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COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION
AND THE
COMMITTEE AGAINST THE DISCRIMINATORY CRACK LAW

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MARCH 7, 1995

On behalf of the American Civil Liberties Union (ACLU) and The Committee Against the Discriminatory Crack Law (CADCL), I welcome this opportunity to comment as to whether the U.S. Sentencing Guidelines should be amended with respect to the 100-to-1 quantity ratio between cocaine base [hereinafter "crack"] and powder cocaine. We feel that the 100-to-1 disparity in sentencing is irrational and unwarranted, and strongly urge this Commission to amend its Guidelines to institute a one-to-one correspondence at the current levels set for powder cocaine, and to recommend that Congress repeal the mandatory minimum penalties for crack cocaine possession and distribution, allowing those convicted to be sentenced pursuant to the newly amended guidelines instead.

The ACLU is a nonpartisan organization of over 275,000 members nationwide dedicated to the defense and enhancement of civil liberties. Because protection of the Bill of Rights stands at the core of our mission, we have a particular interest in ensuring that

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

The ACLU is a founding member of the Committee Against the Discriminatory Crack Law, which is a non-partisan coalition of over 20 criminal justice, civil and human rights, and religious organizations who have joined together to educate the public and Congress about the unwarranted disparity in cocaine law sentencing.

We feel that the racial implications and ramifications of current sentencing policies invoke strong questions of equal protection of the law and freedom from disproportionate punishment. We maintain that the overwhelming weight of the evidence shows that mandatory minimum sentences for crack cocaine are not medically, scientifically or socially supportable, are highly inequitable against African Americans, and represent a national drug policy tinged with racism.

On February 28, 1995 this Commission released a very thorough and meticulously prepared report on the disparity in the sentencing of crack cocaine defendants and powder cocaine defendants. The Report stated that "Federal sentencing data leads to the inescapable conclusion that Blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine." The Report disclosed that in 1993, 88% of those convicted of

federal crack cocaine distribution offenses were African American, while only 4.1% of the defendants were Caucasian, despite a finding that a majority of the nation's reported crack users are White.

We agree with this Commission's statement in its Report that Congress should not rely solely on a statutory distinction between the two forms of the same drug and, instead, that the guidelines system should be revised to further the purposes of sentencing. We feel that the guidelines should be revised to reflect a one-to one correspondence between crack and powder cocaine possession and distribution, with the penalties set at the current levels for powder cocaine. However, we feel that already existing guideline enhancements sufficiently account for any additional harm that may be associated with crack (or any other drug), thus it is unnecessary to promulgate additional guideline enhancements for cocaine penalties.

It is our understanding that the federal sentencing guidelines already take into account involvement of firearms or other dangerous weapons, serious bodily injury or death, use or employment of juveniles, leadership role in the offense, prior criminal history, among other aggravating factors. Therefore, we are particularly troubled by the addition of systemic crime (crime related to the drug's marketing, distribution, and control) and social harms (harms associated with increased addictiveness, parental neglect, child and domestic abuse, and high risk sexual behavior, as factors to be considered for guideline enhancement.

Three persons testified before this Commission on the issue of

violence and gangs at its November 1993 hearing: Dr. Steven Belenko, Deputy Director, New York Criminal Justice Agency, Dr. Paul Goldstein, Associate Professor of Epidemiology at the University of Illinois at Chicago Circle, and Dr. Jerome Skolnick, Professor of Law at the University of California at Berkeley. None of the three supported the proposition of increased penalties for crack cocaine defendants based on the assertion that there is more violence associated with the use of crack than with the use of powder cocaine.

Professor Goldstein also made a presentation during "The Experts Speak" panel of a 1993 symposium sponsored by the ACLU and the Committee Against the Discriminatory Crack Law, entitled, "Racial Bias in Cocaine Laws." Although we have summarized his presentation in previous comments before this Commission, it is relevant to reiterate his findings at this time.

Professor Goldstein asserted that there are no valid and reliable sources of data for policy makers, in either the criminal justice or health care systems, that adequately explains the relationship between violence and drugs. Media reports on violence, he contended, are unclear and misleading, with distinctions between drug use and drug trafficking often not made.

Professor Goldstein divided drug-related violence into three categories: pharmacological (the drug's actual effect on the user); economic compulsive violence (where the user commits a crime to support his habit); and systemic (the violence related to the system of drug distribution). Based on his studies, Professor

Goldstein asserts that he has found little pharmacological violence attributed to either powder or crack cocaine; most of this violence is related to alcohol. Similarly, Professor Goldstein has found little "user-trying-to-support-his-habit" economic violence: only 2% to 8% of cocaine-related violence is of this type. He found that almost all cocaine related violence is found in the cocaine market;ace and system of distribution. "Examples of systemic violence," he explained, "include territorial disputes between rival dealers, assaults and homicides committed within particular drug dealing operations in order to enforce normative codes, punishment for selling adulterated or bogus drugs, assaults to collect drug related debts, and so son."

Goldstein's findings provide evidence that certain common assumptions about drug-related violence are incorrect or exaggerated. For example, although it is commonly believed that violent, predatory acts by drug dealers to obtain money to purchase drugs is an important threat to public safety, Goldstein's data indicates otherwise. He found that violence is most likely to occur with respect to the drug marketplace, and to involve others similarly situated.

Goldstein theorized that police procedures substantially add to cocaine-related violence:

> Intensified law enforcement efforts probably contributed to increased levels of violence. Street sweeps, neighborhood saturation, buy-bust operations, and the like lead to increased violence in a number of ways. For example, removing dealers from their established territory by arresting them creates a vacuum that other dealers fight to fill. By the time these hostilities have ended, convicted dealers may have returned from prison and attempted to reassert their

authority, resulting in a new round of violence.

Finally, Professor Goldstein found no difference in the violence level between the powder cocaine and the crack cocaine market.

This Commission also reported that it would seek to factor in "social harm" as an enhancement to the sentencing guidelines relevant to cocaine offenses. This approach is also problematic and should be abandoned. As stated in the Report, cocaine in any form produces the same physiological and psychotropic effects. The onset, intensity, and duration of effects, however, differ according to how the drug is administered. Research in the Report revealed that psychotropic effects can be reached within one minute after smoking crack, with the "high" dissipating after approximately 30 minutes); 4 minutes after injecting powder cocaine (with the effect also lasting 30 minutes; and 20 minutes after snorting powder cocaine. However the high from snorting cocaine lasts for 60 minutes -- twice as long as from injecting or smoking crack. The Report stressed that both powder and crack cocaine have risk of addiction. Both show aberrant behavior and psychoses. And the duration of effect is the same for inhalation (smoking crack) as it is for injecting powder cocaine.

Moreover, cocaine powder is easily transformed into crack by combining it with baking soda and heat. Some medical experts believe that intravenously-injected cocaine, not smoking it, is the leading cocaine-related threat to both the user and the society. All of these factors show that there is no rational basis for

stiffer penalties for crack because of increased addictiveness or dangerousness.

The Report also stated that reliable information comparing babies born to mothers using crack versus those born to mothers using powder is not available, because medical tests cannot distinguish between the presence of crack as opposed to powder in mother or newborn child. Moreover, this Commission's research revealed virtually no studies that addressed concerns related specifically to crack cocaine use and maternal neglect, teenage pregnancy, and boarder babies. Indeed, although the specter of a generation of "crack babies" has been used as justification for the distinction in penalty between crack and powder cocaine, it has been shown that many of these infants suffer as a result of other social factors such as community violence, malnutrition, other drug usage, and inadequate health care.

Finally, we oppose any arbitrary increase in the penalty levels for powder cocaine to the levels currently established for crack for this will simply flood the courts with more mandatory federal sentences for nonviolent, unarmed first time drug addicts. According to the National Institute on Drug Abuse, about 7,000,000 people used powder cocaine in the past year -- five times the amount that used crack.

Current mandatory penalties have resulted in prison overcrowding and, in some cases, the early release of more violent felons, such as murderers, rapists, etc. New York Governor George Pataki learned this hard lesson upon his recent election. He moved

to ease some of his state's 1973 drug sentencing laws. These laws mandated stiff mandatory sentences for drug offenders but also fueled skyrocketing prison costs and quintupled the number of prisoners being held. Pataki described his proposal in language that illustrates the current realities and benefits of his approach:

> It [his proposal] does three things. First it frees up the cell space for violent felons. Second, it will allow those inmates who otherwise would simply become hardened convicts to have the treatment and the support services, so hopefully they could be led back to productive lives. Then third, we believe it could lead to lower costs to the taxpayers."

A survey of prison wardens found that half of them do not support mandatory minimum penalties for drug offenders and 85% of them think elected officials have failed to offer effective solutions to crime.

CONCLUSION

We believe that the 100-to-one disparity in sentencing between powder and crack cocaine is irrational and unwarranted, and that, by and large, the legislature and the courts have drawn a distinction where science and medicine have concluded none exists. This Commission contemplated that its guideline refinement process could be accomplished within the current and next amendment cycles, resulting in the submission to Congress by May 1, 1996 of a comprehensive revision of the cocaine offense guidelines. This timetable, however, is unacceptably slow for correcting the injustices identified by this Commission in its report. Moreover, this approach, no matter how meritorious, will not remedy the situation. Reform of the sentencing guidelines fails to confront

the barrier of the mandatory minimum statutes. Without a repeal of the relevant mandatory minimum statutes, any appropriate adjustments in punishment within the guideline structure will be impossible, for the statute will always trump the guideline.

Thus, it remains incumbent that this Commission recommend that Congress repeal of the mandatory minimum statutes as they relate to cocaine offenses, or, in the alternative, advocate for a one-to-one sentencing ratio at the current level set for powder cocaine offenses.

NOTE: We wish to reserve the right to submit an addendum to these comments at the time of next week's testimony.

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STATEMENT OF

MARY LOU SOLLER, CHAIRPERSON

COMMITTEE ON THE U.S. SENTENCING GUIDELINES

SECTION OF CRIMINAL JUSTICE

ON BEHALF OF

THE AMERICAN BAR ASSOCIATION

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

SENTENCING GUIDELINE AMENDMENTS

MARCH 14, 1995

My name is Mary Lou Soller, and I am the Chairperson of the ABA Criminal Justice Section's Committee on the United States Sentencing Guidelines. The members of this committee include professionals with diverse views and who are involved in all aspects of the criminal justice system -- including the judiciary, prosecutors, public and private defense practitioners, academics, and criminal justice planning professionals.

I appear before you today at the request of ABA President George E. Bushnell, Jr., to convey the Association's views on the proposed amendments to the Sentencing Guidelines. Our comments are made in the context of the ABA Standards for Criminal Justice "Sentencing," third edition (1993).

As in prior years, we remain interested and concerned about the process employed by the Commission in the amendment of the Guidelines. This is particularly true this year when the Commission has set as a primary goal the need to be responsive to actual and perceived Congressional wishes. Our concerns are both general about the amendment process and specific as to the amendments proposed this year.

Administrative Procedures

As in the past, we would first like to take this opportunity to provide comment on the procedures employed by the Commission in conducting its business.

In previous years we have urged the Commission to adopt rules of procedure and to work toward a more accountable process. We renew those recommendations. We believe systematization of the Commission's process is an important part of any effort to improve federal sentencing.

The Sentencing Reform Act envisioned an expert sentencing commission acting as an

informed and responsive administrative agency. Although located in the Judicial Branch, the Commission has important substantive rulemaking responsibility. Because that responsibility is being exercised by individuals who are not elected, it is critical that those officials actually be -- and appear to be -- both open to input and accountable to the public.

We recognize that the Commission has taken some steps in this direction in the past few years. However, even with the changes that have been made, the Commission remains significantly less accountable than other federal rulemaking agencies. This difference contributes unnecessarily to the controversial nature of Commission decisions. While many of the Commission's policy decisions will of necessity be unpopular with some, Commission policy decisions become even harder to accept when the decision makers have not provided adequate access to information, sufficient opportunity to comment, or an adequate explanation of the decisions reached.

We would like to take this opportunity to reiterate our belief, consistent with ABA Standards, that as a general matter the Commission should use as models for procedural regularity the procedures followed by other administrative agencies that issue substantive rules. While these procedures are not perfect, they do represent an accommodation reached over time between the need for agency efficiency and the need for public accountability.

Consistent with our previous suggestions to the Commission, we make the following recommendations, which could be implemented without any changes in the Commission's statutory mandate and without altering any rights of review that may currently exist.

1. The Commission Should Promulgate Rules of Procedure.

We note that 28 U.S.C. § 994(a) envisions that the Commission will promulgate and amend its Guidelines pursuant to "its rules and regulations." However, the Commission has not as yet brought together those procedures it now follows into a unified and published set of standards. We urge the Commission to publish a set of rules and procedures to govern all aspects of its rulemaking process and to make those procedures available to the interested public.

2. The Commission Should Provide a More Detailed Statement of Basis and Purpose When Adopting Rules.

Section 553(c) of the Administrative Procedures Act ("APA") requires that an agency incorporate "a concise statement of basis and purpose" in the rules adopted. For most agencies, that requirement poses a more elaborate burden than the term "concise statement" implies. As the Supreme Court has explained, "an agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[1]

In the past, the Commission's explanations have not met this standard. For example, the Commission has often failed to account for factors Congress required it to consider, such as the impact of Guideline changes on prison overcrowding. It has also rarely responded to public requests to explain why a comment was being accepted or rejected. For some issues, such as the decision to make Commission changes retroactive, the Commission has supplied no explanation at

[1] Bowen v. American Hospital Ass'n, 476 U.S. 610, 626 (1986).

all.

We urge the Commission to provide a more thorough explanation of its amendments and policy statements, to explain why it chooses one option over others considered, and to explain why it rejects public comment opposed to its suggestions.

3. The Commission Should Publish a More Detailed Regulatory Agenda.

The Commission now publishes a notice in the Federal Register identifying the issues on which it seeks comment and those on which it may adopt amendments, and we commend you for doing so. However, that notice is generally far less detailed than the notice published in the United Agenda of Federal Regulations and required of other agencies. We recommend that, to the extent feasible, the Commission should model its agenda on the United Agenda. The more information the Commission can provide to the public, the better the feedback it can expect.

4. The Commission Should Adopt Procedures for Petitions.

At present, the Commission has no written procedures concerning the solicitation and disposition of petitions. It also does not maintain a public petition file. The Commission should consider adopting procedures regarding petitions.

5. The Commission Should Comply Voluntarily With FACA and FOIA.

Conventional rulemaking agencies are subject to the requirements of the Federal Advisory Committee Act ("FACA") and the Freedom of Information Act ("FOIA"). The Commission's

failure to operate under these open-government provisions, or to construct acceptable analogies, frustrates legitimate public efforts to inform and learn from the Commission.

FACA requires open advisory committees. Most other, more traditional, agencies have learned to operate with open meetings. An open meeting rule would permit the public better access to the Commission's committee action and would improve the quality of its deliberations by permitting public input. Compliance with FOIA, or a Commission analogue, would permit the public easier access to Commission documents with relevance to sentencing questions.

6. The Commission Should Comply With the Sunshine Act.

Although the Commission's meetings are open to the public, the lack of notice and lack of formality concerning the meetings limits the usefulness of any open meeting policy. The Commission's current policy does not require a week's prior notice of the meeting or publication of the notice in the Federal Register, nor does the policy define what meetings are open or limit the circumstances under which a meeting may be closed. In addition, the Commission does not make tape recordings of prior meetings available to the public. We urge the Commission to amend its policies to provide greater notice of the time of its meetings, access to a record, and standards for those rare circumstances when decisions will not be made in public.

Specific Amendments

In addition to our general comments, we also have specific comments on some of the proposed amendments. Our position is set forth below and in Attachment 1 to this submission.

A. Amendments Proposed In Response to Congressional Action (Proposed Amendments 1-32).

The first thirty-two (32) proposed amendments published by the Commission relate to sentencing provisions in the Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. 103-322) and other legislation passed by the 103rd Congress. We believe these proposals raise a threshold question of how the Commission should approach such statutory provisions.

The Sentencing Commission is an administrative agency created by Congress, and the Guidelines promulgated by the Commission are -- like all agency regulations -- subject to revision by Congress. Thus, although the Sentencing Reform Act establishes a passive process for congressional consideration of Guideline amendments (28 U.S.C. § 994(p)), the Congress could pass a law tomorrow rewriting the Guidelines in whole or in part -- or abolishing the Guidelines altogether.

To date, Congress has exercised its absolute authority over the Guidelines with restraint. Since sending the initial Guidelines to Congress in April, 1987, the Commission has sent more than 500 Guideline amendments to Congress and only one has been explicitly rejected or rewritten by Congress.[2]

Apparently Congress recognizes that the specialized, independent agency it created in 1984 is best suited to refine a set of rules as intricate as the Guidelines. The same logic that led Congress to create this expert agency eleven years ago has led Congress to adopt a generally

[2] The 1992 Treasury, Postal Service and General Government Appropriations Act (Pub. L. 102-141) included an amendment offered by Senator Helms (section 632) rewriting a proposed amendment to the child pornography guideline (§ 2G2.4).

deferential approach to the Guidelines promulgated by the agency.

This is not to say that Congress has ignored sentencing policy over the past eleven years, because plainly it has not. Rather, Congress has pursued two separate and, we believe, contradictory strategies for effecting sentencing policy.

First, Congress has persisted in enacting mandatory minimum sentencing laws that undermine the structure, cohesiveness, and effectiveness of the sentencing guideline system. Whatever the wisdom of such laws may have been before November 1, 1987, the establishment of a guideline system in the federal courts rendered mandatory minimums unnecessary and counterproductive.

The ABA is opposed to mandatory minimums. We believe these pose a serious threat to the viability of the guideline system. We commend the Commission both for its 1991 landmark study on the subject and for the subsequent steps it has taken to discourage Congress from enacting mandatory minimums. We take this occasion to urge the Commission to continue to be aggressive in its opposition to the mandatory minimum sentences proposed in several of the crime bills currently under consideration in Congress.

On the other hand, the second means by which Congress has enunciated sentencing policy is not necessarily unhealthy. In recent years, Congress has learned to communicate with the Sentencing Commission through statutory directives of varying specificity. For example, Congress may direct that the Commission amend the Guidelines to enhance the punishment for offenses committed under certain circumstances. Similarly, Congress may direct the Commission to review existing Guidelines to ensure that particular sentencing factors are given due weight.

Such directives are a sensible way for Congress to express itself on matters of sentencing policy, especially when crafted to afford the Commission great flexibility to implement the legislature's will. Even a specific statutory directive to the Commission is preferable to a mandatory minimum, since the latter ignores -- and therefore undermines -- the guideline system.

The Sentencing Commission should respond diligently to statutory directives for two reasons: first, because by law it must, and second, because the Commission should seek to encourage this form of congressional sentencing policy as a desirable alternative to mandatory minimums. Over time, if the Guidelines are working well and as Congress gains faith in the Commission as an institution, Congress should feel less need to pass mandatory minimums or to fine-tune the Guidelines with unduly specific directives. In short, the Congress will trust the Commission to do the job Congress assigned it in the first place.

The imperative to respond diligently to statutory directives must not be misunderstood as a duty to respond blindly, however. After all, the Commission is not just any administrative agency -- it is an agency cloaked in the considerable prestige of the federal judiciary and created expressly to make sense of federal sentencing practices. If a statutory directive is susceptible to two or more responses, the Commission should choose that which conforms most closely to the goals of the Sentencing Reform Act: consistency, rationality, and fairness.

This proposition parallels the statement of managers accompanying the 1994 crime bill conference report, which contains the following paragraph three separate times:

> In carrying out directions from the Congress, the United States Sentencing Commission shall assure reasonable consistency with other guidelines, avoid duplicative punishment for substantially the same offense, and take into account any mitigating circumstances which may

> justify exceptions. The Commission shall also carry out such directions in light of the factors set forth in subsection 3553(a) of title 18, United States Code.

H.R. Rep. 103-711 at 388-89, 391, and 392 (1994).[3]

This recent legislative history is significant because it incorporates, by its reference to § 3553, the overriding goal of the 1984 Sentencing Reform Act -- i.e., a cohesive sentencing system that is fair to defendants and victims alike, individualized yet not unduly disparate, and -- above all -- rational. Congress is instructing the Commission that the statutory directives it has enacted subsequent to passage of the Sentencing Reform Act do not stand alone; they are to be implemented within the framework and in furtherance of the goals of the 1984 Act.

With this principle firmly in mind, we offer the following three observations in response to the first thirty-two proposals. These general points are supplemented by an item-by-item analysis attached as an Appendix to this testimony.

1. Not Every Expression Of Congressional Sentencing Policy Requires a Guideline Amendment.

   a. Minimum Sentences.

The 1994 crime bill contains many sentencing provisions, but only a handful explicitly or

[3] This paragraph of the legislative history is apparently drawn from a portion of the statute itself. Section 280003(b) of the crime bill (Pub. L. 103-322), which calls for an enhancement in cases involving hate crimes, concludes with the sentence: "In carrying out this section, the United States Sentencing Commission shall ensure that there is reasonable consistency with other guidelines, avoid duplicative punishment for substantially the same offense, and take into account any mitigating circumstances which may justify exceptions." When the hate crimes provision was offered as an amendment to the crime bill, Senator Hatch, the new chairman of the Senate Judiciary Committee, spoke in favor of it. 139 Cong. Rec. S. 15024 (daily ed. Nov. 4, 1993).

implicitly require a response by the Commission. For example, title VII contains the notorious "three strikes and you're out" provision. Judge Wilkins, then-chairman of the Sentencing Commission, forthrightly testified on behalf of the Commission before Congress that this mandatory minimum sentencing law was unnecessary because the Guidelines have always mandated substantial punishment -- including life sentences -- for career offenders. Congress, however, chose not to follow this advice.

Proposed Amendment #28 asks whether the Commission should attempt to incorporate the three strikes law in the Guidelines. We think it should not. As this Proposed Amendment notes, § 5G1.1 currently "provides instructions on the application of mandatory statutory penalties that conflict with the guidelines." A Guideline amendment is simply unnecessary.

b. Maximum Sentences.

Just as the Commission need not react when Congress creates a new statutory minimum sentence, the Commission need not necessarily react when Congress increases a statutory maximum. For example, Proposed Amendments #22 and #23 refer to provisions in the 1994 crime bill that increase the maximum penalties for various immigration offenses. Absent some evidence that the current offense levels are too low (e.g., that upward departures are relatively frequent or that increased punishment would enhance deterrence), the Commission should assume that Congress increased the maximum penalty to permit harsher punishment for the most egregious case, not for the heartland case contemplated by the base offense level. Indeed, on the current record, we do not believe there is any justification for increasing base offense levels in

§ 2L, especially because the Commission so recently amended the immigration guidelines to provide for more stringent punishment for the heartland case.

2. Congressional Directives Should Not Interfere Unduly With the Goal of Guideline Simplification.

An impressive consensus has developed among judges, practitioners, and current Sentencing Commissioners on the need to simplify the Guidelines. But even while influential members of Congress have themselves noted the complexity of the system,[4] the 1994 crime bill threatens -- quite literally -- to weigh down the Guidelines.

In its omnibus law, Congress understandably has sought to address public concern about specific criminal scenarios (e.g., counterfeiters who use guns [sec. 110512; Proposed Amendment #8] or drive-by shootings to facilitate drug trafficking [sec. 60008; Proposed Amendment #9]). But guideline simplification requires that the Guidelines be made more, not less, generic.

The Commission may be tempted to construct new guidelines, or to concoct new specific offense characteristics, to address the specific criminal activity against which Congress has sought to legislate. We believe that temptation should be avoided whenever the current Guidelines, however generically, produce appropriately stiff punishment for the activity in question.

For example, we recommend that the Commission respond to passage of the International

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[4] See Hatch, The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System, 28 Wake Forest L. Rev. 185, 191 (1993) ("numerous commentators have detailed problems with the guidelines, including the sentiment that the guidelines are excessively time consuming, rigid and technical in their application"); Kennedy, Sentencing Reform -- An Evolutionary Process, 3 Fed. Sent. Rptr. 271 (1991) ("novelty and apparent complexity of the current federal guidelines make the system seem mechanical").

Parental Kidnapping Crime Act (Proposed Amendment #4) and the Freedom of Access to Clinic Entrances Act (Proposed Amendment #14) by simply adding them to the statutory index. Existing guidelines are entirely adequate to ensure appropriate punishment for these crimes. Writing new Guidelines to address these new laws would serve only to add weight and complexity to a Guidelines manual already bulging with too much of both.

The original drafters of the Guidelines sought to avoid the trap of writing a guideline for every potential fact pattern by relying on a court's departure authority to handle unusual factual occurrences. In the introduction to the initial Guidelines, the Commission wrote that courts should:

> treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. . . . The Commission has adopted this departure policy [because] it is difficult to prescribe a single set of guidelines that encompass the vast range of human conduct potentially relevant to a sentencing decision. . . .

U.S.S.G., Ch. 1, Pt. A.

The current Commission should adhere to this sensible policy. We suggest, for example, that the possibility that a crime involved terrorism (Proposed Amendment #24) or street gang activity (Proposed Amendment #26) be left to a court's departure authority, rather than be the impetus for new Guidelines or specific offense characteristics. That response will further the cause of simplicity and reflect the fact that the terms "terrorism" and "gang activity" encompass such wide ranges of possible conduct that they are not readily reducible to a flat numerical enhancement.

We recognize that in the terrorism provision (as elsewhere), Congress has directed the Commission to "provide an appropriate enhancement," but this does not mandate a contrary result. Consistent with our analysis of the framework in which these directives have been formulated, we urge the Commission to find that a recommended departure satisfies the requirement for an "enhancement." In contrast, the mere addition of a specific offense characteristic for terrorism would fail to satisfy the requirement of the statute, because it would not be an "appropriate" enhancement -- i.e., it would prove to be indefensibly high or low in individual cases on the wide spectrum of conduct constituting terrorism.

3. When Faced With Congressional Action That Presents the Commission With Options, The Commission Should Not Amend the Guidelines Without Sufficient Data And Public Input.

We note that none of Congress's actions establishes a deadline for the promulgation of amendments. We commend the Commission for seeking to react to the new laws in a prompt manner, but we believe this reaction should not be hasty. In several areas, we believe there is not sufficient data available to justify action in the current amendment cycle.

For example, relevant to Proposed Amendment #1 (relating to HIV transmission) and Proposed Amendment #5 (relating to sexual abuse), Congress has mandated studies that will not be completed until March 13, 1995. It is impractical for the Commission to disseminate the results of those studies, publish proposed amendments, seek public comment, and submit amendments to Congress on those subjects by May 1, 1995. We therefore urge the Commission to refrain from promulgating any amendments in these areas during the current amendment cycle.

Similarly, we also note that there are a number of instances in which the Commission has stated a general issue on which it seeks comment, but has not set forth any specific proposal. (Some examples of such areas are found in Proposed Amendments #17, #18, #19, and #24.) We urge the Commission to defer action on any issue for which a specific proposal is not set forth by the Commission. As noted in Section I.3, above, we believe a narrative description of the issue raised by a statutory provision does not provide sufficient notice to allow interested parties -- including the ABA -- to comment intelligently.

There is nothing in the 1994 crime bill or any other legislation that suggests Congress wants the Commission to act before it has all the information and input it needs to act responsibly. Above all, we submit, Congress wants the Commission to remain true to the goals and deliberative methods set forth in the Sentencing Reform Act of 1984.

B. Drug Offenses (Proposed Amendments 33 through 44).

Consistent with ABA Standards and with our past positions before this Commission, we believe drug quantity has a role in the determination of the sentence, but the impact of this single factor should be reduced from its present preeminent position.

There are several reasons for our support. First, we have long believed that the current Guidelines overemphasize the quantity of drugs in determining an offender's culpability. Second, consistent with ABA policy, we oppose the mandatory minimum provisions themselves. This amendment would reduce the extent to which the Guidelines are distorted by those ill-considered statutes. Further, consistent with the principle stated both in our Standards and in 18 U.S.C.

§ 3553 that punishment should be sufficient -- but not greater than necessary -- to fulfill the statutory purposes of sentencing. A recently released study from the Department of Justice documented the extent to which federal prisons are heavily populated with low-level, non-violent drug offenders. This result is caused largely by mandatory sentencing statutes and their interaction with Guideline § 2D1.1. Amendments that will reduce the effect of quantity will help address these concerns.

For these reasons, we believe that Approach #1 in the Proposed Amendments is the better choice of the Commission's proposed changes. We are concerned that when Approach #2 is applied to actual cases, it will have the effect of resulting in even higher sentences for a substantial number of defendants. Not only is this inconsistent with the ABA Standards, but there is no demonstrated need to strive for this result.

Moreover, we note that Approach #1 has the benefit of continuity with the current system. Approach #2 will so fundamentally change the system that practitioners and judges will, in essence, be starting from scratch in this area. We believe it is currently better to tinker with the existing system than to discard it.

Because our comments are based on the ABA Standards, which are general in nature, and the Commission's proposals in this area are very specific, we are not submitting specific comments on individual proposed amendments. However, we note that proposed amendments such as that in #34 (which caps the level for low-level drug offenders) are consistent with ABA policy, to the extent they reduce the effect of quantity on the sentence imposed.

The Commission has examined the amendment of the drug guidelines for four years now.

We believe the issues generally are ripe for action. However, in the area of the relationship between crack and powder cocaine, we are concerned about Commission action when no proposal has been published this year. The ABA agrees that any guidelines that perpetuate racial disparity are to be condemned, but we reiterate our concerns (set forth in Section I above) about amendment of the Guideline without full publication of a specific proposal.

C. Money Laundering (Proposed Amendment 44).

As in the past, we strongly support the adoption of this amendment to § 2S1.1 and § 2S1.2, with several modifications.

We agree with the Commission's Money Laundering Working Group that where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same for the underlying offense."

Many of our members have reported to us their experience that the current Guidelines encourage prosecutors to seek money laundering convictions in cases not related to narcotics or other traditional forms of money laundering because the resulting sentences are significantly higher than for the underlying offenses. We have also become aware of many instances in which the government has attempted to influence plea bargaining negotiations merely by threatening to include a "money laundering" count in the indictment. Anecdotal evidence suggests that this is a common tactic by prosecutors.

The proposed Amendment seems to recognize that 18 U.S.C. §§ 1956 and 1957 are so

broad that they encompass cases which are not normally thought to be "money laundering" -- and indeed, in some cases, in which the underlying offense is virtually indistinguishable from the underlying crime. See, e.g., United States v. Paramo, 998 F.2d 1212 (3rd Cir. 1993), cert. denied, 114 S.Ct. 1076 (1994) (mere cashing of embezzled checks promoted underlying scheme and constituted money laundering); United States v. Cavalier, 17 F.3d 90 (5th Cir. 1994) (payment of false insurance claim promoted underlying scheme and constituted money laundering). Adoption of the amendment would go a long way toward addressing the problems this overreaching creates.

Although this Amendment would go a long way toward correcting the current problems, we suggest that the ultimate goal of achieving fairness in sentencing would be more clearly advanced by modifying the proposal so that the base offense level for an underlying offense would be applied in all cases, not just in cases where that level would exceed the base offense level in § 2S1.1(a)(2) or (3). Further, if the Commission is intent on achieving uniformity among Guidelines by conforming § 2B1.1 and § 2T1.1 with § 2F1.1, we suggest that § 2S1.1(a)(3) should also be assigned the same base offense level as § 2F1.1, including the specific offense characteristic for more than minimal planning when appropriate.

D. Imposition Of A Sentence On A Defendant Subject To An Undischarged Term Of Imprisonment (Proposed Amendment 46).

As we understand it, the alternative proposals to amend § 5G1.3 are being offered to address a concern voiced by probation officers about the difficulty in computing a sentence when

a defendant is also facing another sentence (or sentences) from a state or federal court.

We do not believe that the mere difficulty in obtaining information is a valid justification for increasing the severity of sentences. We agree that finding a common approach to the problem may be consistent with the goal of Guideline simplification, but we are concerned that the approaches suggested do not adequately address the perceived problems of § 5G1.3.

Indeed, the current formulation of § 5G1.3 is the most consistent with the ABA Standards. It requires that sentences run consecutively only to the extent necessary -- and no more than necessary -- to achieve an appropriate punishment in an individual case. Moreover, the present state of the Guideline -- and, we believe, the better approach -- does not allow for differences in sentences based merely on the time of the imposition of the sentence.

The ABA does not believe either alternative proposal should be adopted. However, if the Commission is intent on adopting an amendment, we believe that option #1 is preferable to option #2. Option #1 urges the sentencing court to follow the same general rules of application whenever possible. On the other hand, option #2 can be read as allowing the court to deviate from these rules for no valid purpose. If the Guideline system is to remain coherent, option #2 is simply inconsistent with this goal.

Guideline Simplification

Finally, we understand that the Commission currently has underway a project directed toward simplifying the Guidelines. We encourage this effort. We note that there is a tension between avoiding disparity and the issue of complexity. As the Commission wrote in the

introduction to the initial Guidelines:

> The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system . Mover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.

U.S.S.G., Ch.1, Pt. A.

We are anxious to participate in this process and are willing to work with the Commission in any way in which we can be of assistance. We also suggest that, after the project has progressed to the point where several approaches have been identified, proposals should be drafted and regional hearing should be held to receive comment on the suggestions. We believe such regional hearings would be extremely valuable to the Commission.

Attachment 1

SPECIFIC COMMENTS ON THE COMMISSION'S PROPOSALS
IN RESPONSE TO CONGRESSIONAL ACTION

1. For the reasons set forth in the body of our testimony, we recommend that the Commission take no action in response to section 40503 of the crime bill until it has completed the study mandated by that section, disseminated the results, published a concrete amendment proposal, and obtained public comment thereon. We suspect, in any event, that federal assault cases involving HIV transmission are so rare that Guideline amendments in this area are unnecessary and run counter to the goal of simplification.

2. This Proposed Amendment addresses a new assault offense. We oppose Commission action in the absence of a concrete proposal. Moreover, we believe current Guideline § 2A2.3 and the vulnerable victim enhancement in Chapter 3 are adequate to deal with the new statutory subsection. Finally, a Guideline amendment in this area would run counter to the goal of simplification.

3. This Proposed Amendment raises the question of how the Commission should deal with the increased statutory maximum penalty for involuntary manslaughter. As noted in the body of our testimony, we do not believe an increased maximum necessarily warrants an increased base offense level. As noted in the Federal Register, this is an instance in which the Commission itself sought the increased maximum "to allow the guideline sentence for this offense to operate without undue constraint." On this record, and without a concrete proposal, there is no justification for amending the existing Guideline.

4. As set forth more clearly in the body of our testimony, we urge the Commission simply to amend the statutory index to include the new crime of International Parental Kidnapping (option #2).

5. As set forth more clearly in the body of our testimony, we recommend that the Commission take no action in response to section 40112 of the crime bill until it has completed the study mandated by that section, disseminated the results, published a concrete amendment proposal, and obtained public comment thereon.

6. The Commission correctly notes that the use of specific offense characteristics to reflect the increased penalties for offenses resulting in the death of the victim would move away from "the modified real offense sentencing system" of the original Guidelines toward "a pure real

offense system" in which such important sentencing factors would be decided by a lower standard of proof. We reiterate the concern expressed in past years that such a structural change should not be undertaken on an ad hoc basis and without far more detailed study. We also question the adequacy of a "preponderance" standard, especially for significant sentencing factors, such as the death of the victim. For these reasons, we endorse option #1, which merely amends the statutory index.

7. This proposed amendment would recommend an upward departure for recidivist sexual offenders. We believe the existing Guidelines (particularly § 4A1.3) already adequately address this situation, but the proposed new application notes are preferable to Guideline amendments. We would not object to adoption of this amendment.

8. In the Federal Register, the Commission notes that its "data suggest that the frequency of firearm possession in [counterfeiting] cases is very low." Because of the need for Guideline simplification described in the body of our testimony, we oppose option #1 which would create a new specific offense characteristic for an infrequently occurring fact pattern. Instead, we support the adoption of option #2, which would allow for an upward departure.

9. Because of the need for Guideline simplification described in the body of our testimony, we oppose the Department of Justice proposal to create a new enhancement for drive-by shooting where no injury occurs. Rather, we support the generic approach of amending the statutory index (option #1).

10. As set forth more fully in the body of our testimony, we oppose the promulgation of a Guideline amendment until a concrete proposal, rather than a narrative description of the issue, has been published in the Federal Register. Although it is clearly logical to better coordinate the Guidelines in § 2D2.1 and § 2P2.2 since they both relate to drug offenses in prison, there is insufficient information in the Federal Register for us to provide meaningful input.

11. Section 90102 of the crime bill directs the Commission to amend the Guidelines to provide an "appropriate enhancement" for violations of 21 U.S.C. § 860. This is a clear example of an instance in which the Commission should exercise common sense in responding to statutory directives, since the Guidelines already provide for such an enhancement. Because Congress was seemingly unaware of the current enhancement, no additional Commission action is necessary.

12. We support the technical amendments to the Guidelines relating to drugs.

13. We support this proposal's attempts to enhance consistency in the treatment of drug paraphernalia cases.

14. We support the general goal of consolidation and simplification embodied in option #1 of

this proposal. We do not take any position on which of the several offense levels should be selected, however.

15. Consistent with our position on the need for Guideline simplification, as set forth more fully in the body of our testimony, we oppose the Department of Justice proposal to create a new enhancement for semi-automatic assault weapons. We instead support the generic approach reflected in the proposed amendment.

16. The difference between the three options outlined for implementing the youth handgun prohibition in the crime bill essentially turns on a normative decision about the appropriate offense level. Because the ABA does not take a position on which of several offense levels should be selected, we do not take any position with respect to this Proposal.

17. We oppose the promulgation of a Guideline amendment based on a narrative description of the issue, rather than a specific published proposal. We urge the Commission to resist adopting an amendment in this area until such a specific proposal is made. We note, however, that it appears illogical to provide for a new specific offense characteristic when the conduct in question (use of certain weapons in other crimes) is already embodied in the current base offense level.

18. We oppose the promulgation of a Guideline amendment based on a narrative description of the issue, rather than a specific published proposal. Nonetheless, we note in general that option 2 appears to be most consistent with the current structure of the Guidelines.

19. We oppose the promulgation of a Guideline amendment based on a narrative description of the issue, rather than a specific published proposal. Nonetheless, we note in general that it appears that Chapter 4 of the Guidelines already provides for an appropriate enhancement based on a defendant's prior record.

20. This proposed amendment concerns a statutory provision that amends the current firearms statutes, but does not specifically call for Commission action. As noted in our comment on Proposed Amendment 6, the ABA is concerned about amendments that move the Guidelines haphazardly toward a more pure real offense system. For that reason, we oppose option #1. The proposal to suggest an upward departure (option #2) is preferable, because it avoids increased complexity in the Guidelines.

21. This proposal would amend the statutory index to take account of a new subsection in 18 U.S.C. § 924. The amendment seems appropriate and we support it.

22. We oppose the promulgation of a Guideline amendment based on a narrative description of the issue, rather than a specific published proposal. Nonetheless, for the reasons set forth more fully in the body of our testimony and in light of recent amendments to the Guidelines governing

immigration offenses, we do not believe that Congress' decision to increase the statutory maximum penalty for such offenses warrants another amendment to the Guidelines.

23. See response to Proposal #22.

24. We oppose the promulgation of a Guideline amendment based on a narrative description of the issue, rather than a specific published proposal. Nonetheless, for the reasons set forth in the body of our testimony, we do not believe Commission action is necessary in light of the existing Guideline provision recommending an upward departure in cases involving terrorism.

25. In the interest of Guideline simplification, we oppose the proposal of the Department of Justice to create an entirely new Guideline for the crime of using a minor to commit a crime. We believe existing Guidelines and departure authority are already sufficient to address this conduct.

26. For the reasons set forth in the body of our testimony, we oppose the creation of a specific offense characteristic for conduct involving "street gang activity." This is a factor best left to a court's departure authority.

27. We are unaware of any new empirical evidence that suggests the current "vulnerable victim adjustment" does not deal adequately with the issue of elderly victims. We do not oppose the recommendation relating to an upward departure in section (B) of this Proposal, but we believe further action is unwarranted at this time, especially since the Commission has not published any more concrete proposals in the Federal Register.

28. For the reasons set forth more fully in the body of our testimony, we urge the Commission not to incorporate the "three strikes" law in the Guidelines.

29. Consistent with ABA standards, we support the "safety valve" proposal in the crime bill, because it mitigates the harsh impact of mandatory minimum sentences on low-level drug offenders. We urge the Commission to re-promulgate its interim Guidelines implementing the safety valve, and to adopt Proposal 33, which more comprehensively addresses the issue of low-level drug defendants. We also urge the Commission to resist efforts in the current Congress to scale back the safety valve provision.

30. We support this Proposal, which simply implements a mandatory restitution provision in the crime bill.

31. We support this Proposal, which simply implements a provision in the crime bill regarding supervised release.

32. We support this Proposal, which simply makes technical changes to the Statutory Index.

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March 2, 1995

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

Dear Chairman Conaboy and Commissioners:

The North Carolina Academy of Trial Lawyers has carefully studied the proposed amendments to the guidelines, policy statements, and commentaries to the Federal Sentencing Guidelines published in the Federal Register for the 1995 amendment cycle.

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

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

The Academy especially believes that the guidelines which affect controlled substance violator's must be altered, and change must occur promptly. We believe that weight of substance currently plays too great a role in sentencing, that use of weapons and violence are not emphasized enough, that the 100 to 1 crack to powder ratio results in unintentional but clear racial discrimination, and that the adjustments concerning role in the offense are too vague and often misapplied. We favor the Practitioners Advisory Group's approach to remedy these flaws.

As to the drug table, we favor Approach One. While Approach Two's proposal has merit, we feel that in reality weight continues to play a significant factor in sentencing under either approach. We believe that some of the specific offense characteristics in

Approach Two will create disparity and, while we favor a leaner drug table, we are concerned that by using the suggested drug type formula, and by more heavily relying on number of participants, fairer drug sentencing will not occur. For example, marijuana is placed in the intermediate category, but there have never been any recorded deaths from cannabis overdose. Also, certain drugs, like imported marijuana as opposed to that which is domestically grown, require more participants so that organizational size does not necessarily translate into offense seriousness. We also note that in both options of Approach Two weight continues to play a significant factor in sentencing. When we considered the totality of circumstances, we found no compelling reason to shift from the formula that most professions now understand to a new approach that will not result in fairer drug sentences. We, therefore, chose Approach One, and we endorse Option B.

There is strong legislative history supporting the argument that those targeted by the mandatory minimum sentences were the leaders of drug organizations who distribute significant quantities. Therefore, adding four levels to a level that already considers leadership results in double counting, and this is exactly what occurs currently when the pre-adjusted range is tied to the ten and five-year mandatories. Option B ties the post-leadership adjusted sentence to the mandatories which not only eliminates double counting, but which drives down those levels not subject to mandatory sentencing. The resulting punishment levels remain severe but fair and represent significant increases over those imposed prior to the guidelines.

In conjunction with downsizing the table, it is absolutely necessary to reduce the crack-powder cocaine ratio. There is no doubt that the effect of the 100 to 1 ratio results in disparate sentences for black defendants. There exists no proven scientific basis for a 100 to 1 differential, and the best research indicates that the most addictive method of ingesting cocaine is by needle which utilizes powder. Finally, many times these enormous crack sentences do not account for the violence and firearms use that drove the political decision to create the 100 to 1 radio in the first place. By reducing the ratio and increasing the penalty for weapons use and injury, a more selective sentencing mechanism is created which bases length of punishment on neutral criteria.

It is absolutely essential that the Commission reduce the ratio and increase the sanctions for violence now, before Congress decides on what, if any, action is required concerning the mandatory minimums and the crack-powder differential. Action now will reduce the unfair enormity of a drug table that permits a life sentence for a first offender who leads a conspiracy which distributes 1501 grams

of crack over a five-year period, but allows an offender with more than nineteen criminal history points who possesses slightly more than one and one-half kilograms of powdered cocaine on one occasion to receive no more than twelve and one-half years in prison. Such a differential can never be justified and must be remedied now. Hopefully, by enacting comprehensive violence provisions now, Congress will be able to fully comprehend the guidelines penalties available for all cocaine entrepreneurs who further their enterprises with violence regardless of the type of cocaine they choose to distribute. By isolating violence as the engine which drives cocaine sentencing significantly above the mandatory minimums, the Commission can lead by example toward more rational sentencing that is properly based on neutral criteria and not on the race of the perpetrator.

The Academy believes that the linchpin of the Practitioners Advisory Group proposal is the enhancement for violence and firearms reproduced on page 63 of the proposed Amendments. These specific offense characteristics act in a proportional and systematic way to provide for incremental sentencing increases depending upon the degree of violence occurring in a drug offense. These provisions re-establish deterrence for drug-related violence. Currently there is no deterrent to violence for a crack organization that distributes more than 1,500 grams. In fact, there may be an incentive to obstruct justice with violence. The leader who uses no violence is subject to life, while the leader who uses violence to intimidate witnesses receives no increase in sentence if violence does not obstruct, but receives no sentence if violence eliminates all evidence of guilt.

Once the drug table is downsized and the crack-powder ratio is reduced, a significant increase in the penalty for violence provides a strong deterrent and provides just punishment for violent drug-distribution predators. The leader of a 50 kilogram cocaine conspiracy who uses no violence has a new sentencing range under this proposal of 188 - 405 months, depending upon criminal history. Under this proposal the same defendant is subject to penalties up to mandatory life if permanent injury occurs as a result of firearms discharge, even if the leader has no prior convictions. By isolating these perpetrators for extremely severe penalties, the justifications of punishment, protection, deterrence and retribution are fulfilled.

The proposal's elimination of the Pinkerton approach for these specific offense characteristics is both just and acts as a further deterrent. By increasing sentences for only those who actually use or induce violence, the true perpetrators are punished, while non-violent co-conspirators are sentenced only for the drug portion of

the conspiracy. Thus, there is a reduced incentive for conspiratorial violence to proliferate once one violent act occurs.

We strongly believe that these three mechanisms for fairer sentences in the drug arena are all essential components of a balanced compromise for drug sentences which, if fully digested and understood by Congress, will meet with little resistance. By reducing the overall impact of quantity, by downsizing the table, by eliminating racial disparity by reducing the crack-powder cocaine ratio, and by significantly increasing the penalty for drug-related violence up to life without parole for larger scale perpetrators, this Commission can administer just, appropriate and racially neutral punishment, which incrementally increases as conduct becomes more severe. Enacting these changes will ensure that the guidelines' ultimate goals of proportionality, uniformity, and elimination of disparity will finally be achieved for the drug-related perpetrator.

We also endorse the modifications proposed for the role in offense adjustment embodied in proposed Amendment 35 with the few brief changes endorsed by the Practitioners Advisory Group.

Commission studies have shown that role adjustments are currently unevenly applied. These proposed changes will help judges provide more consistent role adjustments which will lead to less sentencing disparity.

In total, a system of sentencing which clarifies role, increases drastically the punishment for violence, decreases but does not eliminate weight in determining sentences, and reduces the racial disparity resulting from the current crack-powder cocaine ratio are all laudable goals which can be achieved if this comprehensive proposal is enacted.

The Academy also endorses the changes embodied in Amendment 44 to the guidelines which affect money laundering. Tying the base level to the underlying conduct that generated the proceeds eliminates the possibility that charging decisions as to laundering will occur simply to manipulate the guidelines. At the same time creating this nexus between the punishment for the laundering and the underlying conduct ensures that these guidelines comport with the relative seriousness of the offense conduct, thus ensuring proportionality.

We also endorse the concept of an increase in punishment when the defendant knew the transactions were designed to conceal illegality or if the defendant knew the funds were to be used to promote further criminality.

Richard P. Conaboy, Chairman
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We also recommend the Practitioners Advisory Group's position concerning the proposed base offense level for subsection (a)(3) because we agree that more than minimal planning should not be assumed.

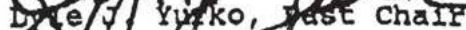
The Academy of Trial Lawyers believes that these changes to the drug and money laundering guidelines are essential to further the Commission's goals for guidelines sentencing.

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

Sincerely yours,

James F. Wyatt III, Chair

Joseph B. Cheshire V, Past Chair



Lyle J. Yurko, Past Chair

Criminal Law Section
North Carolina Academy of Trial Lawyers