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The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Chairman Wilkins:

I am in receipt of a copy of a November 16, 1990 letter forwarded to you by Paul Borman, Chairman of the ABA's Sentencing Guideline Committee, in which Mr. Borman communicates a number of suggestions and requests regarding the Commission's current guideline amendment process. On behalf of the Post Conviction Committee of the National Association of Criminal Defense Lawyers, I am writing to express our enthusiastic support of the matters contained therein and to urge the Commission to affirmatively act on each of Mr. Borman's recommendations.

While we feel that Mr. Borman has identified a number of critical matters that clearly merit Commission attention, please permit me to express particular interest in several of the items therein noted.

We believe that it is most important for the Commission to secure information and comment on what we perceive are some of the disparate procedures and practices of certain U.S. Attorney Offices throughout the nation. Of particular concern are the requirement of the waiver of appeal rights as a condition of the acceptance of plea agreements, the development of policies that specifically limit the extent of departures under §5K1.1, and the withholding of agreements pursuant to §1B1.8 where the office has previously determined that it will make a §5K1.1 motion. It is our position that such practices and procedures impact negatively on the uniform implementation of the guidelines and serve to introduce the precise kinds of disparity that the guidelines were meant to eliminate.

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The Honorable William W. Wilkins, Jr.
Chairman
December 11, 1990
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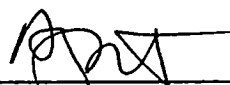
Additionally, we believe that it is most important for some comment to be secured on the issue of limiting the initiation of §5K1.1 departures by prosecution motion in non-mandatory minimum cases. We believe that the guidelines should be amended to permit the courts to make such a reduction on their own or in response to the defense and feel that this issue warrants input from the public.

Moreover, in a matter not addressed by Mr. Borman, we believe that some scrutiny should be given to the guidelines related to marijuana plant offenses. We find it most troubling that an individual found to possess 49 marijuana plants is considered to be involved with 4.9 kilograms of the substance, while that same individual would be held responsible for 50 kilograms if he or she had just one more plant.

Finally, permit me to note that the Committee has just initiated a project to secure information concerning other problems that the criminal defense bar is having with individual guidelines and guideline procedures. In the most recent edition of the Association's publication The Champion, a request was made for feedback in this regard. While the responses anticipated most probably will not be available in time for the current round of amendments, I trust that we will be in a position to share this information in the near future.

We thank you in advance for the consideration that we know will be given to this correspondence and look forward to continuing our relationship with you and the Commission. Please contact me directly if you have any questions or need any additional information.

Sincerely yours,



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STATEMENT OF
ALAN J. CHASET
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE
UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON PROPOSED AMENDMENTS
TO THE UNITED STATES SENTENCING GUIDELINES

WASHINGTON, D.C.

MARCH 5, 1991

Judge Wilkins and Members of the Commission, my name is Alan Chaset, and I am pleased to testify today on behalf of NACDL on the Commission's new package of proposed guideline amendments. I am a partner in the Law Offices of Alan Ellis, P.C., with offices in Alexandria, Virginia, Mill Valley, California and Philadelphia, Pennsylvania, and was formerly privileged to serve as a member of the staff of the Commission. My practice is substantially limited to federal post-conviction matters, including the representation of offenders under the sentencing guidelines. For the past three years, I have served as the Chair or Vice Chair of the NACDL Sentencing and Post Conviction Committees and have had the pleasure of working with members of the Commission and its staff in matters concerning the drafting of guidelines and proposed amendments. I also have had the distinct privilege of serving on the Commission's Practitioners' Advisory Group.

My testimony today is presented on behalf of more than 20,000 criminal defense lawyers who practice in every State and Federal District throughout the nation. As you know, NACDL is the only national bar association devoted exclusively to the defense of criminal cases. Its goals are to assure justice and due process for persons accused of crime, to foster the independence and expertise of the criminal defense bar, and to preserve the adversary system of criminal justice. The membership of NACDL and its forty State and Local affiliates includes criminal defense practitioners, public defenders, law professors and law students.

who have expressed the position that proposals being considered for the May 1st submission to Congress should be circulated and published for comment no later than December 15th of the preceding year. We recognize that the Commission has taken steps to commence the amendment process earlier and we applaud the fact that this year's proposals came out in mid-January. The format for this year's amendments, while still a bit confusing, is a clear improvement over prior submissions. The illustrations make it easier to decipher the proposed changes and the Commission has attempted (although not always succeeded) to give more elaborate and detailed reasons for most (but, unfortunately, not all) of the amendments. The Commission can and should do more.

For example, at several places throughout the package, the Commission makes reference to various studies and other documents available for review at the Commission's offices. Since it is most difficult for all but a very few to come to Washington to inspect and review such materials and since the Commission will not provide copies of same to requesters, it is clear that more detail as to the contents of those studies and documents should be included within the amendment notice itself. Alternatively, those items themselves should be published and distributed separately.

Furthermore, the Commission remains dutybound to conduct extensive empirical research in monitoring sentencing trends

Next, as in prior sets of amendments, the Commission seeks to further limit the dwindling ability of the trial courts to exercise discretion at sentencing by proposing changes to guidelines where the courts might otherwise employ a departure or exercise sound judgement. NACDL is concerned that the Commission is, at best, overreacting and, at worst, attempting through the amendment process to become the ultimate guideline court of last resort. The criticism here should also be read as a function of the above articulated request to limit changes in the Manual generally. According to the Commission's own statistics and pronouncements, departure activity remains most limited. Facts and circumstances differ greatly from case to case and courts should be ordinarily able to distinguish the heartland when it sees it and to act accordingly. And the courts themselves should be given a chance to disagree and to work things out as the issues percolate through the system.

Finally, NACDL has continued to note with interest the apparent impact of the Department of Justice on this judicial branch agency. While we applaud the fact that a federal defender has been serving on loan as part of the staff and while we are most pleased with the development and growth of the Practitioners' Advisory Group, more balance is still needed to assist and inform the deliberative process. We believe that the Commission should support such a goal by seeking the establishment of an Ex Officio position for a defense

such Congressional action should be an important factor in the overall decision to amend, the Commission must demonstrate empirically and otherwise why such changes are warranted. And the Commission must next demonstrate why the new specific offense characteristics are the kinds of relevant factors that should be used to differentiate amongst cases similarly to the process that was used to craft the original set of base levels and specific offense characteristics. While Option 2 (with a 2 level increase) appears the more appropriate and reasonable approach and would be less factually complicated to apply, the Commission has not provided enough justification to permit the making of a more informed assessment.

3. Amendment No. 4, with changes to §§2B1.1, 2B4.1, and 2F1.1

We recognize the fact of the specific instructions contained in the Crime Control Act of 1990, and we acknowledge that such instructions are preferable to the Congress's previous preference for straight statutory mandatory minimums, because they at least permit departures where appropriate in extraordinary cases. However, we express our hope that whenever Congress takes such action to clamp down on the "Crime du Jour"--which commonly occurs without benefit of any hearings or opportunity for public comment--the Commission will move subsequently to inform the Congress of any possible adverse consequences, particularly with

change. The Commission has yet to demonstrate with any data why the current provisions do not adequately reflect the seriousness of this offense; the mere statement is insufficient. As to the proposed change under 7(B), NACDL is opposed for the reasons stated above. As to 7(C), NACDL is opposed out of a concern that it will encourage prosecutors to pick and chose amongst potential robbery counts, leaving the "weaker" cases to get factored into the sanction equation under a less stringent preponderance standard.

5. §2B3.2 Extortion by Force or Threat of Injury or Serious Damage (Amendment No. 8)

NACDL opposes each of the proposed amendments here, especially since the Commission has not provided any basis as to why the increases are necessary and in the amounts proposed, as to what the data has demonstrated in that regard and as to why departures are not otherwise appropriate to sanction these unusual cases. We are particularly concerned with the vagueness of some of the language contained therein. Under 8(A), an "implied threat" must be more particularly limited to avoid its application to almost every extortion situation; under 8(C), the terms "organized criminal activity," "over time," and "a period of time" are too ambiguous to avoid disparate application. As to the question raised under 8(D), it would appear that §5K2.5 should be sufficient here to capture other losses to the victim.

In the specific context of the mitigating role adjustment (§3B1.2), the guidelines frequently fail to adequately account for the actual nature and extent of the defendant's participation in the offense. One of the principal factors used in determining a defendant's level of participation or role is culpability, a complex factual determination rather than a conclusion of law. U.S. v. Buenrostro, 868 F.2d 135 (5th Cir. 1989). As a factual determination, however, appellate courts are loath to reverse a sentencing judge's findings here unless they are clearly erroneous.

Reacting to this problem, departures are seemingly available where the defendant's role in the offense is inadequately accounted for under Chapter 3B of the guidelines. The adequacy of the role adjustment may be a factor for departure under 18 U.S.C. §3552(b). See e.g. U.S. v. Crawford, 883 F.2d 963 (11th Cir. 1989).

However, as noted in Professor Deborah Young's observations entitled "Rethinking The Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability," 3 Fed. Sent. R. 63 (1990), the various mechanisms used to date "come nowhere close to meeting a standard of proportionate justice." Id. at 64. While Ms. Young cites two examples of trial courts attempting to avoid excessive quantity based sentences, she notes that such "visible" adjustments are rare. "Instead, efforts to adjust

For many of the reasons addressed within the comments to proposed amendment 11 above, NACDL strongly supports Option 1 and the concept of capping the sanctions for certain offenses as contained therein. We would like to see this rubric become a road revisited and well traveled in the future.

9. §2D3.5 Violation of Recordkeeping or Reporting Requirement (Amendment No. 16)

Without any express approval or disapproval of the offense level here, NACDL seeks clarification as to why the Commission has seen fit to offer guidelines for these misdemeanor offenses.

10. §2J1.3 Perjury (Amendment No. 19)

While Option 2 appears preferable, we question the need to amend the guidelines on the basis of such a small number of cases.

11. §2J1.10 Harboring a Fugitive (Amendment No. 20)

NACDL opposes this proposed new guideline. The "Reason for Amendment" section does not adequately explain how the harborer is presumed to know the fugitive's pending charge. The existing provision, which ties this conduct to Accessory After the Fact, requires proof of such knowledge. Such a provision appears to be

**14. §2R1.1 Bid-Rigging, Price Fixing or Market-Allocation
Agreements Among Competitors (Amendment No. 25)**

Given the small number of cases that are prosecuted annually here, NACDL believes that the Commission should permit additional experience with the existing guidelines before embarking on the changes as proposed.

**15. Proposed Amendments Concerning Chapter Four (Amendment
No. 29)**

As to Proposed Amendment 29(A), NACDL opposes adding criminal history points for sentences that included periods of unsupervised probation. While the Commission indicates that this proposal is a mere clarification, we are concerned that it is more than that; it curtails the current judicial flexibility to differentiate rationally between the severity of offenses for which prior probationary sentences have been imposed. We also object to the disparate impact vis a vis more affluent defendants sentenced to pay fines rather than bear a probationary sentence.

As to proposed Amendments 29 (B) and (C), we oppose the changes as unnecessary. §4A1.3 appears adequate to address these rare situations, providing the sentencing judge with the discretion to take into account facts and circumstances peculiar to the case being considered rather than mandating an enhanced

tinker with the Sentencing Table as it relates to defendants with high numbers of criminal history points and strongly opposes each of the options. As noted above in related contexts, we believe that §4A1.3 is presently still adequate to address this problem and to provide the courts with the opportunity to weigh and consider all the facts and circumstances related to a particular offender's criminal history. The Commission has heretofore failed to provide data within the amendment package as to the number of cases where the need for such changes might have occurred and has failed to demonstrate what the impact of each of the options might have been in those instances.

Combining the proposals here with those recommended in amendments 29 and 30 would significantly lengthen sentences without any clear rationale. At some number of criminal history points, this particular offender characteristic reaches the point of diminishing returns and cannot rationally support increasing sanctions any further. Without more information on the inadequacy of current procedures to handle extensive criminal histories through departures, no changes should be made.

18. §5E1.1 Restitution (Amendment No. 32)

NACDL is opposed to this proposed change to the restitution guidelines because of its mandatory nature. Nowhere is it made clear why the present discretionary provisions are inadequate.

restrictions contained within the applicable policy statements are insufficient, the Commission is seeking to exclude the consideration of such factors as age, mental, emotional and physical conditions from being realistically factored into the sentencing decision even in unusual situations when those factors should rationally be considered.

Individual objections to each of the subparts here can be offered, but our broader--and greater--concern is that the sentencing process is desperately in need of more "humanizing," not less.

We firmly believe that the congressional mission of eliminating unwarranted sentencing disparity does not necessitate the elimination of all sentencing disparities; those which are rationally related to the individual's offense and level of personal culpability must be not only tolerated, but encouraged. By shutting off such options and mandating "cookie cutter" justice for dissimilarly situated individuals convicted of committing the same offense, the Commission, we fear, is creating a new breed of disparity.

We believe it is no better to treat offenders arbitrarily differently than to treat them arbitrarily the same.

21. §5K1.1 Substantial Assistance to Authorities

heroin and marijuana for purposes of setting such equivalencies.

As to proposed amendment 37(P), NACDL opposes this change. §4A1.3 can be used to address this problem and will still permit the sentencing judge to consider all relevant facts and circumstances.

As to proposed amendment 37(T), NACDL opposes the change as unnecessary. The Commission's mission would be better served by concentrating on the fleshing out of a definition of "sophisticated means" rather than by infecting another guideline with this ambiguous term.

As to proposed amendment 37(X), NACDL supports all efforts to provide additional grounds for downward departures. As to §5K2.15, however, the requirement that "full" restitution must be made before this departure can be considered discriminates against defendants who are financially able to only partially make the requisite payments; we believe that it should apply also to those who make "good faith efforts" to make such restitution prior to the discovery of the offense.

On behalf of NACDL, I thank you for this opportunity to offer our comments, suggestions and criticisms and look forward to our continuing relationship with the Commission on these and other matters.