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Chairman Smith, Ranking Member Scott, members of the Subcommittee, I am Charles Tetzlaff and for the past one and one-half years I have served as the general counsel to the United States Sentencing Commission (the "Commission"). Prior to holding my current position, I had the privilege of serving almost eight years as the United States Attorney in Vermont.

The Commissioners, and in particular Chair Murphy, have asked me to express at the outset of my testimony their sincere regrets for not being able to attend this hearing today. The Commissioners have a long standing commitment to meet with the Criminal Law Committee of the Judicial Conference of the United States in St. Louis this week and therefore are unable to be in Washington, D.C.

The Commissioners recognize that Congress has ultimate authority over federal sentencing policy and welcome congressional oversight hearings such as this. Congressional oversight of the Commission's work is important, appropriate, and an essential component of the policy making process established by the Sentencing Reform Act of 1984.

As you know, the Sentencing Reform Act of 1984 requires the Commission to submit for congressional review all amendments to the sentencing guidelines by May 1 of any given year. We believe this year the Commission passed a package of amendments that reflects the nation's new priorities, provides important sentencing tools to federal law enforcement, and promotes fair and effective sentencing policy. Today, I would like to highlight some of the Commission's

most important achievements of the amendment cycle that ended just two weeks ago on May 1, 2002 and describe some of the specific guideline amendments currently under congressional review:

Terrorism

Last year the Commission promulgated a guideline amendment that significantly increased the penalties for offenses involving nuclear, chemical, and biological weapons. The tragic events of September 11, 2001, prompted the Commission, like most government agencies, to alter its plans and make terrorism offenses its top priority once again this year. Congress should be commended for responding so quickly to the threat of terrorism by passing the USA PATRIOT Act. I believe the Commission also should be commended for its quick response. The USA PATRIOT Act was enacted into law on October 26, 2001, and in less than six months, working closely with the Department of Justice, the Commission passed a comprehensive package of amendments to the guidelines implementing the Act.

Although I will not list all of the many provisions contained in the amendment, among the most significant are appropriately severe penalties for offenses committed against mass transportation systems and interstate gas or hazardous liquid pipelines, increased sentences for threats that substantially disrupt governmental or business operations or result in costly cleanup measures, expanded guideline coverage for bioterrorism offenses, and a new guideline for providing material support to foreign terrorist organizations. The amendment ensures that attempts and conspiracies to commit terrorism offenses are punished as if the offense had been successfully completed and provides an encouraged upward departure in the guidelines' terrorism enhancement for appropriate cases. The amendment also authorizes lifetime supervision of an

offender convicted of a federal crime of terrorism if that crime resulted in substantial risk of death or serious bodily injury.

Cultural Heritage Resources

In response to concerns raised by the Department of Justice (particularly by the United States Attorney in Utah), the Department of Interior, many Native American tribes, and other interested groups, the Commission created a new guideline covering crimes committed against our cultural heritage resources. In light of September 11, the Commission concluded that the existing sentencing guidelines inadequately protected important national treasures such as national monuments and memorials, landmarks, parks, archaeological, historic and other cultural resources specifically designated by Congress for preservation. In addition to punishing for any pecuniary harm caused by an offense, the new guideline, §2B1.5 (Theft of, Damage to, Destruction of, Cultural Heritage Resources), includes five separate sentencing enhancements to account for aggravating conduct that often occurs in connection with these crimes, such as brandishing or using a dangerous weapon or disturbing human remains or sacred objects.

The Commission is concerned, however, that some of the most serious offenders will escape the full impact of this new guideline because several relevant offenses have statutory maximum penalties that in the Commission's view are too low. For example, the criminal provisions of the Archaeological Resources Protection Act of 1979 (16 U.S.C. § 470ee) ("ARPA") carry only a one or two year statutory maximum penalty for a first offense, depending on whether the value of the article exceeds $500. Similarly, the criminal provisions of the Native American Graves Protection and Repatriation Act (18 U.S.C. § 1170) ("AGPRA") carry only a one year statutory maximum penalty, regardless of value. The Commission recently sent a letter

to the House Judiciary Committee recommending that Congress increase the statutory maximum penalties for those offenses in order to allow the new guideline to have its full effect. The Commission hopes that the Subcommittee will support that recommendation.

Career Offenders

In April 2000, the Commission promulgated a guideline amendment in response to statutory changes made to 18 U.S.C. § 924(c) (relating to possession, brandishing, or use of a firearm during a crime of violence or drug trafficking offense). Legislation the previous year modified the existing five year penalty to provide a new tiered statutory mandatory minimum penalty structure for possessing, brandishing, or discharging a firearm with statutory maximum penalties of life imprisonment.[1]

The Commission responded by incorporating the mandatory minimum penalties into the firearms guideline, §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), and amending the career offender guideline. Pursuant to the mandate to the Commission in section 994(h) of Title 28, United States Code, the career offender guideline is designed to ensure that certain three-time repeat or "career" offenders receive a sentence of imprisonment "at or near the maximum term authorized." At the time, the Commission responded to the legislation by specifying that a conviction under 18 U.S.C. §§ 924(c) and 929(a) can qualify as a "*prior* crime of violence or *prior* controlled substance offense" for purposes of that guideline, but deferred the much more complicated issue of whether convictions under those provisions can qualify as *instant* offenses for purposes of triggering the career offender guideline.

[1] *See* the Act to Throttle the Criminal Use of Guns, Pub. L. 105-386 (1999)

The Commission revisited the issue this year and concluded that to be fully in compliance with 28 U.S.C. § 994(h), and to be responsive to a specific request from the Department of Justice, section 924(c) and 929(a) offenses should qualify as instant offenses for purposes of triggering the career offender guideline. Because of the interaction of the guidelines and the statutory scheme, by necessity the amendment is somewhat complex, but the Commission is confident that it meets the congressional intent behind the career offender provision to sentence these offenders at or near the statutory maximum penalty.

Public Corruption

In response to another request from the Department of Justice, the Commission amended the guidelines to ensure that offenses involving public corruption of foreign officials are penalized as severely as domestic public corruption offenses. This amendment also complies with the mandate of a multilateral treaty entered into by the United States, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In part, this Convention requires signatory countries to impose comparable sentences in both domestic and foreign bribery cases.

Official Victims

In response to a request from the Federal Bureau of Prisons ("BOP"), the Commission expanded application of the official victim guideline enhancement, §3A1.2. This enhancement provides a three level increase (an approximate 37 percent increase) for offenses in which the victim is a law enforcement officer or corrections officer. BOP advised the Commission that the federal prisons use a variety of employees, contractors, and volunteers to supervise inmates, and not just corrections officers. The Commission responded by amending the guideline to cover an

assault of *any* prison official authorized to act on behalf of the prison, effectively overruling United States v. Walker, 202 F.3d 181 (3d Cir. 1999) (holding a prison food service employee not a "corrections officer" and therefore official victim enhancement not applicable).

Sex Trafficking

The Commission also promulgated an amendment that ensures severe sentences for commercial sex acts such as the production of child pornography or prostitution, specifically targeting offenders who use fraud to entrap victims. The amendment makes several specific changes to §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) to address more adequately the new offense at 18 U.S.C. § 1591 created by the Victims of Trafficking and Violence Protection Act of 2000.

Drugs

This year the Commission also placed on its agenda the difficult issue of cocaine sentencing policy, in part because federal cocaine sentencing policy continues to be criticized by many, and in part because the Commission sensed a renewed interest by some members of Congress in exploring possible changes to the penalty structure. In the course of its work this year, the Commission (i) reviewed the findings from recent literature on specific issues such as the addictiveness of cocaine and the consequences of prenatal cocaine exposure; (ii) conducted an extensive empirical study of federal cocaine offenders sentenced in fiscal year 2000 and compared those results with the findings in the Commission's 1995 special report to Congress on federal cocaine sentencing policy;[2] (iii) surveyed state sentencing policies; (iv) considered public

[2] USSC, 1995 Special Report to Congress: Cocaine and Federal Sentencing Policy (as directed by section 2800006 of Public Law 103-322) (Feb.1995).

comment on the appropriateness of current federal cocaine sentencing policy; and (v) heard testimony at three separate public hearings from the medical and scientific communities, federal and local law enforcement officials, including the Department of Justice, criminal justice practitioners, academics, and civil rights organizations.

After carefully considering all of the information available, the Commission firmly and unanimously concluded that the current penalty structure can be significantly improved to achieve more effectively the various congressional objectives outlined in the Sentencing Reform Act of 1984, the Anti-Drug Abuse Act of 1986 (which established the current mandatory penalties for most major drugs of abuse),[3] and the 1995 legislation[4] disapproving the prior Commission's guideline amendment addressing cocaine sentencing.[5]

Having reached that substantive conclusion, the Commission faced the difficult threshold decision of determining how best to proceed. The Commission seriously considered promulgating an amendment to the guidelines and submitting it for congressional review on May 1 along with the other guideline amendments I have described. After consulting with a number of members of Congress and their staff and considering persuasive and helpful letters from Chairman Smith, and several members of the Subcommittee as well as Ranking Member Conyers, the Commission unanimously agreed that at this time they can best facilitate congressional consideration of the proposed statutory and guideline changes by first submitting

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[3] *See* Pub. L. 99-570, 100 Stat. 3207 (1986).

[4] *See* Pub. L. 104-38, 109 Stat. 334 (1995).

[5] That amendment, among other things, would have equalized the quantity-based sentencing guideline penalties for crack cocaine offenses with the sentencing guideline penalties for powder cocaine offenses.

recommendations to Congress, and then working with Congress to implement appropriate modifications to the penalty structure. The Commission expects to have those recommendations ready for Congress in the coming days.

In addition to its work on cocaine sentencing policy, the Commission promulgated a four part amendment to the drug offense guidelines that was submitted for congressional review on May 1, 2002. The first part of the amendment significantly increases penalties for certain offenders convicted under 21 U.S.C. § 856 (Establishment of Manufacturing Operations). That statute originally was enacted to target defendants who maintain, manage, or control so-called "crack houses," but more recently has been applied to defendants who facilitate drug use at commercial dance clubs frequently called raves. **This amendment increases that maximum base offense guideline sentencing range from 21-27 months to 63-78 months for a first-time offender who had no participation in the underlying controlled substance offense other than allowing use of the premises.**

The Commission determined that the existing maximum base offense level did not adequately reflect the culpability of offenders who knowingly and intentionally facilitate and profit, at least indirectly, from the trafficking of illegal drugs, even though they may not participate directly in the underlying controlled substance offense. **The Commission believes that this penalty increase will prove to be an important tool for federal law enforcement and was promulgated in direct response to a specific request from the Department of Justice.**

The second part complements the Commission's guideline amendment effective November 1, 2001, that significantly increased penalties for ecstasy trafficking in response to a

generally expressed congressional directive. The Commission received information from the Drug Enforcement Administration suggesting that certain commentary to the drug trafficking guideline no longer accurately reflected the type and weight of ecstasy pills typically trafficked and consumed. Because this inaccuracy could result in underpunishment in some cases, the Commission modified the commentary to reflect that ecstasy usually is trafficked and used as MDMA in pills weighing approximately 250 milligrams.

The third part of the amendment clarified that the two level reduction provided in the primary drug trafficking guideline for defendants who meet the "safety valve" criteria set forth at 18 U.S.C. § 3553(f)(1)-(5) and reproduced in §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) applies regardless of whether the defendant is convicted under a statute that carries a mandatory minimum term of imprisonment.

The final part of this drug amendment, the primary subject of today's hearing, modifies the primary drug trafficking guideline, §2D1.1, to provide a maximum base offense level of 30 (which corresponds to 97 to 121 months imprisonment – or eight to ten years – for a first-time offense) if the defendant receives a mitigating role adjustment under §3B1.2 (Mitigating Role). Under §3B1.2, the guidelines provide a two to four level reduction if the court makes a finding of fact that the defendant played "a part in committing the offense that makes him substantially less culpable than the average participant."[6]

In the drug context, mitigating role defendants typically perform relatively low level trafficking functions, wield little authority in the drug trafficking organization, and often have no control over the quantity of drugs attributable to their conduct. Many mitigating role offenders

[6] USSG §3B1.2 (Mitigating Role), comment. (n. 3).

are couriers and mules whose highest trafficking function is transporting drugs at the direction of and for the profit of others. Other mitigating role defendants essentially work as manual laborers, loading or unloading drugs into storage or onto some mode of transportation. Gophers and lookouts also often qualify for mitigating role reductions, as well as individuals whose sole involvement in the drug offense is providing space or structures to further the offense. These defendants often have no knowledge of the full scope of the drug trafficking activity.

The guidelines system (like the mandatory minimum penalties) recognizes that drug quantity – as a measure of harm – is a principle factor in determining the appropriate sentence for a drug offender. But the Commission believes that other factors must also be taken into account in determining an appropriate sentence. For the overwhelming majority of drug offenders, the drug quantity serves as a reasonable initial proxy both for the harm caused by the offense and the trafficking function performed by the offender. In other words, offenders who perform higher trafficking functions, such as organizers, manufacturers, supervisors, and managers, tend to be held accountable under the guidelines for the largest quantities of drugs, and offenders who perform lesser functions tend to be held accountable for smaller quantities. Thus, for the overwhelming majority of offenses, there does not appear to be any tension between the assignment of the offender's offense level based on drug quantity and the role of the offender.

The Commission has observed some anomalous results, however, for a limited number of offenders who perform trafficking functions widely considered to be low level. These offenders, because of the unique nature of their function, are held accountable for exceptionally large drug quantities, which runs counter to the usual relationship between drug quantity and defendant culpability. As a result, these low level offenders receive quantity-based penalties that exceed

their culpability.

For example, as part of its study of cocaine penalties the Commission conducted an intensive study of federal cocaine cases sentenced in fiscal year 2000 and learned that powder cocaine offenders classified as "renters, loaders, lookouts, enablers, users, and others" on average were held accountable for greater drug quantities (7,320 grams) than powder cocaine offenders classified as managers and supervisors (5,000 grams) or wholesalers (2,500 grams). And couriers and mules were held accountable for almost as much powder cocaine (4,900 grams) as managers and supervisors, and more than wholesalers.

In cases involving offenders such as these, there is a tension between using relatively large drug quantity as a proxy for the harm caused and the relatively low individual culpability of the defendant. For some time judges, practitioners, and others have expressed concern that we have not struck the right balance between these two competing concerns. They argue that as the initial determinant of offense seriousness (*i.e.*, before other aggravating and mitigating sentencing guideline adjustments are applied), quantity-based penalties in excess of ten years imprisonment are inappropriately and unnecessarily long to achieve the purposes of sentencing as set forth in the Sentencing Reform Act of 1984.

As early as 1992, then Chairman William H. Wilkins, Jr., who is the current chairman of the Criminal Law Committee of the Judicial Conference of the United States ("CLC"), moved to adopt an amendment to the guidelines that would have limited the impact of drug quantity for certain mitigating role defendants. The amendment failed 3 to 2, primarily because the two commissioners who voted against it wanted to decrease further the impact of drug quantity on the penalties for these offenders. This year the Commission received public comment from a

number of sources – including the CLC of the Federal Judicial Conference, the Commission's standing advisory committee, the Practioners' Advisory Group, and the American Bar Association – again urging us to adopt some version of a "mitigating role cap."

After carefully considering all of the comments received, including Chairman Smith's letter, **the Commission unanimously, and I stress *unanimously,* concluded that for this category of least culpable offenders, a base offense sentencing guideline range of 97 to 121 months is sufficient to meet the purposes of sentencing and strikes an appropriate balance between basing penalties on the quantity of drugs and the role of the offender.**

Furthermore, the Commission believes that this is a modest limitation on the impact of drug quantity on sentences. **The Commission ensured that the guideline penalties remain consistent with the mandatory minimum penalties even for mitigating role defendants.** With this amendment, a mitigating role defendant who is found responsible for a drug quantity sufficient to trigger a ten year mandatory minimum penalty still will receive a base offense level that corresponds to the ten year mandatory minimum penalty. Other aggravating adjustments in the trafficking guideline (*e.g.*, the weapon enhancement at §2D1.1(b)(1)) and general aggravating adjustments in Chapter Three of the guidelines still can operate to increase the defendant's offense level above level 30. The defendant's criminal history score also can further increase the defendant's sentence. Finally, although the Commission intends for this amendment to have a meaningful benefit for those defendants for which it applies, the Commission estimates that this "mitigating role cap" will apply in only *six percent* of cases sentenced under the primary drug trafficking guideline, resulting in a *slight reduction of one month in average sentences from 72 to 71 months – or 1.4 percent – for all offenders sentenced under the guideline*.

Conclusion

The Commission hopes that the information presented today assists the Subcommittee's assessment of its work this amendment cycle and its review of the guideline amendments currently pending before Congress. In the few short years since this Commission was appointed on November 15, 1999, they have increased penalties significantly for offenses such as electronic copyright infringement, identity theft, cell phone cloning, sexual offenses against children, human trafficking, college scholarship fraud, terrorism, money laundering, fraud and theft, methamphetamine and amphetamine manufacturing, ecstasy trafficking, stalking and domestic violence, GHB offenses, firearms offenses, offenses involving nuclear, chemical and biological weapons, and many others. This Commission has strived to be responsive to the will of Congress and hopes to continue building upon its good working relationship with the Subcommittee.