardiovascular system, experience a non-linear pharmacodynamic response to increased dosages of MDMA. With increasing dose, a disproportionate elevation of plasma levels occurs that is significantly greater than that which would have been expected from linear kinetics. From the public health and safety perspective, therefore, it would appear that a persistent fixation on the relative risks and implications of the serotonin neurotoxicity threat has hampered efforts to investigate more clinically relevant concerns, including risks of cardiac arhythmias, hypertension, cerebrovascular accidents and adverse drug–drug interactions at higher dosage levels of MDMA (Dowling *et al.*, 1987; Manchanda and Connolly, 1993; Harrington *et al.*, 1999).

Controversy has also existed over whether MDMA (and fenfluramine) fit the precise definition of neurotoxins. Concerned that the term "neurotoxicity" has been too broadly applied, James O'Callaghan, a neurotoxicologist for the U.S. Centers for Disease Control and Prevention, has questioned many of the assumptions upon which this area of research has rested, particularly whether MDMA causes degenerative conditions of the central nervous system. O'Callaghan has demonstrated that the standard techniques used to identify classic evidence of neuronal destruction, such as astrogliosis and silver degeneration staining, do not occur in rats treated with MDMA. Disputing the use of immunohistochemical evidence to interpret the significance of long-term reorganization of brain serotonergic neurotransmitter systems, O'Callaghan takes issue with the assertion that MDMA causes classic neurotoxicity. Evidence of lowered indices of serotonin, he states, should not necessarily be equated with the destruction of serotonin axons, as one would expect in bonafide serotonin neurotoxicity, because assessments of serotonin are only indicative of the presence of this transmitter in neurons, not the actual neuronal structures themselves. In other words, O'Callaghan contends that MDMA can decrease the level of serotonin without necessarily destroying serotonergic axons, much as water could be drained from a pipe

without there necessarily being structural damage to the pipe itself. Furthermore, the expected evidence of structural damage to serotonin neurons, glial proliferation, does not reliably occur. Known neurotoxins, including bilirubin, cadmium, tri-methyl tin, the dopamanergic neurotoxin MPTP and the classic serotonergic neurotoxins para-chloroamphetamine (PCA) and 5,7-dihydroxytryptamine (5,7-DHT) predictably induce a proliferation of enlarged astroglial cells. According to O'Callaghan. the failure to detect evidence of a reliable astrogliosis response caused by MDMA or fenfluramine through standard laboratory testing in rats, even in the presence of decreased neurochemical markers of serotonin, further detracts from the neurotoxicity argument and instead calls for the alternative model of "neuromodulation", where protein synthesis inhibition occurs as a natural extension of the pharmacological activity of the compounds (O'Callaghan, 1993; O'Callaghan, 1995; O'Callaghan and Miller, 1993; O'Callaghan and Miller, 1994). Of course, O'Callaghan's arguments are qualified by the relative persistence of the serotonergic deficits caused by MDMA. Simple adaptation or neuromodulation would not be expected to last for years or even months as a consequence of the application of a compound that did not in fact produce some degree of prolonged structural change. Nevertheless, the functional significance of such changes remains unclear.

Debate over the clinical relevance of the MDMA neurotoxicity data, along with the political pressures of the time, have restricted the development of alternative perspectives and interpretations of serotonergic system change. Examining the implications of extensive serotonin neurotoxicity induced by administration of the classic serotonin neurotoxin, 5,7-dihydroxytryptamine (5,7-DHT), neuroscientist Efrain Azmitia of the New York University School of Medicine has raised the question of brain plasticity. Using basic laboratory models, Azmitia has explored the possibility that serotonin may actually function as a neurodevelopmental signal. Through damage to specific populations of serotonergic neurons in the adult brain, latent mechanisms for new growth and axonal sprouting are reactivated and a compensatory growth response occurs from neighboring undamaged neurons. The implications of this *Awakening the Sleeping Giant*, as Azmitia titled his review of the subject (Azmitia and Whitaker-Azmitia, 1991), are considerable, given that serotonin has been implicated in

a variety of serious clinical conditions, including mood dysregulation, obsessive compulsive behaviors, eating disorders, sudden infant death syndrome, schizophrenia and Alzheimer's dementia. It might also be worth asking, whether the proposed concept of serotonin neuroplasticity could in fact be the basis for an entirely new approach to treating these often unresponsive and refractory conditions? That is, could the loss of certain aspects of serotonergic function actually be at the heart of the proposed therapeutic actions of MDMA? We know, for example, that serotonin neurons in the hippocampus exhibit a high degree of death and regrowth in response to corticosteroid levels. Furthermore, non-neurotoxic decreases in serotonin cause neuroplasticity in adult rats, decreasing the number of nonaminergic synapses in some brain areas (Azmitia, 1999). Within the field of MDMA neurotoxicity, however, Azmitia's theories appear not to have attracted much interest. Although this state of affairs might reflect the politically incorrect nature of even suggesting such a position, there are also issues of safety that cannot be neglected. Indeed, Azmitia's own studies that growth of cultured serotonin cells were stimulated by low concentrations of MDMA but injured at higher concentrations (Azmitia *et al.*, 1990), highlight the need to approach this issue with great caution. Nevertheless, recent awareness of the complexity of these serotonergic systems should spur further discussion of the implications and significance of the changes associated with the phenomenon of MDMA neurotoxicity.

From early on in the debate over MDMA neurotoxicity, the difficulty in demonstrating significant behavioral disturbances in laboratory animals administered large quantities of the drug has remained problematic. In many degenerative brain conditions it is known that 80–90% of the neuronal pathway must be lost for symptoms to appear, as is the case with dopaminergic deficits in Parkinsons Disease. There is no study, however, that has been able to provoke serotonergic losses of that magnitude in response to MDMA treatment, though of course it is not necessarily certain that 5-HT system loss to this degree is necessary for deterioration of clinical function to occur. Even so, there has been the expectation that states of serotonin dysregulation would manifest in disorders of mood, aggression, sexuality, eating, learning and memory. For many years, however, there were virtually no reports of abnormal animal behaviors induced by MDMA. Even

those subtle indices of behavioral change which have been identified, however, have not necessarily been evidence of injury. Investigators have reported findings ranging from enhanced conditioned and non-conditioned learning in some animals treated with MDMA (Romano and Harvey, 1993) to attenuation of alcohol consumption in others (Rezvani *et al.*, 1992). Although additional studies have found both slight impairment or no difference compared to control animal function (Slikker *et al.*, 1989; Robinson *et al.*, 1993), the lack of clear proof of injurious functional effect continues to confound the expectations of behavioral consequences in response to neuronal injury by MDMA.

A further cause for concern has been the lack of reports emerging of the long-term effects of high dose MDMA on non-human primate behavior. Recently, Ricaurte and his colleagues reported data describing the immunohistochemical effects in monkeys treated with MDMA seven years previous (Hatzidimitriou *et al.*, 1999). Although that report detailed persistent effects upon neurochemical markers of serotonin function, curiously there was no discussion of whether behavioral changes occurred. Given the extended period of time Ricuarte and his colleagues maintained the monkeys following their initial treatment with MDMA, seven years previously, one might expect the investigators would have had ample opportunity to observe these non-human primates prior to their eventual destruction, particularly if changes were seen. The field of evolutionary biology is rich with examples of how primate research models have furthered our understanding of the relationship between altered neurotransmitter function and animal behavior, including disorders of mood and aggression (Heinz *et al.*, 1998; Suomi, 1999). The lack of any information on the behavior of these monkeys housed by the investigators for seven years therefore remains puzzling.

Advances have occurred in the field of MDMA neurotoxicity research, leading to clearer understanding of the underlying mechanisms by which high, repeated dosages of MDMA induce serotonergic axonal loss. Several lines of evidence from these investigations suggest a critical role for oxidative stress and the generation of free-radicals that cause degeneration of serotonin axonal terminals (Sprague *et al.*, 1998). It has also been suggested by some investigators that metabolites of MDMA may be involved in the process. Furthermore, multiple neurotransmitter systems appear to exert an influence, as a variety of

substances have been demonstrated in laboratory models to be capable of blocking neurotoxicity, including the serotonin reuptake blockers fluoxetine and citalopram (Schmidt, 1987; Schmidt and Taylor, 1987), the serotonin antagonist ritanserin (Schmidt *et al.*, 1990), the dopamine antagonist haloperidol (Hewitt and Green, 1994), the N-methyl-D-aspartate antagonist dizocipline (Colado *et al.*, 1993) and the monoamine oxidase-B inhibitor L-deprenyl (Sprague and Nichols, 1995).

One of the most significant recent achievements investigators in the field have had, however, has been demonstrating the critical role thermoregulatory mechanisms exert on the development of MDMA neurotoxicity. Lewis Seiden, veteran neurotoxicity researcher at the University of Chicago School of Medicine, has reported that relatively small changes in ambient temperature provoke significant alterations in core temperature of MDMA treated rats but do not affect core temperature of control saline treated rats (Malberg and Seiden, 1998). As MDMA neurotoxicity is evidently dependent upon high core temperatures, preventing the development of hyperthermic states in experimental animals will reliably block the loss of serotoninergic terminals (Collado *et al.*, 1995; Broening *et al.*, 1995). The implications of this link between MDMA induced hyperthermia and potential serotonin neurotoxicity to human users are considerable, as temperature is a variable that can be easily regulated. The MDMA treatment paradigm, therefore, appears to be compatible with the imperative to avoid the generation of elevated body temperatures through the use of cool ambient environments, appropriate fluid replacement and the avoidance of physical exertion. On the other hand, the common recreational context of *Ecstasy* use at *raves*, where participants vigorously exercise (dance) for prolonged periods of time often in hot and poorly ventilated indoor environments, would appear to heighten risks for MDMA induced hyperthermia and magnification of any neurotoxic effect, as well as for malignant hyperthermia The critical point remains, however, that MDMA neurotoxicity may be entirely setting dependent and therefore completely preventable. When considering both the dangers of MDMA when used as a *rave* drug versus the importance of appropriate temperature control when establishing safety parameters for sanctioned investigations of treatment applications, the importance of these recent laboratory discoveries of the role

of thermoregulation are of great significance to future research developments.

The field of MDMA neurotoxicity research has also taken on the problem of trying to evaluate directly the effects of the drug on humans. Far more methodologically challenging than animal research, human studies have often failed to shed much light on the critical questions of MDMA's effects on health and safety. Indeed, to a regrettable degree, discrepancies between how studies were actually conducted and how they were reported in the literature have further clouded an already murky situation. Early work centered at the Stanford University School of Medicine, where Ricaurte in the late-1980s began to develop his program of human MDMA neurotoxicity studies. Attempting to investigate whether MDMA decreased levels of the primary metabolite of serotonin in cerebrospinal fluid (CSF), 5-hydroxyindole acetic acid (5-HIAA), Ricaurte compared a group of recruited *Ecstasy* users with a control group of chronic pain patients (Ricaurte *et al.*, 1990). Although understandable given human subjects committee restrictions on conducting lumbar puncture on normal volunteers in order to obtain CSF, an apparently unrecognized flaw in the design was that chronic pain is known to induce increased levels of serotonin function, including raised CSF 5-HIAA (Costa *et al.*, 1984; Ceccherelli *et al.*, 1989), thus placing the legitimacy of the findings of relatively low CSF 5-HIAA in *Ecstasy* users into doubt. Although a later report by Ricaurte's group has repeated the finding (McCann *et al.*, 1994), an earlier investigation from another group found no difference between a smaller sample of users and nonusers (Peroutka *et al.*, 1989).

A subsequent study, however, raised far more serious questions. Interested in examining MDMA's possible long-term effects on the L-tryptophan challenge model, an indirect measure of serotonin function, a collaborative study was developed by Ricaurte with investigators from Yale University. Publishing their study in the highly prestigious Archives of General Psychiatry, the collaborative team reported that MDMA exposure was associated with a trend towards reduced response to L-tryptophan, although the difference between the users and nonusers was not statistically significant (Price *et al.*, 1989). Subsequent scientific reports have sometimes referred to this report as if this difference was significant. What was neither reported

in the original article nor corrected by the investigators in the subsequent scientific literature, however, was the fact that the MDMA subjects used in this study were actually pre-selected from the larger group of original Stanford *Ecstasy* users on the basis of their having tested on the lower end of the CSF 5-HIAA spectrum. Utilizing a model of exploring whether markers of serotonin dysfunction are consistent across different tests may be an interesting question, yet given that this was not the purported intent of the study, serious questions about its significance remain (Grob *et al.*, 1990; Grob *et al.*, 1992; Grob and Poland, 1997). Since publication of the article in 1989, it has continued to be regularly cited as a critical piece of evidence for MDMA neurotoxicity in humans.

A logical area of investigation to extrapolate the findings of animal neurotoxicity research to the human model is the neuropsychological influence of presumed MDMA use. Dating back to the late-1980s investigators have conducted evaluations on the cognitive abilities of *Ecstasy* users. The first serious attempt to answer this question occurred in collaboration with the Yale L-tryptophan challenge study. Although concluding that *Ecstasy* users had signs of impaired cognition (Krystal *et al.*, 1992), as with the L-tryptophan study serious questions must be raised concerning basic research design. In addition to the unreported pre-selection subject bias of *Ecstasy* users in the earlier Stanford study who had tested on the low end of the CSF 5-HIAA spectrum, the Yale neuropsychological assessment methodology is also burdened by additional factors which might have predisposed *Ecstasy* subjects to performing less well than their non-Ecstasy using controls. For example, some of the *Ecstasy* subjects were tested the day after flying from the west coast to New York and several hours after having been administered intravenous L-tryptophan, the serotonin precursor amino acid known to produce sedation in some subjects. Non-*Ecstasy* using literature controls, on the other hand, tend to live locally and therefore are not subjected to cross-country air flight the day before testing. They are also not likely to receive earlier the day of their memory and concentration testing the sedating amino acid serotonin precursor L-tryptophan. In a pre-publication letter to a funder of the investigation, the study neuropsychologist acknowledged that "by and large, these results are striking for the fact that most subjects evaluated had IQ scores in the above average range or higher. Except

for the tests mentioned above (Memory and Tactual Performance Test) very few neuropsychological findings exist in this population. It should be noted that the memory findings for the paragraph are not uncommon in patients especially when anxiety, fatigue, or difficulties in attention or concentration exist in the individual. It is quite possible that the large number of impaired scores on the paragraph measures in this population are related to travel fatigue, being in a new environment, or being stressed in some way following the challenge testing that each subject performed" (R. Doblin, pers. com.). The actual published report, however, failed to adequately take into account these important extenuating circumstances. Even though the reported findings of memory impairment were slight and were not clinically significant, and in spite of the suspect methodology, the Yale study has become a cornerstone for the subsequent development of efforts designed to establish the neurotoxic impact of MDMA in humans. While subsequent studies have reported decreased performance in some memory tasks, these decreases are generally less than one standard deviation below the scores of the controls (a difference which is not considered even borderline impairment by clinical neuropsychologists).

Given the degree of risk young people expose themselves to while engaging in the exuberant activities of the *Ecstasy* culture, ranging from polydrug abuse to sleep and nutritional deprivation, there does exist a compelling need to construct and implement psychiatric investigations that will evaluate for signs of injury. Some researchers, particularly neuropsychologists in the United Kingdom, have contributed to our understanding of the short and long-term effects of marathon drug facilitated dancing on cognition and mood. Valerie Curran, a psychological investigator at the University of London, has described the persistent dysphoria and mild memory impairment experienced by *ravers* during the week following their weekend of drug fueled dancing (Curran and Travill, 1997). These "mid-week lows" were significantly more severe for *Ecstasy* users who were also regular users of cocaine and methamphetamamine. Curran's work, and those of her counterparts in the United Kingdom, have highlighted the degree to which the *Ecstasy* scene has been pervaded with polydrug abuse. In Curran's study, less than two percent of her *Ecstasy* subjects were not polydrug users. An added factor, has been the surge in

popularity of the dissociative anesthetic ketamine (Dalgarno and Shewan, 1996). Known to induce strong frontal lobe effects and cognitive dysfunction (Ellison, 1995), ketamine use has increased significantly among *Ecstasy* using *ravers*. British investigators, to a far greater extent than some of their American counterparts, have been revealing the actual context of *Ecstasy* use experienced by their research subjects. Excessive use of a variety of powerful psychoactive substances, taken at all night *raves* under conditions of nutritional and sleep deprivation, were all common histories for the *Ecstasy* users recruited into the British studies (Curran, 1998). Although clearly identifying dangers to vulnerable *Ecstasy* culture youth, the investigators acknowledge that these findings tell us far less about the true neuropsychological effects of MDMA.

In the United States, two major studies concluding that MDMA induced memory impairment were published by Ricaurte's group in the late-1990s (Bolla *et al.*, 1998; McCann *et al.*, 1999). Funded by federal grants, the findings of these investigations have received considerable publicity as part of the campaign informing the public that MDMA causes brain damage in humans. Unfortunately, fundamental flaws of research methodology, both reported and unreported, have again obstructed full understanding of what actually occurred. A recurrent problem in Ricaurte's program of retrospective human MDMA research has been his difficulty in providing adequately matched controls. Data published in one study clearly show the far greater exposure of *Ecstasy* subjects to a variety of different drugs when compared to non-*Ecstasy* using controls, including five times the exposure rates to cocaine and methamphetamine, four times the exposure to PCP and twice the exposure to inhalants. What the report does not provide, however, is the extent to which these different drugs were used by subjects and controls. Given the greater probability that the subjects who had considerable histories of *Ecstasy* ingestion were also far more likely to consume greater quantities of other drugs as well, this discrepancy between the two different groups may well be far more substantial than the published data would indicate. By contrast with the hard-living polydrug using *Ecstasy* subjects, many controls in these two studies were graduate student volunteers from the local Baltimore-Washington area, a group likely to have had far less exposure to drugs and the *rave* scene. Indeed, "*ecstasy* use" may be turning

into a catchword for a collection of variables that includes the infusion of many drugs into a stressful lifestyle, rather than a characteristic defined by *ecstasy* use per se.

Other puzzling statistical manipulations have been observed in the study by Bolla *et al.* (1998). Although the investigators report that there were no significant differences on memory testing between the 24 *Ecstasy* users and the 24 controls, they nevertheless concluded that "the extent of memory impairment correlates with degree of MDMA exposure". To reach such a conclusion, however, the investigators appear to have used a data chart that was surprisingly excluded from the published report (Nelson, 1999). This ancillary data revealed that in order to demonstrate memory impairment, the subjects had to be divided into a "Control Group", which included not only all 24 controls *but also the 13 subjects with less cumulative Ecstasy use histories*, versus a "High Dose Group", which comprised the remaining 11 subjects with the greater lifetime use of *Ecstasy*. What has been so troubling about this report, published in the peer reviewed journal *Neurology*, was that neither the number of *Ecstasy* subjects in the high and low dose groups, nor the inclusion of the 13 low dose *Ecstasy* subjects into a larger control group, were mentioned in the paper. Without these vital data, it is impossible to ascertain how the published findings could have been statistically determined. Even with this knowledge, however, and in spite of well-publicized assertions to the contrary, the evidence from these studies for MDMA induced memory impairment remains highly suspect.

In late 1998, another study was published purportedly attesting to MDMA's severe dangerousness to humans. Triggering media excitement and concern around the world, the Ricaurte group announced that by means of state of the art Positron Emission Tomography (PET) scans they had identified evidence of "neural injury" in the brains of *Ecstasy* users (McCann *et al.*, 1998). Uncritically accepting his conclusions as reported in the highly regarded British journal *Lancet*, the world press followed the lead of the *Times of London*, which announced on October 30, 1998 that Ricaurte had definitively demonstrated "Proof That *Ecstasy* Damages The Brain". Under close scrutiny, however, both the methodology and data interpretation employed by this particular study appear to suffer from some of the same limitations exposed in his earlier work. Although the rapidly

progressing field of modern brain imaging techniques offers great potential to aid our understanding of MDMA's effects on the brain, including the concern over possible neural damage, this most recent contribution from the Ricaurte team once again raises more questions than it answers.

Utilizing a recently developed technique to visualize components of the serotonin neurotransmitter system, Ricaurte attempted to demonstrate abnormal findings in a group of 14 *Ecstasy* using subjects compared with a second group of 15 normal controls who had never used *Ecstasy*. Essential data characterizing these two groups, however, is missing. Although the investigators say they administered a drug-history questionnaire to their subjects, these critical results are absent from the report. No information is therefore provided addressing the critical question of polydrug abuse among *Ecstasy* users. The degree to which these subjects may have had exposure to methamphetamine, cocaine, opiates, barbiturates, hallucinogens, ketamine, PCP, cannabis, inhalants, tobacco, alcohol or other substances in addition to *Ecstasy*, does not enter into the authors' interpretation of their reported data (Erowid, 1998a). Nor is there any discussion of the polymorphous nature of *Ecstasy* itself, that in addition to being MDMA it might also constitute other drugs, including MDA, MDE, MBDB, 2CB, methamphetamine, LSD, psilocybin, ketamine, PCP or dextromethorphan. Simply put by Ricaurte, the study succeeds in demonstrating the injurious effects of MDMA on the brain serotonin system. On closer inspection of the research design employed, however, it is apparent that by choosing subjects who reported taking *Ecstasy* on an average of 228 (70–400) separate occasions, 6 (1–16) times per month for 4.6 (1.5–10.0) years, the investigators were selecting a group of unarguably heavy users of *Ecstasy*. Indeed, the average dose of presumed MDMA reportedly taken by the subjects, 386 (150–1250) milligrams, is an exceptionally large amount, approximately three times the recommended therapeutic dose. It is difficult to believe that *Ecstasy* was the only drug used in high doses by these subjects. Given these inherent problems in methodological controls, attempts to extrapolate to the occasional (or one-time) low dose MDMA treatment model remain highly problematic.

For the PET technique used by the Ricaurte group, each subject was injected with a radioactive labeled marker that selectively binds to

serotonin (5-HT) transporters (the serotonin re-uptake sites) on the axons of serotonin neurons. These transporters consist of protein structures that are embedded in the membranes of nerve endings and are part of the interneuron communication system. The key finding, reported in the study, was that MDMA users showed decreased global and regional brain serotonin transporter binding compared with controls. Reporting that decreases in serotonin transporter binding positively correlated with the extent of previous *Ecstasy* use, the authors conclude by stating that they had demonstrated "direct evidence of a decrease in a structural component of brain 5-HT neurons in human MDMA users". Closer examination of the research design and method of data interpretation employed, however, reveals serious shortcomings. First, the identified MDMA users hardly appear to have abnormally low-serotonin transporter levels at all. Looking at the data chart provided, it is clear that there is relatively little difference between the subject group and the control group. Only one of the *Ecstasy* users falls well outside the range of the rest of the subjects. Excluding that particular individual (with a reported lifetime total of 150 *Ecstasy* ingestions), all of the remaining presumed MDMA users' scores are within the same range as the non-MDMA users. As 2 of the 14 MDMA users are actually near the top of the non-MDMA user range (and above the majority of controls), confidence that these data support the findings remains lacking. Indeed, if one removes the one outlier subject and the 15 controls who had been included to weight the correlation curve, a new regression analysis reveals no statistically significant correlation between MDMA use and transporter density. The touted effect correlating low transporter and MDMA use appears to disappear altogether (Erowid, 1998b). Finally, disregard of the possibility that some subjects may have had pre-existing low transporter levels prior to initial *Ecstasy* exposure, perhaps even predisposing them to polydrug abuse to begin with, further erodes the significance of the reported findings.

Doubts have also been raised about the experimental PET approach used in the study, the [11C]-McNeil-5652 serotonin ligand, which has only recently been available to investigators. Only a handful of brain imaging researchers have had access to this developing technology, including two groups of European investigators who have commented critically on the technique used by the Ricaurte group. Professors

Kuikka and Ahonen at the Universities of Kūopio and Oulu in Finland have responded to the original article in *Lancet* that the approach used in that study raises the question of whether the reported reductions in serotonin transporter are in fact actually based on different kinetics of the non-specific radioligand [11C](–)McNeil-5652 between controls and presumed MDMA users (Kuikka and Ahonen, 1999). The other group that has raised questions about Ricaurte's PET methodology, at the University of Zurich under the leadership of Franz Vollenweider, has been at the forefront of the recent resurgence of high level European neuropsychiatric research with hallucinogens and phenethylamines, including MDMA. Having considerable experience with brain imaging and the [11C]-McNeil-5652 ligand, Vollenweider has emphasized that test-retest variability must first be assessed in order to know how stable and reliable the data actually are (Buck *et al.*, 2000; F. X. Vollenweider, pers. com.). The failure of Ricaurte and his colleagues to account for and report the test-retest variability for their technique further underscores the degree to which methodological uncertainty persists with the particular PET scanning approach used.

Finally, there remains the question of what a reduction of serotonin transporters means, if MDMA is capable of inducing such an effect. Does a decrease in measurable transporter density inevitably mean structural damage to the serotonin system? Or, might it simply be a reflection of a functional modulation (pharmacologic downregulation) in response to lower concentrations of the neurotransmitter. Neuronal systems are known to be capable of exhibiting a wide range of adaptive and compensatory responses in response to toxic effects or drug use. In recent years, the classical view of antidepressant drugs as modulators of acute synaptic events has been broadened to include long-term actions that modify neuronal function. Administration of serotonin ligands, including tricyclic and selective reuptake inhibiting antidepressants, have been shown to reduce significantly both the expression of serotonin transporter mRNA as well as the density of serotonin transporter binding sites labeled by [3H]paroxetine in the dorsal raphe nuceus in rats (Lesch *et al.*, 1993; Watanabe *et al.*, 1993; Kuroda *et al.*, 1994). Interestingly, the recreational drug cocaine has also been shown to decrease significantly the abundance of serotonin transporter mRNA (Burchett and Bannon, 1997). To buttress their contention that MDMA is a dangerous human neurotoxin, Ricaurte and his

colleagues have charged that the failure to observe severe short-term negative clinical sequelae is deceptive, and that it might take years for neuropsychiatric signs of serotonin to manifest (the "Time Bomb" theory of MDMA neurotoxicity). They introduce the example of the dopamine neurotoxin MPTP into the argument, and describe how with age the functional dopamine reserve must be progressively depleted before individuals become symptomatic with Parkinsons Disease. What they fail to acknowledge, however, is that unlike the dopamine system, which clearly declines with advancing age in humans and animals, the serotonin neurotransmitter system appears to maintain relative stability over time with significantly lesser degrees of chronological decline than the case of dopamine (McEntee and Cook, 1991). Although legitimate concerns remain that heavy *Ecstasy* users may have caused long-standing alterations in their central nervous system function by their life style and drug taking habits, the Ricaurte PET data sheds little light on the range of MDMA's effects on humans.

CURRENT STATUS

During the concluding years of the 20th Century and into the 21st Century, *Ecstasy* use has continued to spread throughout the United States and Europe. Increasing numbers of youth, at younger ages, are attending *raves* where the vast majority ingest a variety of drugs. The reliability of *Ecstasy* supplies has continued to deteriorate, highlighting the poor quality control which exists on the illicit drug market. The trend for drugs other than MDMA to be used as substitutes for *Ecstasy* has intensified, typified by a recent report from the French *rave* scene identifying that only 25% of *Ecstasy* pills analyzed by *Medicins du Monde* representatives actually contained MDMA (Inciyan, 2000). A variety of different drugs, often but not necessarily disguised as *Ecstasy*, are now in wide circulation on the youth recreational drug market, including methamphetamine, cocaine, opiates, hallucinogens, inhalants, PCP, ketamine, dextramethorphan and GHB. To fully appreciate the degree of public health risk, it is essential for investigators to acknowledge the polydrug context of *Ecstasy* culture. To mistake the cumulative consequences of multiple drug

use for the effects of MDMA alone obfuscates our understanding of this complex phenomenon.

The implications to millions of youth world-wide frequently self-administering these powerful psychoactive drugs remain unclear. Virtually all research efforts to date have been directed at establishing through laboratory animal investigations and retrospective human *Ecstasy* user models the neurotoxic dangers of MDMA. After 15 years, however, the case has yet to be made. Although long-term alterations of neuronal architecture in animals ranging from rats to non-human primates have been consistently demonstrated, the functional consequences have remained obscure. Furthermore, efforts to extrapolate evidence of MDMA induced neuropathology from retrospective examinations of heavy *Ecstasy* users have consistently manifested serious methodological flaws. Although laboratory experimentation in particular has provided fertile ground for the advancement of our knowledge of brain neurotransmitter systems, the MDMA neurotoxicity research model, media hype aside, has demonstrated limited clinical utility.

While the dangers youth expose themselves to while engaged in the activities of *Ecstasy* culture should by no means be written off lightly, more objective appraisal of risk for the long neglected low dose MDMA treatment model needs to be examined. Relying on evaluation of youth with extensive polydrug histories, extreme lifestyles and often comorbid psychopathologies to inform us of the effects of MDMA imposes an inadequate and misleading perspective. The only way to rigorously establish true risk (and safety) parameters is to utilize prospective human research models. Only by administering known quantities of pure drug in a research setting controlling for extraneous factors (including though not limited to ancillary drug use), will we be able to establish an accurate profile of MDMA's effects. In spite of the compelling need to utilize human administration research models, however, only a handful of studies have been conducted. For years, fears aroused by the publicization of neurotoxicity concerns have stalled the development of alternative research paradigms. Although a limited number of prospective investigations have been permitted, recent efforts to expand such research programs (Vollenweider *et al.*, 1998; Vollenweider *et al.*, 1999; Lieberman and Aghajanian, 1999) have come under dubious attack (Gijsman *et al.*, 1999; McCann and

Ricaurte, 2000). While clearly strong human subject protection procedures must be assured for all investigations of this sort, a process of truly objective risk assessment should allow for the cautious elaboration of these optimal research models.

With the brief and isolated exception of the Swiss psycholytic group experience ten years ago, there has been no authorized treatment since MDMA was classified as a Schedule 1 drug in the mid-1980s. The regulatory decision to allow a formal program to investigate the safety and efficacy of MDMA as a treatment modality has not as yet been reached, although there have been hopeful signs for the future. Indeed, a growing consensus is beginning to recognize the need to conduct prospective research with pharmaceutical grade MDMA on subjects who are neither denizens of *Ecstasy* culture nor severe polysubstance abusers. There is no doubt that recreational *Ecstasy* users are exposing themselves to greater and more unusual risks than were ever anticipated by the early explorers of MDMA's putative therapeutic effects (Jansen, 1998, Brody *et al.*, 1998; Harrington *et al.*, 1999). And yet, what is the genuine relevance to the clinical treatment model of such poorly controlled data collected from populations of young polydrug users who have frequented for extended periods of time the fast lane of the contemporary *rave* scene? Hopefully, the time has arrived where it will be possible to undertake sanctioned studies which will finally and honestly elucidate the true risk/benefit ratio for this misunderstood drug.

The world of contemporary *Ecstasy* use poses many dangers for our youth. Exposed to the vagaries of the underground drug trade, and misguided by the omnipotence and naivete of their age, millions of young people experimenting with today's panoply of substances have ignored their elders' admonitions of caution and have continued to pursue the activities of *Ecstasy* culture. Denied the safeguards provided to youth initiates of traditional cultures, young *ravers* in our own contemporary world continue to incur unnecessary degrees of risk (Grob and DeRios, 1992; DeRios and Grob, 1994). Clearly, new models for assessing the unique properties of MDMA, both positive and negative, are called for. The old models which have stalled the development of alternative paradigms, have also unfortunately impeded the flow of open and honest dialogue on these critical issues. The long-neglected treatment model of MDMA augmented

psychotherapy has to date neither been disproven nor proven. Particularly in patients with severe refractory conditions, including the psychological distress associated with end-stage cancer and the spectrum of chronic post-traumatic stress disorder, rigorous and well controlled research assessment of safety and efficacy deserves investigation. Utilizing thorough and comprehensive informed consent procedures, strict standards of medical ethics should be satisfied. Hopefully, the opportunity now exists to develop and implement those research models which will finally address not only the pressing public health concerns implicit within modern *Ecstasy* culture, but also the never answered questions of MDMA's potential as a therapeutic medicine.

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FAMM
Families Against Mandatory Minimums
FOUNDATION

March 9, 2001

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

Dear Mr. Courlander:

I request that I be added to the list of people presenting testimony to the Commission on March 19, 2001. My statement is attached.

Please feel free to contact me at (202) 822-6700 if you have any questions.

Thank you.

Sincerely,

Mary Price

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Families Against Mandatory Minimums
FOUNDATION

Statement of Mary Price
General Counsel
Families Against Mandatory Minimums
Submitted March 9, 2001

Families Against Mandatory Minimums (FAMM) works to end mandatory minimum sentencing laws and practices. We do so because discretionless sentencing frequently results in draconian penalties that fit neither the crime nor the offender. Over the years we have worked in Congress and before this Commission to bring you the faces and stories of people subjected to mandatory sentences (due either to statutory minimums or guideline offense levels). We have done so out of our belief that sentencing decisions should be made in light of **all the information available**, including how discretionless sentencing affects offenders whose culpability is not measured by drug quantities. Today we once again express our concern that the Commission consider its decisions in light of **all the information available**, this time about Ecstasy. This body is uniquely suited to fashion appropriate penalties, constrained only by the need to increase the existing penalties as directed by Congress. We are deeply concerned that the current proposal to increase Ecstasy penalties does not credit the many objections from the medical and scientific community that calls into doubt a number of the conclusions on which the Commission appears to be basing its decision.

Background on Proposal

Today, this commission is poised to assign new and substantially higher penalties for trafficking in Ecstasy. The proposed amendment responds to the Congressional directive to increase the base offense level for MDMA, MDA, PMA, and MDEA. It does so by amending the drug equivalency table to "make the penalties for these substances comparable to other drugs of abuse." Proposed Amendment to the Sentencing Guidelines, Proposed Amendment: Ecstasy, at 1. Congress did not direct the Commission to raise the penalty level by a given amount, or equate the drugs with a specific drug currently warranting higher penalties.

The Commission proposed originally to equalize the penalties among these drugs and then equate them with heroin, without any explanation or justification for such a remarkable increase. (For example, as originally proposed, the amended level for MDMA would add **twelve** offense levels for 100 grams of MDMA.) Publishing the proposal a mere two weeks prior to the deadline for comments, this Commission merely noted that "Ecstasy (*i.e.*, MDMA, MDEA, MDA and PMA)[1] is similar in its hallucinogenic effect on the user to mescaline, and also has been described

[1] Troubling is the fact that the Commission, *sua sponte*, has chosen to erase penalty distinctions among these drugs, which are different in significant ways and which are currently

as having an added stimulant component . . . . It has also been suggested that the drug is neither physically nor psychologically addictive." Issue for Comment.

Today, the proposal to increase penalties has been scaled back very modestly to equate 1 gram of MDMA, etc. to 500 grams of marijuana, placing the drugs on the continuum between heroin and cocaine.

In the Issue for Comment, this body listed a variety of other drugs to which Ecstasy might be compared, ranging from cocaine to mescaline. The latter drug equivalency would **actually reduce the penalties**, contrary to Congressional directive, given that at present 1 gram of MDMA is equivalent to 35 grams of marijuana while 1 gram of mescaline equals 10 grams of marijuana. It was probably the latter proposal, as appealing as it might appear in light of the Commission's conclusion that Ecstasy is similar to mescaline, that is in some sense most troubling, insofar as it reveals what appears to be a rather random approach to setting the penalty levels and drug equivalencies. We simply could not figure out how the Commission arrived at the penalty trigger it established and what about MDMA merited such a severe jump, particularly in light of the fact that the overwhelming majority of comments received on this proposal disputed the severity of the increase in light of the information provided by the commission in the Federal Register notice (*see* United States Sentencing Commission, *Public Comment Emergency Amendments, 2001 Amendment Cycle* (January 2001) (including, among others, fifteen letters from doctors, scientists and professors objecting to the original proposal).

One of the chief policy goals of the Commission is to ensure that drug penalties be commensurate with the dangers associated with particular drugs. U.S.S.C., Special Report to Congress regarding Cocaine and Federal Sentencing Policy (April, 1997). All the public comment we read in reaction to the Commission's first proposal strongly suggested that the penalties proposed were not commensurate with the dangers. We share the Commission's concern about achieving just sentencing practices. Fairness can only be achieved by considering all sides in an informed, thoughtful and considered process. Therefore, we asked the Commission, as did the National Association of Criminal Defense Lawyers (NACDL), to defer a decision on Ecstasy. The Commission granted NACDL's request for a deferment so that it could present expert testimony at this hearing.

We are very pleased that the Commission agreed to the additional time to take further testimony, because we believe the Commission has relied on interpretations of scientific studies of the effects of Ecstasy and conclusions drawn from them that are themselves the subject of

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treated distinctly under the guidelines. *See* Federal Public and Community Defenders Public Comment at 2 and n.7 (noting the current levels established based on testimony from the DEA and citing DEA, U.S. Dep't of Justice, *In the Matter of MDMA Scheduling*, Opinion and Recommended Ruling, Findings of Fact and Conclusions of Law of Administrative Law Judge 56 (Docket No. 84-48) (May 1986), discussing differences in cognitive effect between MDA and MDMA).

vigorous debate. The Commission should hear from those scientists and doctors. The scientific community does not agree about the long term neurotoxic effects of Ecstasy or other dangers attendant on its use. A number of submissions also pointed out that the public health and public safety concerns attendant on ecstasy use are much lower than for heroin and cocaine. That much is apparent from the public comments submitted by psychiatrists, physicians, pharmacologists and others published by the Commission.

Medical and Scientific Disputes

The Commission has identified, besides the congressional directive, a number of concerns that drive the proposed penalty levels. A number of the submissions from medical and scientific experts call these assertions into question. I have extracted some in order to underscore our point that there are well-founded disputes surrounding the assumptions and conclusions on which the Commission appears to be relying. In light of those disputes it seems inappropriate to increase penalty levels to such a high degree.

Below are some of the grounds cited by the Commission for increasing the penalties and extracts (nonexhuastive) from some of the submissions received by the Commission in response.

> **It 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." Proposed Amendment at 2.**

These conclusions are disputed in the comments submitted by Doug Shytle, Ph.D., of the University of South Florida, Department of Psychiatry and Behavioral Medicine. He advised the Commission by his letter of February 4:

> I am not aware of any evidence (other than chemical homology) suggesting that Ecstasy has psychological effects on the user similar to the hallucinogenic effects of mescaline. Over the past fifteen years, it has become a well-established scientific fact that MDMA fits into a completely different therapeutic class . . . . without the changes in perception in time and space that accompany most other hallucinogenic drugs. **In fact, a recent scientific study . . . reported that MDMA improved measures of sensory gating in human, an effect essentially the opposite one sees with other classic hallucinogens.** (Emphasis added).

David E. Nichols, Professor of Medicinal Chemistry and Molecular Pharmacology at Purdue University, in his letter of February 5, 2001 to the Commission, cites "extensive literature [that] clearly shows that MDMA is in no way comparable to mescaline" either by virtue of its structure, effect, or ability at high doses to produce psychosis.

> **The drug has a chemical structure similar to methamphetamine. U.S.S.C.,**

MDMA Brief Report **(February 2001) (Brief Report) at (unpaginated) 2.**

Dr. Shytle, in his letter to the Commission, wrote that while MDMA somewhat resembles methamphetamine in its stimulant qualities, it is unclear what that means in terms of health risks. He also asserts that MDMA does not have the physical or psychological addictive potential of methamphetamine, or for that matter, cocaine or heroin.

Dr. Nichols also advised the Commission that while MDMA does have some stimulant effect, it is "approximately only one-tenth that of methamphetamine."

> **In 1998 MDMA was mentioned in relationship to emergency room visits 1, 135 times, up from 626 times in 1997. Brief Report at 2, *citing* the Community Epidemiology Working Group review of Drug Abuse Warning Network (DAWN) emergency room mentions.**

This statistic appears to be incomplete or at least, not presented in context. The DAWN data for 1999 reveals that 19 percent of all emergency room visits that mentioned a drug or alcohol related cause listed alcohol; 17 percent mentioned cocaine and a mere 0.03 reported MDMA. Letter from Julie Holland, MD, Attending Psychiatrist, Bellevue Hospital, to Michael Courlander (March 3, 2001). Furthermore, a study was recently conducted by Bellevue medical emergency room physicians of hospital ecstasy cases reported to the New York Poison Control Center. There were 191 cases reported between 1993 and 1999 of which 139 cases or 73 percent were mild with little or no toxicity. Most common were reports of increased heart-rate (22 percent); agitation (19 percent) and nausea (12 percent). Only one ecstasy death was reported and that due to hyperthermia. *Id.*

> **Among the "physical and emotional hazards" . . . associated with MDMA use:**
>
> > **problems similar to those experienced by amphetamine and cocaine users . . . [and] can include muscle tension, involuntary teeth clenching, nausea, blurred vision, faintness, and chills or sweating;**
> >
> > **confusion, depression, sleep problems, anxiety, and paranoia during, and sometimes weeks after, taking the drug.**

MDMA Brief Report at 3.

Dr. Holland, Attending Psychiatrist in the emergency department at Bellevue Hospital writes that in her five years there she has routinely treated "every kind of casualty to drug and alcohol abuse imaginable: psychosis, severe depression, violence, suicide attempts, homelessness

and self-neglect. At least three-quarters of the patients I see on any given shift are exacerbating, if not causing, their psychiatric illness by using alcohol and cocaine. Less than one percent of these substance-induced psychiatric disorders are due to MDMA."

> **[f]atalities associated with MDMA . . . [from] dehydration, hyperthermia, heart or kidney failure.**

Brief Report at 3, *citing*, NIDA Notes, *Facts About MDMA (Ecstasy)*, National Institute on Drug Abuse, NIH Publication Number 99-3478 (November 1999).

Dr. Holland points out in her statement to the Commission of March 3, that DAWN data reveals that between 1994 and 1998, 2,601 people died from methamphetamine while only 27 deaths were attributed to MDMA. In 1999, 4,705 people died from heroin poisoning, while 9 people died secondary to MDMA use.

> **"Also of great concern [are] the long term effects of MDMA on serotonin sites within the brain." Brief report at 3. Distilling the NIDA Notes, the Brief Report reported that brain scan comparisons showed that MDMA users had significantly reduced numbers of serotonin transporters and that loss corresponded to greater drug use. A baboon study demonstrated actual loss of serotonin nerve endings. The researchers who conducted the baboon study compared human and non human users in memory tests finding significant impairments in visual and verbal memory. "Whether loss of these serotonin sites and the corresponding impairment are permanent is unknown at this time. However, one study involving squirrel monkeys indicates that some damage to serotonin sites persists at least seven years after exposure to the drug."**

Brief Report at 4, *citing* report published by Hatzidimetriou, G, McCann, U.D., Ricuarte, G.A. in Journal of Neuroscience 1999 Jun 15; 19(12): pp. 5096-5107.

The Criminal Division of the Department of Justice also points to concerns about brain damage, asserting without identifying the literature, that

> **scientific studies have established that MDMA is neurotoxic and destroys serotonin 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.**

Letter from Michael Horowitz, Chief of Staff, United States Department of Justice, Criminal Division. (February 9, 2001) at 2.

The neurotoxic effects of MDMA, probably the most frightening potential danger, are also

disputed in the medical community. *See* James P. O'Callaghan, Ph.D., Head, Molecular Neurotoxicology Laboratory, Centers for Disease Control and Prevention - NIOSH, *Defining Neurotoxicity: Lessons from MDMA and Other Amphetamines* (attached). He concludes that while MDMA targets the serotonin-containing neurons and may deplete serotonin, that is not synonymous with brain damage. "Despite nearly two decades of research on the neurotoxic properties of substituted amphetamines, including MDMA, no definitive data have been obtained to indicate that these compounds are in fact neurotoxic to man." O'Callaghan at 14.

Similarly, Charles S. Grob, M.D., Director of Child and Adolescent Psychiatry at Harbor-UCLA Medical Center disputes the conclusion that MDMA causes permanent brain damage. In his paper, *Deconstructing Ecstasy: the Politics of MDMA Research*, published in Addiction Research, 2000, Vol. 8, No. 6, he calls into question the conclusions of such research. Dr. Grob's paper cites flaws in research using monkey models that "neglect interspecies differences in pharmacokinetiks and drug metabolism" (at 564) and cites the ongoing "debate over the clinical relevance of the MDMA neurotoxicity data." (At 567). "A further cause for concern has been the lack of reports emerging of the long-term effects of high dose MDMA on non-human primate behavior." Noting the seven-year monkey study that showed altered serotonin sites, he wrote that it was puzzling that no information was made available about the monkey's behavior in that time period in light of the fact that "[t]he field of evolutionary biology is rich with examples of how primate research models have furthered our understanding of the relationship between altered neurotransmitter function and animal behavior." Grob at 567. He also identified other methodological irregularities in studies as well as "discrepancies between how studies were actually conducted and how there were reported in the literature." Grob at 571.

Conclusion

While this is by no means an exhaustive examination, as you can see from this short survey of the materials you have received regarding the proposed amendment, many of the conclusions presented in the Commission's brief report are disputed. FAMM does not recommend that this Commission resolve these very difficult disputes within the scientific community. Rather we ask that you recognize that the medical and scientific community are not of one mind about the dangers attendant on the use of MDMA and many in the community do not believe the drug to be as dangerous as heroin, cocaine, methamphetamine or even mescaline. In light of these deep and fundamental disagreements, we urge that you refrain from increasing penalties to such a drastic extent.

If the Commission is not convinced that penalizing MDMA at or above cocaine overstates the danger, certainly setting such a drastic penalty in light of the dearth of agreement about those dangers should promote a more moderate approach. Disputed studies and unsupported claims weave very brittle reeds on which to base such drastic increases in penalties. FAMM urges you to step back from such sweeping changes in the penalty levels given that some of the most basic assumptions on which the Commission appears to rest its decision are at best disputed, if not unsupported.

Furthermore, in light of the concerns we have expressed about how the Commission arrived at the proposed penalties we make the following recommendations:

1. Permit members of the public to attend what have heretofore been *ex parte* briefings by DEA, NIDA, and the Customs Service. In the alternative, make those briefing materials available to those of us in the public who wish to comment on proposed drug guideline amendments. Casting sunshine on this process can certainly improve it and is likely to result in a more informed public, one that can be more confident of the outcomes. Help us understand how you arrive at decisions. Why does Ecstasy warrant a place in the drug equivalency table at or near heroin and cocaine. What are the criteria you apply assigning penalty levels?

2. Actively encourage and invite experts outside the Justice Department to address the Commission when considering information beyond the expertise of this body. In this case, it appears that the Commission heard from only one side of what is appears to be a vigorous debate in the medical community over the harms posed by Ecstasy. It can only improve decisions to invite other respected voices to address questions, particularly when so much is at stake. For example, NACDL had hoped to secure an invitation from the Commission for Dr. James P. O'Callaghan, but was unable to secure one. Dr. O'Callaghan is the head of the Molecular Neurotoxicology Laboratory at the Centers for Disease Control, National Institute of Occupational Safety and Health. Dr. O'Callaghan is a leading expert on Neurotoxicology and has conducted research and written extensively on the subject of neurotoxicity and MDMA. He has concluded that no definitive data exists so far indicating that MDMA and other substituted amphetamines are neurotoxic (that is, cause brain damage) to humans. He would have addressed his remarks to the issue of serotonin neurotoxicity and brain damage and discussed his conclusions from original research on laboratory animals, that brain damage only follows massive doses of MDMA in laboratory animals and that damage does not implicate the serotonin nervous system. An invitation was necessary because he works for another federal agency. This Commission would have benefitted from his contribution.

3. Revisit drug sentencing policy in light of the concerns raised by this proposed amendment. It would be a good time to reassess criteria for assigning penalty levels and judging relative penalties for different substances.

DEFINING NEUROTOXICITY: LESSONS FROM MDMA AND OTHER AMPHETAMINES

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"This is your brain (an egg); this is your brain on drugs (egg in frying pan)." This "fried egg/fried brain"analogy has long been used to depict the adverse consequences of drug use. But just what are the neurotoxic effects of drugs used in a recreational or a therapeutic context? Clearly, in the field of MDMA research, the term "neurotoxicity" has been very broadly applied to describe the effects of the drug in both experimental animals and man. Unfortunately, there has been very little effort to define what is meant by "MDMA neurotoxicity" much less to distinguish MDMA's "neurotoxic" actions from its potential to cause neuropathological effects, i.e. effects associated with degenerative disorders of the nervous system. In short, everybody talks about drug-induced neurotoxicity but little attempt is made to define it in terms meaningful to the human condition. In this chapter I will briefly address specific aspects of the MDMA neurotoxicity issue by looking at definitions of this term, as well as some different types of effects of MDMA in animals (and humans), and I will talk about functional outcomes. I won't address dosage regimen, *per se*, but I will touch on some cross-species extrapolation issues.

Brain damage vs. neurotoxicity:

So just what is neurotoxicity in the context of the effects of MDMA use? For example, can this drug damage the brain? For that matter, just what is brain damage and can chemicals/drugs damage the brain? These all are relevant issues with respect to

understanding potential risks associated with the use of MDMA or any other agent that affects the nervous system.

When one speaks of brain damage this is usually equated with neuropathology. Thus, traumatic injury or neurological diseases such as Alzheimer's, Parkinson's, Huntington's or multiple sclerosis all have distinct neuropathological underpinnings defined by changes in brain cells viewed under a microscope (Adams and Duchen, 1992; Olanow and Lieberman, 1992). These neuroanatomical abnormalities serve as the structural (brain cell) basis for the functional deficits associated with a given condition. No one will argue that the neuropathological effects underlying the devastating symptoms associated with diseases or trauma of the nervous system do NOT constitute brain damage. Likewise, on the surface, it would seem safe to assume that acute or long-term administration of MDMA would not be linked to underlying neuropathology (brain damage) in the absence of some neurological symptoms. Unfortunately, this assumption would be erroneous on at least two counts. First, owing to the functional reserve of the nervous system, damage or even near complete destruction of a given brain area is not necessarily associated with loss of brain function. For example, in victims of Parkinson's disease, loss of upwards of 70% of the target neurons is required before characteristic symptoms emerge (Jellinger, 1987). A second consideration is the fact that damage to the putative target of MDMA, the serotonin-containing neurons, may not be obvious due to our lack of understanding as to the function of this component of the nervous system. Thus, it is possible that repeated administration of MDMA over long periods of time may result in subtle brain pathology (damage) and such damage eventually may eventually be

manifested by subtle changes in mood , appetite and sexual behavior, to name a few effects associated with the serotonergic nervous system (Meltzer, 1990; Curzon, 1990; Gorzalka et al., 1990).

When one encounters the term neurotoxicity, this usually is in reference to the effects of chemical exposures in the environment (Luthman et al., 1995) or workplace (Costa and Manzo, 1998), or with self-administration of drugs of abuse (Erinoff, 1993). The specter of chemical-induced carcinogenesis and birth defects has long dominated public perception of the hazards of exposure to specific chemicals and drugs (the "lumps and stumps" mentality). There is, however, more than ample evidence in the literature for the propensity of all classes of chemicals to damage the developing (O'Callaghan and Miller, 1989) and adult nervous system (O'Callaghan, 1993; O'Callaghan et al., 1995), as well as to cause cancer and birth defects. Viewed in these terms, neurotoxicity is synonymous with chemical-induced brain damage. This does not discount the fact that chemicals and drugs have actions on the nervous system that change its biochemistry, indeed, by design that is how drugs achieve their therapeutic actions. Yes, unwanted short to long-term changes in brain chemistry can be viewed as "neurotoxic" because these changes may represent undesired effects of the compound (ethanol would certainly fit into this definition) (O'Callaghan, et al., 1995). Viewed in these latter terms, however, neurotoxicity cannot be equated with brain damage in the absence of evidence for neuropathology. This is the crux of the arguments surrounding the effects of MDMA (see below). For the purposes of the arguments put forth here, a chemical will be considered to be neurotoxic if it causes brain damage.

Neurotoxic episodes in man have been well documented following the ingestion of tainted food (e.g. domoic acid)(Perl et al., 1990), the application of tainted acne medication (triethyltin)(Kimbrough, 1976) or the exposure to industrial solvents and metals to name a few (e.g. mercury and carbon disulfide)(Costa and Manzo, 1998). All of these incidents were associated with deaths and were linked to the neuropathological effects of the offending agent. It is not a question as to whether chemicals are neurotoxic but rather which chemicals preferentially attack the nervous system and at what exposure levels. Moreover, owing to the extreme cellular complexity of the nervous system, one cannot predict which brain area or cell type will be vulnerable to a given neurotoxic chemical or whether symptoms of exposure will be overt or hidden (see O'Callaghan, et al., 1995). Nor can one assume that the neurotoxic effects of a drug are just dose-related extensions of its pharmacology. For example, therapeutic dosages of a drug known as MK-801, an anti-seizure medication, antagonize the toxic actions of excessive levels of the neurotransmitter glutamate by blocking its receptors throughout the brain (Monaghan et al., 1989). At high dosages, MK-801 has been shown to destroy neurons in a small area of cerebral cortex, a brain region unrelated to the sites of its therapeutic actions (Fix et al., 1994; 1995). By analogy, even though the psychostimulant actions of MDMA may be mediated through the serotonergic nervous system, there is no reason, a priori, to assume that serotonergic neurons would be affected at doses that might be toxic to other brain systems (or other organs). All of this may seem confusing but the facts of the matter are dictated by our neurobiological make-up which, in turn, predicts the following: 1) chemicals/drugs can damage the brain; 2) areas of the brain that mediate the desired

pharmacological effects may not be the areas vulnerable to toxicity and 3) subtle brain damage can occur in experimental animals and in man in the absence of overt symptoms.

How do you detect subtle damage of the brain?

If one accepts the notion that chemicals can damage the brain and that damage constitutes neurotoxicity, then all that is needed to assess neurotoxicity are the appropriate techniques. As with the evaluation of traumatized or diseased brains, neuroanatomical methods have remained the dominant means for detection and characterization of neurotoxicity (see O'Callaghan et al., 1995). Where cells are killed outright by the offending agent, it is possible to visualize the damaged areas with tissue stains that have been in common usage for more than a century. Of course, under these circumstances, the functional deficits associated with the loss of cells already may have provided the clues to point to a neurotoxic exposure. This situation is unlikely to describe the real-world situation. Here, the greatest concern is directed toward detecting and preventing the cumulative damage that occurs following protracted exposures to chemicals or drugs whose damage is not detected using traditional neuroanatomical stains. Examples would be drugs or chemicals that kill only a few cells, where the surviving cells would be in far greater numbers than those that were destroyed (i.e. like looking for the "needle in the haystack"). Perhaps an even more likely situation would be chemical destruction of parts of neurons with sparing of the nerve cell itself. This is the case put forth for MDMA neurotoxicity (see below). Under both of these scenarios, the selective and discrete nature of neurotoxic effects dictates the need for special

techniques/indicators to identify cells damaged (but not necessarily killed) by a given neurotoxic agent (O'Callaghan and Jensen, 1992). This is not an easy task because, as mentioned above, while the targets of neurotoxic insults may be limited to a very small area of the nervous system, any area of the nervous system may be affected. For the small drop of damaged brain to be detected within the sea of unaffected tissue, requires an indicator of neurotoxicity that possess several features, as follows: 1) it must reveal diverse types of injuries to any area of the nervous system, 2) it must be sensitive to low levels of damage, 3) it must be specific to the damage (neurotoxic) condition so that therapeutic effects of drugs are not scored positive. Succinctly stated, the ideal neurotoxicity endpoint would be an indicator of damage at any level anywhere in the nervous system that would not pick up therapeutic actions of drugs (O'Callaghan et al., 1995).

The propensity of the damaged brain to cause enlargement of a specific cell type known as the astrocyte and for damaged neurons to become impregnated with silver (argyrophilia) are two of only a handful of generic indicators of brain damage, regardless of the causative agent (O'Callaghan, 1993; O'Callaghan and Jensen, 1992). Astrocyte enlargement, known as astrogliosis, refers to the reaction of this brain cell type to all types of brain injury (O'Callaghan, 1993). The hallmark of this response is the accumulation of a protein within astrocytes known as glial fibrillary acidic protein (GFAP). Increases in GFAP, therefore, serve as an indicator of astrogliosis and, by extension, of neurotoxicity. Increased GFAP expression can be examined in slides of brain tissue with antibodies that recognize this protein. Alternatively GFAP levels in

samples of brain tissue can be measured by sensitive immunoassays. Elevations in GFAP are already widely accepted as indicators of brain damage associated with neurological diseases such as Alzheimer's and multiple sclerosis. More recently, enhanced expression of GFAP has been validated as an indicator of neurotoxicity by using a wide variety of prototype chemical neurotoxicants (O'Callaghan, 1993; O'Callaghan, et al., 1995). These include agents that damage many regions of the brain and many different cell types within a brain region, as would be expected to occur under "real-world" conditions. Moreover, increases in GFAP reveal subtle damage to neurons, such as loss of nerve endings, under conditions where traditional neuropathological stains fail to reveal the damage. Importantly, GFAP levels do not change with pharmacological agents administered at therapeutic dosages. Thus, GFAP assessments fulfill the desired requirements for an indicator of neurotoxicity.

As with the increases in GFAP associated with chemical-induced neurotoxicity, staining of brain cells with special silver degeneration stains can be used to show regions and cell types damaged by neurotoxic exposures (O'Callaghan and Jensen, 1992). Silver stains are not as extensively validated as GFAP as indicators of neurotoxicity. Where silver stains have been used, however, they show at least equal sensitivity to GFAP, they reveal sites of damage in the absence of overt cytopathology as assessed by traditional neuroanatomical methods and drug effects do not screen positive. When analysis of GFAP is coupled with mapping of argyrophila using silver stains, there is a remarkable correspondence between the regional and cellular patterns of neuroxicity revealed by the two techniques. Thus, it is likely that the two approaches to neurotoxicity assessment

represent specific and sensitive methods for the assessment of all types of neurotoxic exposures.

What is serotonin neurotoxicity?

In light of the points made above, it would seem sensible to apply GFAP assays and silver degeneration stains to determine whether MDMA is neurotoxic. This has been done in a number of laboratories and I will elaborate on some of the findings below. First, however, it is useful to review the context within which MDMA is considered to be neurotoxic. In almost all studies using experimental animals and humans, MDMA is described as a serotonin neurotoxin (see McKenna and Peroutka, 1990; Steele et al., 1994; Green et al., 1995). What does this mean? Serotonin neurotoxicity implies that MDMA damages the serotonergic nervous system. Because MDMA was known to release serotonin from the nerve endings of serotonin containing neurons in experimental animals, these serotonergic neurons were viewed as the presumed targets of any neurotoxic effects of the drug. Indeed, subsequent measurements of serotonin levels after administration of high dosages of MDMA to rats showed weeks-long decreases in this neurotransmitter. Further, measurements of the enzyme that catalyzes the synthesis of serotonin (tryptophan hydroxylase) and of the protein that transports the released serotonin back into the nerve endings (serotonin transporter) also showed reductions as a result of high doses of MDMA. Because these three constituents of serotonin nerve endings all were reduced for long periods of time (weeks to even months) as a result of

large doses of MDMA, these changes were viewed as evidence of serotonin neurotoxicty, i.e. MDMA-induced brain damage (see reviews by, McKenna and Peroutka, 1990; Steele et al., 1994; Green et al., 1995; Sprague, et al., 1998). There is little argument that the protracted decreases in the constituents of serotonergic neurons resulting from the acute or chronic administration of MDMA are not drug-like (subjective) actions of the compound that serve as the basis for its self-administration. Moreover, the persistent nature of the decreases in these serotonergic endpoints could be considered manifestations of toxicity, at least at a metabolic level within serotonergic neurons. Over the past decade, however, there has been broad recognition of the malleability of the adult nervous system. This "plasticity" certainly extends to the serotonergic nervous system and to its components affected by MDMA. For example, it is now known that treatment with antidepressants such as paroxetine or fluoxetine can decrease the serotonin transporter (Piñeyro et al., 1994) as can a condition that does not even involve exposure to a drug: a food restriction diet (Huether et al., 1997). Pharmacotherapy with antidepressants such as fluoxetine (Prozac®) or dieting is not conditions one often associates with neurotoxicity. Because MDMA and Prozac share the propensity to decrease the serotonin transporter suggests that MDMA can be viewed as much as an antidepressant agent as a "serotonin neurotoxin." Taken together, these observations indicate that changes (even long-term changes) in markers of serotonergic neurons are likely a reflection of neuronal plasticity, i.e. adaptive changes that occur in response to drug therapy in an otherwise intact neuron. Thus, alterations in parameters associated with the functioning of serotonin neurons can not be taken as evidence of neurotoxicity, in the absence of evidence for serotonin neuron pathology. Not only are such "markers"

of serotonergic neurons not useful as stand-alone measures of neurotoxicity, it also is quite likely that current pharmacotherapies may induce changes in these markers and that such changes would be the expected effects of the long-term therapeutic actions of these drugs.

Application of silver stains and GFAP analysis for the assessment of MDMA-induced neurotoxicity

As noted above, one way to resolve the controversy as to whether MDMA is neurotoxic to serotonin neurons would be to use sensitive and selective indicators of neurotoxicity such as silver stains and GFAP analysis (O'Callaghan and Jensen, 1992). When a dose of MDMA (20 mg/kg) that caused 50% decreases in brain serotonin was administered to the rat, it failed to increase GFAP or result in silver staining at any time point after dosing (O'Callaghan and Miller, 1993). Daily dosages of up to 30 mg/kg for a week also did not increase GFAP (O'Callaghan and Miller, 1993). Only when given at fairly enormous dosages to the rat (4 x 50 mg/kg over 24 hours) was evidence of damage obtained (O'Callaghan and Miller, 1993). Even under these circumstances, however, increases in GFAP and silver staining were observed in the cortex but the damaged areas were not those associated with serotonin neurons (O'Callaghan and Miller, 1993; Jensen et al., 1993). These findings indicated that only massive doses of MDMA can cause damage to the brain of the rat and that the damage that occurs is not related to the serotonin nervous system. The implication of these findings is two-fold: 1) changes in markers of serotonin neurons can occur independent of damage to these neurons and 2) large doses of MDMA are required to damage the nervous system of the rat, approximately 100 times the human dosage taken in a recreational context.

One easy explanation for the failure to see damage to serotonin neurons after MDMA, as assessed by assaying GFAP or using silver stains, was that the techniques were not sensitive enough. To address this issue, the known serotonin neurotoxin, 5,7-dihydroxytryptamine, was administered to the rat at a dosage that produced decreases of serotonin equivalent to those seen with MDMA. This resulted in large increases in GFAP (40-100%) in the areas of the brain where serotonin was decreased and these effects were accompanied by silver staining (O'Callaghan and Miller, 1993). These findings indicate the sensitivity of GFAP and silver staining as indices of chemical-induced damage to serotonin neurons. Thus, hallmarks of brain damage occur after damage to serotonin neurons but are absent following administration of very high dosages of MDMA.

Lessons from other compounds and from man.

Lessons learned using experimental animals don't always apply to man, therefore, the absence of evidence (negative data) cited above is not evidence for absence of neurotoxic effects of MDMA in man. In no small measure this often is why sub-human primates are used in an attempt to model more closely the effects presumed to occur in humans. Unfortunately, different species of sub-human primates also provide different responses to drugs, including MDMA (compare Ricaurte et al., 1988 with Insel et al., 1989). There are, however, lessons that can be learned from human exposures to other compounds that can be applied to MDMA. These compounds are 1-methyl-4-phenyl-1,2,3,6-

tetrahydropyridine (MPTP), methamphetamine and dexfenfluramine. In the early 1980's a group of individuals self-administered what they assumed was an analogue of meperidine (a synthetic narcotic). The compound administered turned out to be MPTP, an unintended contaminant that had devastating consequences: many of the individuals exposed to MPTP developed symptoms of Parkinson's disease (see review by Sayre, 1989). Subsequent research clearly demonstrated that MPTP damaged dopamine-containing neurons, the same ones affected in Parkinson's disease. The MPTP episode raised the specter that similar damage would occur in another cohort of humans, methamphetamine users, because methamphetamine acts on the same dopamine neurons damaged by MPTP and Parkinson's disease. Given the widespread usage of methamphetamine in the 1960's and 1970's, the potential for this drug to have damaged dopamine neurons should now be manifested with age, as is the case for Parkinson's disease (Langston et al., 1992). Because the prevalence of Parkinson's disease has not increased over the intervening decades suggests that methamphetamine is unlikely to have had a neurotoxic effect on human dopamine neurons. A recent study of humans exposed to methamphetamine (Wilson et al., 1996) bears more directly on this issue and provides data more relevant to human MDMA users. This study involved post-mortem examination of brains from verified methamphetamine users. Marked decreases in markers of dopamine neurons were found in these brains including, dopamine, the enzyme that catalyzes its formation (tyrosine hydroxylase) and the dopamine transporter. If the decreases in these markers were a reflection of damage to dopamine neurons, then this would have been manifested as symptoms of Parkinson's disease prior to death. None of these individuals had such symptoms. Thus, as was the case for markers of

serotonin neurons in rats (and, recently, humans) exposed to MDMA (McCann et al., 1998), the data for dopamine markers in human methamphetamine users was indicative of an adaptive change in response to the drug rather than a neurotoxic action on the neuron. The anorectic agent, dexfenfluramine, is the final example of a human exposure relevant to MDMA. Although this compound recently was taken off the market due to reports of abnormal heart function, it was also the subject of a controversy involving neurotoxicity (e.g. see McCann, et al., 1997). This stems from the fact that in rats, MDMA and dexfenfluramine have nearly identical actions on serotonin neurons (e.g. see Zaczek et al., 1990). As a consequence, dexfenfluramine, like MDMA, became a suspect "serotonin neurotoxin (e.g. see McCann et al., 1997)." Unlike MDMA, dexfenfluramine or its racemate, fenfluramine, have been taken by millions of patients worldwide for 20 years. Extensive post-marketing patient surveillance has yet to reveal any effects of dexfenfluramine that can be linked to adverse effects on the nervous system (e.g. see Guy-Grand et al., 1989). The above data for human exposures to methamphetamine and fenfluramine are consistent with results of research on these agents using experimental animals. They indicate that these drugs have the potential to alter biochemical markers of dopamine and serotonin neurons without causing neurotoxicity. Given the similarities between the effects of these compounds and MDMA, it is likely that we can infer that MDMA shares similar actions in man.

Despite nearly two decades of research on the neurotoxic properties of substituted amphetamines, including MDMA, no definitive data have been obtained to indicate that these compounds are in fact neurotoxic to man. This interpretation of existing data does

not constitute an endorsement of the recreational or therapeutic use of these compounds. Rather, it is a call for continued research on the adaptive responses that these compounds engender in their target neurons. If we are to understand the potential for these drugs to cause neurotoxicity, then we must understand the significance of their long-term effects in relation to their potential to damage the nervous system.

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Statement by

WILLIAM D McCOLL
DIRECTOR OF LEGISLATIVE AFFAIRS
THE LINDESMITH CENTER - DRUG POLICY FOUNDATION
WASHINGTON, D.C.

before the
UNITED STATES SENTENCING COMMISSION

March 19, 2001

Thank you for inviting The Lindesmith Center - Drug Policy Foundation to participate in today's hearing on the issue of appropriate sentencing guidelines for MDMA. The Lindesmith Center - Drug Policy Foundation believes increasing MDMA penalties is unwarranted given the standards that the Commission uses when designing new sentencing schemes, such as incorporating the proper purposes of sentencing and providing certainty and fairness. Steeper penalties will do nothing to provide non-violent drug offenders with the rehabilitation necessary to weave them back into the social fabric and such sentences only further sever their ties to their communities and families. Since most MDMA offenders are non-violent, incapacitation of offenders has no impact on violent crime. Additionally, increased penalties will be neither a deterrent nor a just punishment. Despite tough drug laws, drugs have been getting cheaper and purer over the last couple of decades. In addition, steeper penalties will be out of line with the medical community's views on MDMA. Tougher MDMA laws will also not bring more certainty and fairness to the criminal justice system. History has shown that the brunt of harsh drug laws falls heavily on low-level drug offenders, especially the poor and people of color, while higher-level offenders, whites, and people of means bargain their way out of stiff penalties.

The Commission should be careful to base its final decision regarding MDMA on science, not political pressure. The Comprehensive Crime Control Act of 1984 charges the U.S. Sentencing Commission with ensuring fairness in the criminal justice system, guaranteeing that punishments fit the crime, making sure that various sentencing structures don't create disparities within the criminal justice system, and guiding Congress in the establishment of rational sentencing policies. The Lindesmith Center - Drug Policy Foundation believes that the Commission will find that, upon examination of all the evidence, increases in MDMA penalties are unnecessary and will only undermine community efforts to reduce various harms associated with MDMA abuse.

In February The Lindesmith Center - Drug Policy Foundation, in partnership with the San Francisco Medical Society, held a national conference to examine and discuss the current medical and sociological research regarding MDMA. Entitled *The State of Ecstasy: the Medicine, Science and Culture of MDMA*, the conference attracted over 300 doctors, sociologists, activists, and policy makers, while another 1,300 viewed the conference via our web site. Covering such issues as the current scientific research on the benefits and dangers associated with MDMA, the sociological and cultural impact of the drug on America, the future direction of MDMA medical research, and evolving policy issues, the conference was the most comprehensive conference on MDMA in the United States. Speakers included Marsha Rosenbaum, director of our West Coast office, former NIDA-funded researcher for 18 years, and the lead researcher on the first federally funded sociological study on MDMA; and some of our country's leading MDMA scientific researchers including, FDA Pharmacologist, Dr. Katherine Bonson; UCLA director of Child and Adolescent Psychiatry, Dr. Charles Grob; and NIDA researcher/ John Hopkins neurobiologist, Dr. George Ricaurte. As a result of the conference, The Lindesmith Center - Drug Policy Foundation is in a unique position to report to the Commission on the latest medical and sociological research regarding MDMA.

The Lindesmith Center - Drug Policy Foundation shares the desire of Congress and the Sentencing Commission of reducing the demand for MDMA. Severe sentencing increases, however, have not proven effective in controlling the use of MDMA. Indeed as the government has been waging a war on MDMA use since the mid-80s, MDMA has gone from a relatively unknown drug with limited use to a widely used drug that is available across the country today. Harsh new sentences will not change this record of failure. Additionally, penalty increases are likely to have serious unintended consequences including: creating a more competitive MDMA black market that will spawn more prohibition-related violence; subjecting more non-violent Americans to long prison sentences, further expanding our bulging two-million inmates prison system; and increasing the number of adulterated MDMA pills sold to unsuspecting consumers, further endangering the lives of Americans who use MDMA.

One major consequence of steeper MDMA sentences that needs to be considered before making any decision is the risk of more counterfeit substances being sold as MDMA (so sellers can meet the demand for MDMA without risking the harsh MDMA sentences). Many, if not all, of the problems attributed to MDMA stem not from MDMA itself, but from the use of counterfeit drugs sold to unsuspecting buyers as MDMA.

Just one example is a rave of more than 5,000 people in Oakland, California last fall, where nine people were sent to the hospital by ambulance for complications arising after they took what they believed to be MDMA. Tests after the fact determined that eight of the nine users had taken pills that weren't even MDMA. DanceSafe, a national, youth-oriented harm-reduction organization, has found that 40% of MDMA pills sent to them to be tested for composition are substances other than MDMA. As many as 20% of the MDMA pills they test at raves contain drugs other than just MDMA.

Common adulterants include caffeine, cocaine, speed and various over-the-counter drugs. Other drugs, such as PCP and ketamine, are commonly and fraudulently sold to users as MDMA. One of the most harmful adulterants (and what eight of the nine Oakland ravers actually took) is DXM (dextromethrorphan), a cheap cough suppressant that can produce hallucinations when taken in a concentrated form. DXM inhibits sweating and when coupled with dehydrating activity, such as dancing, can cause heatstroke. Another dangerous drug often fraudulently sold as MDMA is PMA (paramethoxyamphetamine), an illegal drug that is vastly more potent and hypothermic than 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

The proposed sentencing increases are also unwarranted given both the nature of MDMA and the current scientific evidence regarding its use and problems associated with it. Despite ample evidence supporting the therapeutic use of MDMA, the evidence regarding possible negative consequences of its use is mixed. Before MDMA was banned in 1987, therapists and psychiatrists around the country used MDMA-assisted psychotherapy to help thousands of patients suffering from terminal illness, trauma, marital difficulties, drug addiction, phobias, and other disorders. Medical professionals reported lasting improvements in patients' self-esteem, their ability to communicate with loved ones, their capacity for reaching empathic rapport, and their capacity for trust and intimacy. A recent study on the therapeutic benefits of MDMA found that half of psychiatrists with personal past histories involving MDMA reported long-term improvement in social and interpersonal functioning. 85% had increased ability to be open with others, 65% had decreased fear, and 50% had increased awareness of emotions and reduced aggression.

A Swiss study of patients being treated with MDMA from 1988 to 1993 found 90.9% had

improved clinical status as a result of MDMA-assisted treatment, while only 2.5% appeared to have clinically "deteriorated." The Swiss-MDMA patients also were shown to have significantly reduced their use of nicotine, alcohol, and marijuana in the years following their MDMA treatment, and significant improvements were found in their self-acceptance, autonomy, and overall quality of life. In Spain, medical professionals are conducting a study on the use of MDMA to treat rape victims with Post-Traumatic Stress Disorders. In the U.S., the Harbor-UCLA Medical Center is conducting research on the use of MDMA to treat patients whose end-stage cancer produces depression, anxiety, alienation and pain that cannot be eased with conventional therapies.

Despite legal barriers, thousands of Americans use MDMA for therapeutic treatment, personal or spiritual growth, and relief of emotional pain. Just one example is the case of Sue and Shane Stevens who used MDMA illegally in 1997 to come to terms with Shane's debilitating cancer and ease the emotional suffering of Shane's pending death. Such self-administered therapeutic use of MDMA is common. The overwhelming scientific evidence in support of the use of MDMA in treating certain patients is why doctors and therapists vigorously fought re-scheduling MDMA as a Schedule I drug in 1987, and why a DEA administrative judge studying the merits concluded that MDMA should be scheduled as a Schedule III instead. Unfortunately, DEA officials (and later Congress) chose to overrule the medical community and the DEA's own administrative judge by scheduling MDMA as a Schedule I drug, greatly curtailing legal medical use and research.

While a large body of scientific evidence shows that MDMA offers certain users important therapeutic benefits, scientific evidence on the drug's negative effects is mixed at best. Although a body of research, primarily conducted by Dr. George Ricaurte with funding from the U.S. government, suggests that MDMA may pose long-term risks to

users, the evidence is inconclusive, and many medical professionals disagree with Ricaurte's conclusions. Heavily cited research on MDMA's possible effects on memory and cognitive skills suffer from serious methodological shortcomings, including failing to control for polydrug use, level of drug use, and other variables, as well as failing to construct an ample control group. Medical professionals still do not understand the exact impact of MDMA on aspects of serotonin neuronal architecture, such as the axonal projections. While scientists are in agreement that there is no evidence that MDMA's effects on axonal projections causes any functional changes, there is disagreement as to what the long-term effects of MDMA could be in this area. Other harms associated with MDMA use, such as temporary changes in body temperatures, are confounded by MDMA prohibition which floods the MDMA market with adulterated MDMA and also makes the establishment of harm reduction programs more difficult.

None of this is to suggest that there are no risks associated with the use of MDMA or that there are no possible long-term negative effects to its use, only that there is still much that we don't know about MDMA. Not only would increasing MDMA-related penalties further jeopardize medical research and its therapeutic use, it also risks giving MDMA offenders harsh sentences out of line with the actual dangers associated with the drug.

The Commission should also be concerned about the effects increased MDMA penalties could have on our criminal justice system. 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 any final decision. Since 1984, Congress has enacted a series of mandatory minimum sentencing penalties and other harsh sentencing structures designed to stem the trade in illegal drugs. Nonetheless, drugs are cheaper, purer, and easier to get than ever, and the illegal drug market is the strongest it has ever been. Incarceration, however, has

Since the government targets the "rave" culture in its fight against MDMA (even though most MDMA use occurs outside of raves), harsher MDMA penalties will result in more low-level, non-violent youths receiving very long prison sentences. The effects of harsher MDMA penalties on young Americans will be similar to the effects of harsh crack-cocaine penalties which, because law-enforcement officers typically target visible inner city youths for arrests, results in a disproportionate number of young, nonviolent black men being incarcerated for extraordinary long prison terms. Additionally, tough new MDMA penalties will bring punitive federal drug laws to communities currently unaccustomed to having the lives of their sons and daughters ruined by long prison terms for non-violent offenses.

One example of what the future of harsh MDMA policies could hold for communities unaccustomed to the injustices of harsh sentencing schemes is the case of Kenneth Gregorio. Kenneth was a 23 year-old New Jersey college student arrested late last year under New Jersey's new MDMA law, which makes penalties for possessing, selling or manufacturing MDMA comparable to cocaine and heroin. This young college student hanged himself in jail after learning that he faced up to twenty years in prison for his first time distribution offense. His family and community were stunned by both his death and the lengthy sentence he faced.

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. While the MDMA black market has traditionally been composed of relatively peaceful actors, tough federal penalties could drive these actors out, leaving the market to violent criminals. The consequences to those that come in contact with the MDMA market, as well as society in

general, should be obvious.

MDMA sentencing increases have not and will not prove effective in controlling the use of MDMA. Steeper penalties will not only be ineffective, they are unwarranted given the nature of MDMA and what the medical community believes to be the benefits and risks associated with the drug. New increases also produce unintended consequences that will multiply the dangers associated with the use of MDMA and its trade.

In contrast, community leaders are trying more effective approaches to reducing the harms associated with MDMA use. Peer educators are working to educate their peers on the dangers of MDMA, prolonged dancing while on MDMA, and the dangers of polydrug use; and harm-reduction organizations are providing valuable education materials and testing services that protect users from adulterated MDMA pills or other drugs, such as LSD or cocaine, masquerading as MDMA. Unfortunately, new federal penalties will scare many Americans away from seeking help from educators and health care officials. The new penalties will also make harm reduction programs even more difficult. For this reason, and many others, the proposed sentencing increases will be a step backwards in the fight to deal with the harms associated with MDMA abuse.

The Lindesmith Center - Drug Policy Foundation recommends that the Commission take into account the fact that MDMA is sold in a capsule/pill form, increasing the weight of the MDMA. Thus, potential increases in MDMA penalties may overestimates the actual MDMA dose amount that an offender will be punished for. Any increase in MDMA-related penalties should take the extra weight of the capsule into account and the penalties should be discounted accordingly.

The Lindesmith Center - Drug Policy Foundation believes that the prudent course of

action is to not increase MDMA penalties and not risk subjecting more non-violent drug offenders, a number of whom are likely to be to quite young, to long prison sentences that will be out of line with the known medical dangers associated with MDMA use. In addition, long experience with drug addiction has shown that there is little or no deterrent value to increasing sentences. It is our strong belief that if the government wants to solve the problem of MDMA abuse facing our nation, the solution should be rooted in science and in the interest of public health, rather than harsh, ineffective sentencing schemes.

The Lindesmith Center - Drug Policy Foundation is the leading independent drug policy institute in the United States. The guiding principle of the center is harm reduction, an alternative approach to drug policy and treatment that focuses on minimizing the adverse effects of both drug use and drug prohibition. Lindesmith Center - DPF and its affiliated organizations promote drug policies based on common sense, science, public health and human rights. These include redirecting government drug control resources from criminal justice and interdiction to public health and education; supporting public health measures, notably syringe exchange and other harm reduction programs, to reduce HIV/AIDS, hepatitis and other infectious diseases; making methadone maintenance and other effective drug treatment more accessible and available; repealing mandatory minimum sentences for non-violent drug offenses; and ending racially discriminatory drug policies and enforcement measures.

March 9, 2001

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

Dear Mr. Courlander:

I request that I be added to the list of people presenting testimony to the Commission on March 19, 2001. My statement is attached.

Thank you.

Sincerely,

Julie Holland MD

Julie Holland, MD

STATEMENT OF JULIE HOLLAND, M.D.

March 3, 2001

Judge Murphy, Ladies and Gentlemen of the Commission:

Good morning, and thank you for the opportunity to speak here this morning.

I am a psychiatrist who works in the psychiatric emergency room of Bellevue Hospital in New York City. For the past five years, I have worked nearly every Saturday night and Sunday night on what can only be called the "front line" of mental illness. I have witnessed every kind of casualty to drug and alcohol use imaginable: psychosis, severe depression, violence, suicide attempts, homelessness and self-neglect. At least three quarters of the patients I see on any given shift are exacerbating, if not causing, their psychiatric illness by using alcohol and cocaine. Less than one percent of these substance-induced psychiatric disorders are due to MDMA.

I have made it clear to my colleagues and the doctors I train that I am particularly interested in MDMA-related psychiatric cases, as I am editing a book on MDMA, and yet I have heard of only three of these cases in the past two years. Eleven percent of high school seniors in 2000 reported taking MDMA in their lifetimes; the national household survey reported that 1.4 million people between the ages of 18 and 25 have taken it as well. Given the recent popularity of MDMA, it is important and encouraging to note that the medical and psychiatric emergency rooms are not overrun with "ecstasy casualties" as one might expect. According to the Drug Abuse Warning Network data, in 1999, 19 percent of all emergency room visits which mentioned a drug or alcohol-related cause listed alcohol as the reason for the visit. Seventeen percent of drug-related visits were due to cocaine. MDMA was reported 0.3 percent of the time.

Not only are MDMA related cases a small percentage of all drug-related emergency room visits, but a large percentage of these cases are not life-threatening. The most common adverse effects from acute MDMA intoxication are anxiety or panic reactions. Also common among frequent or higher dose users is a transient depression several days after ecstasy ingestion. More serious psychiatric consequences from ecstasy use are quite rare and may represent underlying predisposition to psychiatric illness. In a recent study conducted by the physicians at the medical emergency room of Bellevue, (Rella, Int J Med Toxicol 2000; 3(5): 28) a retrospective analysis of regional hospital ecstasy cases phoned into the New York City poison control center were analyzed. There were 191 cases reported during the years 1993 to 1999 inclusive. 139 cases (73%) were mild and experienced minor or no toxicity. The most commonly reported symptoms were increased heart rate (22%), agitation (19%), and nausea and vomiting (12%). In these seven years, only one ecstasy-related death was reported, which was due to hyperthermia.

Contrast MDMA-associated morbidity and mortality with methamphetamine, for example. According to the Drug Abuse Warning Network data, in the five years between 1994 and 1998, inclusive, there were 2,601 deaths reported secondary to methamphetamine. During that same time period, only 27 deaths were attributed to MDMA. In 1999, there were 4,705 deaths recorded attributed to heroin intoxication. In 1999, 9 people died secondary to ecstasy use. Ecstasy is simply not the "killer drug" the media would like us to believe.

MDMA is less likely to cause violence than alcohol, less addictive than cocaine or tobacco, and less deadly than heroin. It is also less deadly than tobacco or alcohol, killing 400,000 and 110,000 Americans respectively each year. In 1999, heroin was the top reported drug in drug-related deaths in fourteen metropolitan areas, and ranked second in another nine. Heroin and cocaine ranked first and second when a drug was attributed directly to causing death. MDMA death statistics are so small, they do not even make the list.

As a psychiatrist, I am particularly interested in the potential therapeutic effects of MDMA. Please remember that before ecstasy became an illicit drug, it was used by psychiatrists and psychotherapists as a catalyst to enhance the efficiency and outcome of psychotherapy sessions. Thousands of people underwent MDMA-assisted psychotherapy sessions in the nineteen seventies and eighties without medical complications. I would also like to remind the commission that after the DEA's administrative law judge Francis Young heard testimony from 34 witnesses at three separate hearings, he handed down a decision in 1986 recommending that MDMA be placed in Schedule III, as he believed it did have medicinal value and less potential for abuse than drugs in Schedule I such as heroin.

Based on what I have learned over the last fifteen years, it is my belief that MDMA can be used safely when in a supervised setting. Clinical research studies utilizing MDMA have been conducted with minimal adverse effects, supporting the notion that a therapeutic dose of MDMA is not intrinsically dangerous. The context and the manner in which the drug is used contributes substantially to the risks of its use. Hyperthermia, by far the most

serious acute complication of ecstasy use, is only brought about when a person engages in vigorous activity in an overheated environment without adequately replenishing lost body fluids. In a clinically controlled setting, MDMA-induced hyperthermia has never been reported.

MDMA is a unique drug. Those experts who are most familiar with its subjective effects feel that it deserves its own drug category. It is not a hallucinogen and should not be grouped with LSD; MDMA does not cause hallucinations, there is minimal sensory or time distortion as is seen with hallucinogen intoxication. MDMA also it is not a simple stimulant to be equated with methamphetamine. MDMA has significantly less stimulant potency than methamphetamine, on the order of one tenth, also its pharmacological mechanism of action is substantially different. Patterns of chronic use and dependence seen with methamphetamine are not seen with MDMA.

I understand that initially the commission proposed that penalties for MDMA be aligned with those for heroin. MDMA should in no way be equated with heroin. First of all, there are roughly two hundred doses of heroin in a gram, as opposed to eight doses in a gram of MDMA. (A typical dose of heroin is roughly 5 mg, as compared with 125 mg of MDMA.) Secondly, there is a much higher potential for physical dependence and addiction with repeated heroin use, and there is a withdrawal syndrome which typically requires medical intervention. While tolerance to MDMA has been demonstrated, there is no withdrawal syndrome, and physically addicted laboratory animals or individuals have not been reported in the literature. There are those who use ecstasy compulsively which does reflect some psychological dependence, but these are the vast minority of users. Repeated use of MDMA results in less desired effects over time, so there is a built in limiter to chronic use. Also consider the route of administration. While heroin is typically injected, leading to potential bacterial and fungal infections as well as increasing the spread of HIV and hepatitis in those who share needles, MDMA is taken orally with no associated collateral infections. The biggest difference between heroin and MDMA is the therapeutic index, or margin of safety. Overdosing on heroin will consistently cause respiratory depression and death.

MDMA also should not be equated with cocaine, whether inpowder or base form. The bulk of the patients I see in the psychiatric emergency room are either psychotic from chronic cocaine use or severely depressed and suicidal from withdrawal. These people have frequently spent every penny they have on buying more and more cocaine, and are typically unemployed and homeless as a result. Although there are clearly many people who are taking too large a dose of ecstasy too frequently, they are not simply not anywhere near the dire situation of these cocaine or heroin addicts .

It is my firm belief that people who are abusing drugs need to be educated and treated within the health care system. Behavioral change and improved self-care will not result from incarceration. Also, please consider this: unintended public health consequences from stiffer penalties will increase the likelihood of drug substitutes flooding the market, which will increase the potential risk from drugs which are more likely to cause hyperthermia and death, alone, or in combination with MDMA, such as dextromethorphan and paramethoxyamphetamine.

The penalties for MDMA possession or distribution should reflect the danger of MDMA and the potential damage to people's lives that it can cause. I see alcoholics and crack cocaine addicts every time I go to work. The psychiatric and medical emergency rooms are overrun with these casualties. I do not see people whose lives have been ruined by MDMA. I would respectfully request that the commission reconsider their proposal to increase the penalties associated with MDMA.

Thank you for your consideration in this important matter.

Julie Holland, MD

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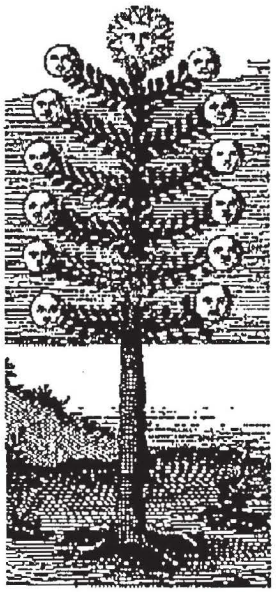
JOURNAL OF COGNITIVE LIBERTIES

RICHARD GLEN BOIRE, ESQ.
EXECUTIVE DIRECTOR



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TESTIMONY OF RICHARD GLEN BOIRE, ESQ. BEFORE THE UNITED STATES SENTENCING COMMISSION

on the topic of

THE PROPOSED AMENDMENT TO INCREASE GUIDELINES SENTENCES CONCERNING MDMA (ECSTASY)

INTRODUCTION

I am Richard Glen Boire, an attorney and director of the ALCHEMIND SOCIETY: THE INTERNATIONAL ASSOCIATION FOR COGNITIVE LIBERTY.

THE ALCHEMIND SOCIETY is a nonprofit, nonpartisan 501(c)(3) public education organization which seeks to foster cognitive liberty — the basic human right to unrestrained independent thinking, including the right to control one's own mental processes and to experience the full spectrum of possible thought. We operate the CENTER FOR COGNITIVE LIBERTY & ETHICS (CCLE), an educational law and policy center working in the public interest to protect and promote cognitive freedom and autonomy.

I want to begin by stating that the members of the ALCHEMIND SOCIETY view aspects of the so-called War on Drugs as an attack on the mental autonomy and cognitive liberty of Americans who have responsibly used psychoactive plants and substances to provide genuine insight and understanding about themselves and the world at large. In this respect, we are against any drug law that makes otherwise law-abiding Americans criminals, and punishes them for decisions they make about how to operate their own minds.

I am here today to speak about MDMA, or "Ecstasy," and in particular, on the impact that increased sentences could have on the cognitive freedom of many Americans. In this regard, I have four brief points.

I. CONTROLLED SUBSTANCES – YESTERDAY & TODAY

I'd like to begin with an analogy. The control of psychoactive substances is not a new phenomenon. In 1450, Johannes Gutenberg invented the moveable type printing press. In 1557, Pope Paul IV issued the first *Index Librorum Prohibitorum*, creating the controlled psychoactive substances known as unapproved books.[1]

Following the mandates of the *Index*, unapproved books were seized and destroyed. Those persons who manufactured (i.e., printed), distributed, or read prohibited books were punished when caught.

Today, people who manufacture, distribute or use certain psychoactive drugs, such as MDMA, are hunted by government agents and punished when caught.

The control of books as dangerous psychoactive substances did not come to an end until 1966 when the *Index Librorum Prohibitorum* was finally abandoned. At that time, the *Index* contained over 4000 forbidden books, including works by Galileo, Kant, Pascal, Milton, Spinoza, and John Locke.

Today, we look at the control of books, and the punishment of those who printed, sold, and read them, as an archaic notion, something contrary to basic concepts of intellectual freedom and a democratic society.

So, my first point is to respectfully submit that this Commission, with regard to setting the punishment for federal drug offenses, is in a similar position to those who previously set the punishment for manufacturing or distributing the controlled substances known as prohibited books. Yet, this Commission, to the extent that it sets punishment for drug offenses in which a person has done nothing more than grow, manufacture, distribute, or use, the psychoactive agents which have been denoted as "controlled substances," participates in an even more pernicious form of

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[1] Books are psychoactive substances. They are ingested by reading, and have direct effects on the mind. Books, like other psychoactive substances, can "alter" your thinking, change your view of the world and of yourself, or permit temporary relief (or "escape") from the problems inherent in being human.

Attempts to control the written word date from at least AD 325 when the Council of Nicaea ruled that Christ was 100 percent divine and forbade the dissemination of contrary beliefs. Since the invention of the printing press in 1450, governments have struggled to control the printed word. Presses were initially licensed and registered. Only certain people were permitted to own or control a printing press and only certain things could be printed or copied. (This was the origin of today's copyright rules.) Works printed without prior authorization were gathered up and destroyed, the authors and printers imprisoned.

For a fascinating survey of suppressed literature as controlled substances, see the multi-volume set *Banned Books*, published by FACTS ON FILE, which covers literature suppressed on religious, social, sexual, and political grounds.

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censorship—a censorship of consciousness itself—by punishing Americans for no other crime than choosing to experience or enable particular states of mind.[2]

II. HARM REDUCTION VERSUS HARM EXACERBATION?

THE COMMISSION'S ROLE WITH REGARD TO MDMA

With regard to MDMA, this Commission should consider that a percentage of the harm to young adults and other people who ingest MDMA, comes not from MDMA itself, but rather from the ingestion of adulterated. and sometimes entirely misrepresented, MDMA.[3]

MDMA does not produce violent behavior and, because it is virtually nonaddictive, users of MDMA do not commit crimes against others in order to support a "habit." MDMA almost universally occasions a state of mind that is accepting, empathetic, and insight-oriented. Because of these qualities, MDMA is presently a very popular drug, despite its criminal status.

Raising the punishment for those who sell *genuine* MDMA, as the Commission proposes to do, would create an inverted and anti-social incentive structure—one that has the potential to dramatically increase the individual and social harm associated with what may be sold as "Ecstasy." By increasing the punishment for manufacturing or selling genuine MDMA, the proposed amendment will encourage unscrupulous manufacturers and dealers to sell other drugs *as "Ecstasy"* in an effort to avoid the significantly increased punishment for selling genuine MDMA.

In this respect, the "MDMA Brief Report, February 2001," which was prepared for this Commission, does not tell the whole story. The story is not just about the impact the Commission's proposed sentencing increase will have on MDMA manufacturers and distributors. The Commission should also take into account the effect such a punishment structure will have on the many young adults and others who are currently using, and will continue to use, MDMA. By creating a punishment scheme that encourages the misrepresentation of other drugs as "Ecstasy," more people who that believe they are buying genuine MDMA, will in fact be sold, *and go on to ingest*, a completely different drug—one that may have an entirely different pharmacological profile than MDMA. The danger, in such a situation, is akin to a long-haul truck driver believing he was taking a No-Doze caffeine-pill, when in fact he was unwittingly ingesting a sleeping pill.

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[2] The Commission has "significant discretion" to determine which crimes have been punished too severely. (28 U.S.C. 994(m) (1982 ed., Supp. IV)).

[3] Baggott N, Heifets B, Jones RT, Mendelson J, Sferios E, Zehnder J., "Chemical Analysis of Ecstasy Pills," *JAMA*, (2000) Vo. 284, No. 17, p. 2190 (See "Attachment A"); Grob C., "Deconstructing Ecstasy: The Politics of MDMA Research," *Addiction Research*, (2000) Vol. 8, No. 6, pp. 549-588.

In short, by raising the punishment for those who manufacture or sell genuine MDMA, the Commission will be increasing the individual and social harm that occurs when young adults and others ingest "who-knows-what" drug, having been falsely told it is "Ecstasy."

III. PUNISH THOSE WHO MISREPRESENT OTHER SUBSTANCES *AS MDMA*

If this Commission is determined to raise the punishment with regard to "Ecstasy" offenses, it should consider leaving the current equivalencies unchanged, but instead increasing—perhaps dramatically—the punishment for misrepresenting *another drug as "Ecstasy."* Misrepresenting the identity of controlled substances is a crime under federal law, as well as in many states.[4]

Under such a plan, any person convicted of selling a drug by intentionally misrepresenting it to be MDMA or "Ecstasy," would receive greater punishment than the current Guidelines punishment for distributing genuine MDMA. By punishing those unscrupulous dealers who misrepresent another drug as MDMA, a vast amount of the individual and social harm associated with "Ecstasy" use would be minimized, and the Commission would avoid the inverted incentive structure that will result if this Commission raises the punishment with regard to manufacturing or distributing *genuine* MDMA.

IV. REPLACE DRUG OFFENSE GUIDELINES WITH AN "UPWARD DEPARTURE" OR "SPECIFIC OFFENSE CHARACTERISTIC"

Lastly, on behalf of the CENTER FOR COGNITIVE LIBERTY & ETHICS and the members of the ALCHEMIND SOCIETY, I submit that the Commission should consider a wholesale revision of Part D of the Federal Sentencing Guidelines – those sections related to drug offenses.

Currently, Section 2D1.1 of the Guidelines—especially those provisions related to establishing "drug equivalencies"—forces this Commission to make impossible comparisons between various drugs, and to set ultimately arbitrary equations under a guise of rationality.

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[4] Federal code section 21 U.S.C. Sec. 802 (7) makes it an offense to sell a "counterfeit drug." Additionally, counterfeit controlled substance laws exist on the state level. For example, California's "Imitation Controlled Substances Act," (Cal. Health & Saf. Code, secs. 109525-109555), makes it a crime to manufacture or distribute an "imitation controlled substance, which is statutorily defined as "(a) a product specifically designed or manufactured to resemble the physical appearance of a controlled substance, that a reasonable person of ordinary knowledge would not be able to distinguish the imitation from the controlled substance by outward appearances, or (b) a product, not a controlled substance, that, by representations made and by dosage unit appearance, including color, shape, size, or markings, would lead a reasonable person to believe that, if ingested, the product would have a stimulant or depressant effect similar to or the same as that of one or more of the controlled substances included in Schedules I through V, inclusive, of the Uniform Controlled Substances Act, pursuant to Chapter 2 (commencing with Section 11053) of Division 10." (Cal. Health & Saf. Code, sec. 109550.)

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One possible method for bringing rationality to the Sentencing Guidelines with regard to offenses involving controlled substances, and to actually reduce the social harm associated with certain drugs, would be for the Commission to abandon the drug equivalency schema, indeed, abandon the entire drug offense section of the guidelines (Part D), and replace it with a simple drug enhancement, an "upward departure" or "Specific Offense Characteristic" to be applied when a federal crime is committed under the influence of, or in possession of, a controlled substance.[5]

Pursuant to this proposal, a person who commits a federal crime under the influence of a drug, or in possession of a drug, would have his or her sentence for the substantive offense increased by an additional drug enhancement or upward departure.

Such a system would leave law-abiding Americans alone. It would return to them the fundamental right to autonomy over their own consciousness, while at the same time significantly enhancing the punishment of any person whose *behavior* after taking a drug causes *actual social harm* (as such harm is codified in the federal criminal code).

Respectfully submitted,

Richard Glen Boire, Esq.
Center for Cognitive Liberty & Ethics
Alchemind Society: The International
Association for Cognitive Liberty

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[5] Such a sentence enhancement would function like currently existing enhancements for using or possessing a firearm in the commission of a crime. The Sentencing Guidelines are replete with firearm enhancements imposed as "Specific Offense Characteristics." Section 2B2.3, for example, states the Guideline sentence for the crime of Trespassing. While Trespassing is ordinarily punished at a Base Level of 4, the punishment is increased 2 levels "[i]f a dangerous weapon (including a firearm) was possessed [in commission of the trespass.]" (United States Sentencing Commission, Guidelines Manual Section 2B2.3. (Nov. 2000).)

For an example of an "upward departure" see, Federal Sentencing Guideline, Sec. 3B1.4, which increases the punishment of any Guideline Sentence by 2 levels "[i]f the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense... ."

"Attachment A"

CPSC for a permanent ban and recall on candles with lead wicks.

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1. Hehir RM. Memorandum to Commissioners: candles with lead core wicks. Consumer Product Safety Commission; December 26, 1973.
2. Centers for Disease Control and Prevention. Update: blood lead levels—United States, 1991-1994. *MMWR Morb Mortal Wkly Rep*. 1997;46:141-146.

RESEARCH LETTER

Chemical Analysis of Ecstasy Pills

To the Editor: 3,4-Methylenedioxymethamphetamine (MDMA) has achieved notoriety as the drug "ecstasy" and has been associated with dance events called "raves." Few reports of the content of ecstasy pills from the United States are available,[1] but European reports suggest that ecstasy commonly contains substances other than MDMA.[2] We sought to describe the range of drugs found in ecstasy pills in the United States.

Methods. Samples were solicited by DanceSafe, a national organization active at dance events, using a Web site (http://www.dancesafe.org) and informational tables at dance events. Individuals were informed they could anonymously mail pills to the analyzing laboratory along with a money order for the cost of the assay ($100) for each sample.

Pills were dissolved in methanol and assayed by gas chromatography–mass spectroscopy in full-scan electron impact mode (70 eV). Compounds were identified with a computerized reference library and confirmed with analytical standards. Complete methods are available from the authors.

Results. Between February 1999 and March 2000, 107 pills were received and assayed. By region, 48 pills (45%) were from California and southwestern states, 18 (17%) from the South, 17 (16%) from New England states, 17 (16%) from Mid-Atlantic states, 3 (3%) from the Pacific Northwest, 3 (3%) from the Midwest, and 1 (1%) from Hawaii.

Sixty-seven pills (63%) contained some MDMA or an analogue (either 3,4-methylenedioxy-ethyl-amphetamine or 3,4-methylenedioxyamphetamine). Thirty-one pills (29%) contained identifiable drugs but no MDMA or analogue. The most common drugs identified other than MDMA was the antitussive dextromethorphan (DXM), found in 23 pills (21%). Other drugs included caffeine, ephedrine, pseudoephedrine, and salicylates. Nine pills (8%) contained no identifiable drug.

Because of the prevalence of DXM in this sample, quantitative analyses were carried out on the first 8 DXM-containing pills received; these contained an average (SD) of 136 (33) mg DXM (range, 103-211 mg).

Comment. Most pills contained MDMA (or an analogue) or 1 or more unscheduled drugs. The most common unscheduled drug was DXM, present in amounts considerably higher than the usual therapeutic dose of 15 to 30 mg (taken up to 4 times daily). Because DXM is apparently common in ecstasy pills but not detected by standard drug abuse toxicology screening tests, it may have an unrecognized role in adverse reactions attributed to MDMA. None of the other unscheduled drugs identified appear likely to produce significant toxicity.

High doses of DXM (>300 mg) can cause lethargy or hyperexcitability, tachycardia, ataxia, and nystagmus, as well as a phencyclidine-like psychosis[3,4] caused by the N-methyl-D-aspartate–blocking effects of its metabolite, dextrorphan. Dextromethorphan intoxication should be considered for patients reporting ecstasy use and presenting with these symptoms, particularly if toxicology screens are negative for MDMA and amphetamines.

Since many ecstasy users ingest multiple pills, DXM and MDMA may be coadministered, leading to adverse interactions. Both drugs are substrates for cytochrome P450 isozyme 2D6 (CYP2D6), and MDMA and its metabolites inhibit the activity of CYP2D6.[5] Coadministration of a CYP2D6 inhibitor increases the incidence and severity of adverse reactions to DXM.[6]

The distribution of drugs in this sample series may not accurately reflect the appearance of these drugs in all illicit ecstasy markets. Because individuals who submitted pills paid the assay costs, they may have been disproportionately older, wealthier ecstasy users. Those pills associated with unexpected drug effects may be overrepresented in this series. Nonetheless, our results appear to describe the range, if not the precise distribution, of drugs in illicit ecstasy pills.

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TO: U.S Sentencing Commission

FROM: Rick Doblin, Ph.D.
President, Multidisciplinary Association for Psychedelic Studies (MAPS)
3 Francis Street
Belmont, MA 02478
617 484-8711

RE: Proposed Increase of MDMA Penalties

Sent via facsimile
(202) 502-4699
ATTN: Michael Courlander

To whom it may concern:

I am writing for two primary reasons to oppose any increases in the penalties for MDMA. The first reason is that enhanced penalties will increase the difficulties in obtaining FDA and DEA permission to conduct legitimate scientific research into the risks and benefits of the therapeutic use of MDMA as an adjunct to psychotherapy. The second reason is that while MDMA does have its risks, as does any other drug or even any non-drug recreational activity, these risks have greatly exaggerated, particularly the risk of serious functional or behavioral consequences from MDMA neurotoxicity.

I've recently completed a dissertation on the regulation of the medical uses of Schedule 1 drugs, primarily MDMA and marijuana, for a Ph.D. in Public Policy from the Kennedy School of Government, Harvard University. I am also the founder and current president of the Multidisciplinary Association for Psychedelic Studies (MAPS), a 501 (c) (3) membership-based research and educational organization that was founded in 1986. MAPS has about 1900 members, mostly from the United States. MAPS assists scientists to design, obtain approval for, fund, conduct and report on FDA-approved research with psychedelic drugs and marijuana. MAPS' top priority is to develop MDMA (Ecstasy) into a prescription medicine as an adjunct to psychotherapy for a variety of clinical indications.

MAPS opened an FDA Drug Master File (DMF) for MDMA in 1986, with data from FDA-required 28-day MDMA toxicity studies in the dog and the rat. MAPS has been working ever since to sponsor research into the risks and benefits of MDMA-assisted psychotherapy. MAPS donated funds to support the first MDMA neurotoxicity primate study ever conducted, under the direction of Dr. George Ricaurte. MAPS also recruited the first subjects for Dr. Ricaurte's human spinal tap studies of MDMA neurotoxicity, with myself as the first subject.

Scientists associated with MAPS will submit a protocol to FDA in April, 2001

seeking permission to study the use of MDMA-assisted psychotherapy in the treatment of patients suffering from Post-traumatic Stress Disorder (PTSD). This protocol, if approved, will be the first opportunity that scientists have had to study the therapeutic use of MDMA since DEA placed MDMA in Schedule 1 in 1985.

Historically, as the penalties for the non-medical uses of a drug are increased, political pressure develops to suppress or restrict research into the beneficial uses of that drug. This has been the case with heroin, marijuana and the psychedelics.

There is also a tendency for government agencies and anti-drug groups to overestimate the risks of drugs that have been criiminalized. Examples include the LSD chromosome damage scare, which was supposedly going to result in a generation of children born with birth defects to users of LSD, and the crack baby phenomenon, which was shown in later research to be vastly overstated. Similarly, the likely risks of MDMA neurotoxicity have also been dramatically exaggerated. I'll leave this to the medical researchers to document.

Sincerely yours,

Rick Doblin, Ph.D.

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

STATEMENT

OF

ROBERT S. MUELLER, III

ACTING DEPUTY ATTORNEY GENERAL

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINE AMENDMENTS

MARCH 19, 2001

Testimony before U.S. Sentencing Commission
Robert S. Mueller, III
Acting Deputy Attorney General
March 19, 2001

Thank you for allowing me this opportunity to testify on behalf of the Department of Justice regarding the proposed amendments to the sentencing guidelines. I wrote to you last month to express the Department's serious concerns over the proposed amendments; especially in the areas of white collar crime, money laundering, and immigration. I understand that the Commission staff has attempted to address some of those concerns. We believe, however, that serious problems still remain with many of the pending amendments. I will focus my brief comments today on those remaining issues.

White Collar Crime Issues

Let me begin with the proposed white collar and economic crime amendments. Simply stated, the Department believes that sentences in white collar crime cases are far too lenient and need to be increased, not decreased. Accordingly, the Department strongly supports the Commission's efforts to change the loss tables to increase sentences for mid- and high-level white collar crimes.

Unfortunately, the Commission is also considering various amendments that would significantly expand the number of white collar defendants who are eligible for probationary sentences. The Department is adamantly opposed to proposed amendments that would have the effect of reducing the sentences for this privileged group of defendants. I am confident that Congress will share this view.

In particular, the Department firmly believes that the proposals to expand Zones

B and C of the sentencing table and to allow for flexibility options in white collar cases are unwarranted and would have a severe adverse impact on white collar prosecutions. For example, under the expanded zones and flexibility options, a stock broker who stole up to $500,000 from investors would be eligible for probation under certain circumstances. Commissioner Rossotti will discuss the devastating impact these changes would have on tax prosecutions. I have reviewed his testimony and agree completely with the points he makes. I understand some might argue that these changes would only give the sentencing judge discretion to impose probation, but my experience as a line prosecutor and U.S. Attorney has been that if white collar defendants are eligible for probation, they will likely receive probation.

At a time when vigorous white collar crime prosecution is needed, these flexibility options and changes to the sentencing zones send entirely the wrong message. After all, many white collar defendants have generally benefitted from society, have strong educational backgrounds and are often successful professionals. When these individuals break the law, they should not be excused from serving a prison sentence simply because they did not commit crimes of violence. The public has a right to expect that people with privileged backgrounds who commit crimes will not be exempt from the full force of the law and will not be treated with inappropriate leniency. Accordingly, the Department strongly opposes these amendments.

Money Laundering

The Department is also extremely concerned about many of the proposed changes to the money laundering guidelines. This is an extremely important issue that the Justice Department, the Treasury Department, and the Congress have spent much

time on over the past few years. Unfortunately, some of the changes being proposed would lower sentences for even the most serious forms of money laundering. This the Department strongly opposes.

As an initial matter, I want to make clear that the Department agrees with the Commission that prosecutors should not be using the threat of money laundering charges – which carry with it much more serious guidelines – in order to induce guilty pleas in lower-level fraud cases. Accordingly, we have been supportive of the Commission's efforts to reduce the impact of the money laundering guidelines for that category of first-party money launderers. However, the Commission's proposed amendment not only makes those appropriate changes, but also results in lower sentences for some first-party and third-party drug money launderers. That is entirely inappropriate and the Justice Department will strenuously oppose any proposal that would reduce penalties for individuals who launder drug proceeds. Again, I believe that Congress will share these views.

Immigration

Let me briefly mention my concerns about the immigration amendment. I again urge the Commission to delay consideration of this amendment until next year.

We appreciate the Commission's concern that the present guideline does not measure the seriousness of the underlying aggravated felony in illegal re-entry cases. And we agree that some distinction may be appropriate, although we also agree with Congress that the penalty for any illegal re-entrant should be substantial.

The pending amendment attempts to distinguish between aggravated felonies by considering the defendant's time served. As a practical matter, this is extremely

problematic and will result in significant delay in disposing of illegal re-entry cases while prosecutors, defense lawyers, and probation officers all attempt to determine what portion of a sentence the defendant actually served. We believe that it would be more appropriate – and would be easier to implement – if the guideline distinguished between aggravated felons based on the character of the underlying offense rather than on the sentence served or imposed. We are certainly willing to work with the Commission over the next several months to fashion such a guideline, but we oppose the amendment as it presently reads.

Narcotics

Next, I want to comment briefly on the Commission's proposed amendments dealing with ecstacy and an extension of the safety valve.

As we previously advised the Commission, the Department strongly supports the proposed amendment increasing the penalties for ecstacy. Ecstasy is a Schedule I controlled substance that has a high potential for abuse, causes widespread actual abuse, and has no acceptable medical use. The target population consists of teenagers and young adults, and the drug is quickly becoming one of the most abused drugs in the United States. Medical evidence demonstrates the serious dangers it poses to users, including the death of brain cells. The damage this drug can produce is significant and long-term. We have an opportunity to stop this growing problem before it becomes an epidemic, and the proposal put forth by the Commission would very much help with that effort. We urge its adoption.

With regard to an extension of the safety valve, the Department opposes any such expansion. The "safety valve" exemption from mandatory minimum sentences

was enacted to provide relief for persons who received high sentences but who were identified by Congress as the least culpable group of such offenders. The guidelines therefore reduce an otherwise severe sentence in recognition of the "safety valve" criteria. By contrast, a low-level drug dealer, whose relevant conduct results in an offense level below 26, is subject to a sentence of less than five years, even before consideration of mitigating factors that can reduce the sentence further, factors such as acceptance of responsibility and role in the offense. The proposed two-level reduction is simply not needed for this offender.

Nuclear, Biological, and Chemical Weapons

One final point I would like to make concerns the proposed amendment relating to nuclear, biological, and chemical weapons. The amendment the Commission has proposed fills a gap by addressing several relatively new statutes concerning biological and chemical weapons, for which there has been no sentencing guideline in the past. It is an excellent amendment, and we urge the Commission to adopt it.

Conclusion

In conclusion, thank you for the opportunity to express our views. We in the Department look forward to continue working with the Commission in the years ahead to ensure that the guidelines are just and fair, and that the sentences proposed by the guidelines are commensurate with the crimes committed.

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WHO Expert Committee on Drug Dependence

Twenty-second Report

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729

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In summary, there is no evidence, except for its structure, that *N*-ethyl-3,4-methylenedioxyamphetamine has a pharmacological profile or dependence potential similar to compounds already controlled under the Convention on Psychotropic Substances. Thus, the Expert Committee was unable to make any recommendation until more information becomes available about the compound. Because of the close structural relationship of this substance to MDA, which is already controlled, the Expert Committee urged that efforts be made promptly to gather further pharmacological data on it.

2.27 5-Methoxy-3,4-methylenedioxyamphetamine

In the "spinal dog" 5-methoxy-3,4-methylenedioxyamphetamine (MMDA) has a pharmacological profile that resembles that of both LSD and amphetamine, but it also has other properties not exhibited by either drug. There are no data available on its toxicology, pharmacokinetics, dependence potential, nature and magnitude of associated public health or social problems, or epidemiology of its use and abuse. The substance is under national control in five countries. It has no known therapeutic use and no information is available concerning its production. There are some reports from the USA of minor incidences of illicit trafficking in this substance.

On the basis of the data outlined above, it was the consensus of the Expert Committee that 5-methoxy-3,4-methylenedioxyamphetamine met the criteria of article 2, paragraph 4, for control under the Convention on Psychotropic Substances. Since it has no known therapeutic use, the Expert Committee recommended that it be placed in Schedule I of the Convention.

2.28 3,4-Methylenedioxymethamphetamine

In mice, 3,4-methylenedioxymethamphetamine (MDMA) increases locomotor activity and produces analgesia. In dogs and monkeys the substance has a pharmacological profile similar to that of other substances already controlled under the Convention on Psychotropic Substances. There are contradictory reports of the hallucinogenic activity of this substance in man. The substance is a potent serotonin-releaser in rat whole-brain synaptosomes. Its toxicological properties have been studied extensively in animals.

The acute toxicity of this substance is about twice that of mescaline. No pharmacokinetic data are available.

3,4-Methylenedioxymethamphetamine has discriminative stimulus effects in common with amphetamine but not with 2,5-dimethoxy-α4-dimethylbenzeneethanamine (DOM). No data are available concerning its clinical abuse liability, nature and magnitude of associated public health or social problems, or epidemiology of its use and abuse. The substance is under national control in Canada and the United Kingdom and its control has been proposed in the USA.

The substance has no well defined therapeutic use, but a number of clinicians in the USA have claimed that it is potentially valuable as a psychotherapeutic agent. No data are available concerning its lawful production. Evidence of some illicit trafficking in the substance has been reported from Canada and there have been extensive seizures of the drug in the USA.

On the basis of the data outlined above, it was the consensus of the Expert Committee that 3,4-methylenedioxymethamphetamine met the criteria of article 2, paragraph 4, for control under the Convention on Psychotropic Substances. Since there is insufficient evidence to indicate that the substance has therapeutic usefulness, the Expert Committee recommended that it be placed in Schedule I of the Convention.[1]

It should be noted that the Expert Committee held extensive discussions concerning the reported therapeutic usefulness of 3,4-methylenedioxymethamphetamine. While the Expert Committee found the reports intriguing, it felt that the studies lacked the appropriate methodological design necessary to ascertain the reliability of the observations. There was, however, sufficient interest expressed to recommend that investigations be encouraged to follow up these preliminary findings. To that end, the Expert Committee urged countries to use the provisions of article 7 of the Convention on Psychotropic Substances to facilitate research on this interesting substance.

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[1] One member, Professor Paul Grof (*Chairman*), felt that the decision on the recommendation should be deferred awaiting, in particular, the data on the substance's potential therapeutic usefulness and that at this time international control is not warranted.