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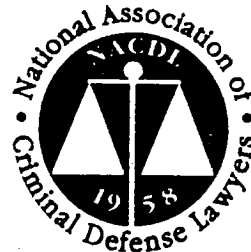
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Stuart M. Statler



February 4, 1997

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

Dear Chairman Conaboy and Commissioners:

We write on behalf of the National Association of Criminal Defense Lawyers to comment on the proposed Emergency Amendments.

The NACDL is a nationwide organization comprised of 9000 attorneys actively engaged in defending criminal prosecutions, including private attorneys and public defenders; our membership also includes judges, law professors and law students. NACDL is also affiliated with 78 state and local criminal defense organizations, allowing us to speak for more than 25,000 members nationwide. Each of us is committed to preserving fairness within America's judicial system.

We commend you for your forthright attempts to assure that federal sentences "provide just punishment". As you embark on this year's amendment cycle, we ask you to be cognizant that: (a) our rate of incarceration in the United States is the greatest of any civilized nation; (b) federal criminal laws are impacting and being applied disproportionately on minorities; and (c) sentences must be "sufficient, but not greater than necessary" to meet the purposes of sentencing.

### Disturbing Rate of Incarceration

First and foremost, we want to express our alarm at the "disturbing state of affairs," to quote the Honorable Richard A. Posner, Chief Judge, United States Court of Appeals for the Seventh Circuit, in which our criminal justice system finds itself.

Our retention, indeed our expanding use, of capital punishment, our other exceptionally severe criminal punishments, (many for intrinsically minor, esoteric, archaic, or victimless offenses), our adoption of pretrial

detention, as a result of which some criminal defendants languish in jail for years awaiting trial, and our enormous prison and jail population, which has now passed the one-million mark, mark us as the most penal of civilized nations. . . .

[W]e have had slavery, and segregation, and criminal laws against miscegenation ("dishonoring the race"), and Red Scares, and the internment in World War II of tens of thousands of harmless Japanese-Americans; and most of our judges went along with these things without protest. . . .

[J]udges on the one hand should not be eager enlists in popular movements, but on the other hand should not allow themselves to become so immersed in a professional culture that they are oblivious to the human consequences of their decisions, and in addition should be wary of embracing totalizing visions that . . . reduce individual human beings to numbers or objects. . . .

Richard A. Posner, Overcoming Law 157-58 (Harvard U. Press 1995). Chief Judge Posner's advice to judges applies equally well to you, Sentencing Commissioners who have been entrusted with establishing federal sentencing guidelines.

#### Disparate Application & Impact of Criminal Penalties

Second, we also express alarm at the unwarranted and increasing racial disparity of the prison population. This pernicious reality seems to have developed "between 1986 and 1988" but continues into today.<sup>1</sup> U.S.S.C., Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 82 (1991). This troubling disparity results not merely from a disparate impact but from a disparate application of the harshest federal penalties.

The Commission has reported the disparate racial application of the penalties for federal drug and gun offenses.

The disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the

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<sup>1</sup> "Traced over time, the relative proportion of Whites in the defendant population has steadily declined since 1990, while increasing considerably for Hispanics, and to a lesser degree for Blacks." U.S.S.C. Annual Report 46 (1995).

defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum; and to the circuit in which the defendant happens to be sentenced. . . . This differential application on the basis of race and circuit reflects the very kind of disparity and discrimination the Sentencing Reform Act, through a system of guidelines, was designed to reduce.

Id. at ii.

The Commission has also reported the disparate racial impact of the penalties for cocaine use and trafficking. U.S.S.C., Special Report to the Congress: Cocaine and Federal Sentencing Policy 192 (1995) ("To the extent that a comparison of the harms between powder and crack cocaine reveals a 100-to-1 quantity ratio to be an unduly high ratio, the vast majority of those persons most affected by such an exaggerated ratio are racial minorities. Thus, sentences appear to be harsher and more severe for racial minorities than others as a result of this law, and hence the perception of unfairness, inconsistency, and a lack of evenhandedness.").

We commend you for your forthright actions in discovering, reporting and attempting to correct these injustices. In particular in promulgating the immigration amendments, the Commission should be mindful of the Supreme Court's recognition that there may be unwitting or invidious discrimination against "races or types which are inimical to the dominant group" and that therefore "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (invalidating on equal protection grounds a statute that required sterilization of habitual felony offenders excluding felonies involving embezzling, revenue act violations, and political offenses while including larceny).

We ask you to continue to perform your proper statutory function in leading the fight to eradicate the unwarranted disparate application and impact on minorities of federal sentencing laws.

### **Just Punishment**

Third, we ask you to keep in mind the congressional mandate that sentencing courts must impose "a sentence sufficient, but not greater than necessary" to comply with the purposes of sentencing, the first of which is "just punishment". 18 U.S.C. § 3553(a); see also 28 U.S.C. § 991(b)(1)(A). Absent empirical evidence to support increased penalties, the Commission should not devise guidelines that increase the term a convicted person must spend in prison.

Three other matters are also of concern.

### **Emergency Amendments**

We question the Commission's promulgation of emergency amendments when the congressional grant of authority requires only that you promulgate amendments "as soon as practicable". These emergency amendments came at a time when the Commission was already considering a substantial number of issues as it implements its simplification project. The Commission has had less than three months from the passage of the methamphetamine (October 3, 1996) and immigration (September 30, 1996) bills until it voted to publish these emergency amendments at its December 17, 1996 meeting. It is not practicable for the Commission to promulgate amendments if it has not had adequate time to gather empirical evidence and study the issues. Amendments promulgated under the abbreviated emergency procedures lack the reasoned and empirical base necessary to provide certainty and fairness. The Commission's exercise of this emergency authority seems particularly debatable when there has been no Congressional finding that an emergency in fact exists.

The four emergency amendments under consideration illustrate the problem with this abbreviated procedure. In publishing multiple options for a number of the adjustments, the Commission has seemingly selected numbers willi-nilly without any empirical or other reasoned basis. While the power of Congress to make such political judgments as it pertains to criminal laws may be subject to few restraints beyond the will of the electorate, the Commission does not have such unchecked authority. Both by virtue of the enabling legislation and of its function as an agency in the judicial branch, the Commission may act only pursuant to reasoned judgment.

In light of the shortcomings of the abbreviated emergency procedures, we ask the Commission to promulgate only those options that are directly required by the legislation. The Commission should not exceed the congressional directive unless and until the Commission is able to provide due consideration to the issues raised by these amendments.

### **Vacancies on the Commission**

We are troubled that the Commission is undertaking such serious amendments to the sentencing guidelines without its full seven-person membership. Of concern is the fact that the Commission is missing one of its three vice-chairs. Of greatest concern is the fact that at present the Commission has only two federal judges rather than the "[a]t least three" that Congress considered necessary for the proper functioning of the Commission. 28 U.S.C. § 991(a).

The opinion of a single Commissioner, especially a federal judge, speaking with the considered judgment gained from experience, knowledge and wisdom cannot easily be discounted. Indeed, a single Commissioner may well sway the whole Commission on any one or a number of issues. We urge the Commission to defer action on any of the amendments until such time as it at least has three federal judges, appointed by the President and confirmed by the Senate, able to consider and vote on the amendments.

### Congressional Directives

Lastly, we are troubled that the increasing use by Congress of specific directives to the Commission threatens to undo the cohesiveness of the sentencing guidelines and thereby undermine the congressional purpose of securing "certainty and fairness, [while] avoiding unwarranted sentencing disparities". 28 U.S.C. § 991(b)(1)(A). Congressional directives are aimed at troubleshooting in limited areas but fail to consider the interrelated complexity of the guidelines which may already account for factors which Congress is attempting to address. Congress established the Sentencing Commission as an expert body to develop sentencing policies and practices. The enabling legislation provides for a dynamic process, permitting fine tuning as warranted by empirical evidence.

We urge the Commissioners to persuade Congressional leaders to refrain from undermining the structure and purpose of the sentencing guidelines through the increasing use of such specific directives. We intend, with other interested individuals, to petition our representatives in Congress on this issue.

Thank you for your consideration of NACDL's concerns. Attached are our particularized comments on the proposed emergency amendments. If the Commission desires additional information on any of these matters, we welcome the opportunity to provide it.

Very truly yours,



Judy Clarke  
President

Alan Chaset  
Carmen Hernandez  
Benson Weintraub  
Co-Chairpersons  
Post-Conviction and Sentencing Committee

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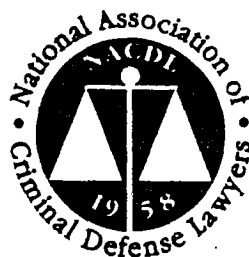
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Stuart M. Statler



## COMMENTS ON THE 1997 EMERGENCY AMENDMENTS

### Amendment 1 - § 2D1.11 (Listed Chemicals)

We do not support this amendment because we believe that Congress had insufficient evidence before it that the penalties available under title 21 and the guidelines were inadequate. However, because this amendment implements the congressional mandate, and no more, we recognize the Commission's limited authority in promulgating it.

The amendment increases by two the offense levels for list I chemicals, raising the top of the chemical quantity table to level 30 from level 28. Congress directed the Commission to effect this increase. Comprehensive Methamphetamine Control Act of 1996, Pub.L. 104-237, § 302. Section 302 also raised the maximum penalty from ten to twenty years for offenses under 21 U.S.C. §§ 841(d)(1), (2) and 960(d)(1), (3).

### Amendment 2 - § 2L1.1 (Alien Smuggling)

The Commission should amend to meet the statutory directive, not go it one better. In the absence of empirical evidence to support anything more than Congress directed, the higher options would not be reasonable and warranted. The Commission also should not delete provisions currently in effect that are not addressed by the congressional directives. The grant of emergency authority is limited to "promulgat[ing] the guidelines or amendments provided for under" § 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, Div.C. The Commission has not been granted emergency authority to delete or amend existing guideline provisions that are not referred to in § 203.

## IIRIRA

Section 203(e) of IIRIRA, directs the Commission to (a) increase the base offense level for alien smuggling, (b) increase or create enhancements for the number of aliens, the use of a firearm, causing death or serious bodily injury, creating a risk of such injury, and for offenders with prior felony convictions for similar conduct, and (c) consider other aggravating or mitigating circumstances.

1. Base Offense Level - §§ 2L1.1(a)(1) & (a)(2)<sup>1</sup>

The Commission should not raise the base offense level beyond the 3 levels mandated by § 203(e)(2)(A) of IIRIRA. A three level increase would raise the base offense level from 20 to 23 for offenses under § 2L1.1(a)(1), which applies "if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony."

The Commission should consider that a 3-level increase results in a base offense level for this nonviolent offense that is equal to or greater than that for most violent offenses. E.g., § 2A2.1(a)(2) (base offense level 22 for assault with intent to commit murder, where the object of the offense would not have constituted first degree murder); § 2A2.2 (base offense level 15 for aggravated assault); § 2A3.2 (base offense level 15 for criminal sexual abuse of a minor (statutory rape)); § 2A4.1 (base offense level 24 for kidnapping and abduction); § 2B3.1 (base offense level 20 for robbery).

Section 2L1.1(a)(2), which applies to all other offenses covered under this guideline, would be raised from 9 to 12. The Commission has provided no empirical evidence or other reason why the increase should go beyond what Congress required. Most importantly, offenders who engage in conduct that involves aggravating factors will see their offense level substantially increase as a result of the other congressional directives enacted under IIRIRA.

2. Number of Aliens Smuggled - § 2L1.1(b)(2)

Here also, for the same reasons, the Commission should comply with the statutory directive, not go it one better. Without providing a reasoned basis, the Commission should not surpass Congress' increase. With respect to the number of aliens smuggled, IIRIRA directs the Commission to "increase the sentencing enhancement by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act." § 203(e)(2)(B).

We recommend a plain reading of the congressional directive -- the Commission should take the specific offense characteristic currently in effect and increase the applicable levels by 50%. In contrast, the proposed amendment reformulates the adjustment, unduly complicates it and does not follow the congressional directive.

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<sup>1</sup> This guideline applies to convictions of offenses under 8 U.S.C. §§ 1324(a) and 1327. Section 1327 makes it a crime to aid or assist certain aliens to enter the United States. Section 1324(a), makes it a crime to unlawfully employ aliens.

Section 2L1.1(b)(2) currently reads:

If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

| <u>Number of Unlawful Aliens...</u> | <u>Increase in Level</u> |
|-------------------------------------|--------------------------|
| (A) 6-24                            | add 2                    |
| (B) 25-99                           | add 4                    |
| (C) 100 or more                     | add 6                    |

U.S.S.G. § 2L1.1(b)(2). The following table illustrates our position:

| Number of Aliens | Current | NACDL Recommendation<br>(% increase) | Proposed Amendment<br># of aliens - adjustment - (% increase) |
|------------------|---------|--------------------------------------|---------------------------------------------------------------|
|                  |         |                                      | 3-5 - add 1 - ( new )                                         |
| 6-24             | add 2   | add 3 - (50%)                        | 6-11 - add 3 - ( 50%)                                         |
|                  |         |                                      | 12-24 - add 5 - (150%)                                        |
| 25-99            | add 4   | add 6 - (50%)                        | 25-99 - add 7 - ( 75%)                                        |
| 100 or more      | add 6   | add 9 - (50%)                        | 100 or more - add 9 - (50%)                                   |
|                  |         |                                      |                                                               |

### 3. Enhancement for Prior Similar Convictions

NACDL opposes both options proposed by this amendment. The proposed amendment is harsher than necessary to comply with the congressional directive. It is also unduly broad in its definition of similar offenses. In surpassing the congressional directive, the amendment seemingly ignores the cumulative effect of the double counting and increased enhancements provided in this amended guideline.

NACDL proposes that if the defendant has one prior, the offense level be increased by 1 (rather than 2 as proposed by the amendment); a second prior would increase the offense level by 2 (rather than 4, as proposed by the amendment). In addition, NACDL proposes that "similar" prior conduct be limited to those offenses covered by U.S.S.G. § 2L1.1.

Lastly, NACDL proposes that the enhancement apply only to true recidivists, those who had been convicted prior to committing the instant offense.

Congress directs the Commission to "impose an appropriate sentencing enhancement" upon offenders with "1 prior felony conviction arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense". IIRIRA, § 203(e)(2)(C). Congress also directs that the priors be double counted -- they should serve to increase both the criminal history and the offense level. *Id.*

Because the prior convictions are being double counted, there is no need to pile on the levels when enhancing the offense level. A one-level increase in the offense level or a two-level increase if there are two prior convictions is sufficient in the absence of a directive by Congress and in the absence of empirical data supporting any greater increase.

For the same reason, the enhancement should apply only if the prior conviction existed at the time of the instant offense. This would be in keeping with the rationale for such an increase -- a person who, once having been apprehended and convicted, persists in criminal conduct is more blameworthy than one who is engaged in continuing wrongful conduct but has not been chastened by an arrest and conviction. *See e.g.*, U.S.S.G. § 4A1.2, comment. (n. 3) (related cases). It is also consistent with the manner in which prior convictions are counted under the career offender guideline (§ 4B1.2(3)) and under the gun guidelines (§ 2K2.1).

For similar reasons, a plain reading of the phrase "the same or similar conduct" should be utilized. The proposed amendment would include any immigration or naturalization offense as a prior, even if the conduct is as dissimilar as obtaining a false work permit for one's own use. *See* 2L2.2. NACDL recommends that only offenses scored under the same guideline, § 2L1.1, would amount to the same or similar conduct.

#### 4. Firearm Enhancements

NACDL opposes the amendment options that make the defendant vicariously liable for the actions of others in possessing or using a firearm. Congress directed enhancements where the defendant himself used the firearm or caused the injury. IIRIRA, §203(e)(2)(E). As we have previously stated, in this emergency amendment the Commission should restrict itself to the enhancements specifically directed by Congress.

NACDL also opposes the provision that requires imposition of a minimum offense level, if a firearm enhancement applies. Such minimum offense levels are not mandated by the congressional directive and are not used by the Commission in either the robbery or aggravated assault guidelines that contain similar enhancements.

**5. Cross-Reference to Murder Guidelines**

NACDL opposes a cross-reference to the first degree murder guideline under any circumstances. Imposition of a sentence of life imprisonment is the harshest penalty, short of the death penalty, that a sovereign may impose upon an individual. Under our criminal laws, life imprisonment is life without parole, reduction for good time credit or other release from imprisonment while the convicted person remains alive. We believe it corrupts the criminal justice system and our constitutional guarantees to impose such a penalty on the basis that a person committed murder in the absence of a grand jury indictment, the right to confrontation, proof beyond a reasonable doubt to be determined by a jury and all the other constitutional and procedural guarantees afforded criminal defendants.

A sentence of life imprisonment pursuant to a cross-reference would certainly amount to "a tail which wags the dog of the substantive offense". McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986). In these circumstances, it would violate due process. The Supreme Court has never upheld imposition of such a harsh sentence on the basis of a mere preponderance of the evidence. See United States v. Watts, 117 S.Ct. 633, 637-38 n.2 (1997) (declining to address the issue under the circumstances of that case but acknowledging divergence of opinion among the Circuits as to whether due process prohibits imposition of a dramatically increased penalty on a preponderance standard).

Furthermore, IIRIRA does not direct the Commission to provide for a cross-reference to the murder guideline. The Commission should certainly not undertake such an enhancement under an emergency amendment.

**6. Other Adjustments for Death, Bodily Injury and Risk of Injury**

IIRIRA also does not direct a sentencing enhancement on the basis of vicarious liability. It directs an enhancement only where the bodily injury or death was caused by the defendant, himself. Section 203(e)(2)(E) provides in pertinent part:

(2) [T]he Commission shall . . .

(E) impose an appropriate sentencing enhancement on a defendant who, in the course of committing an offense described in this subsection--

(i) murders or otherwise causes death, bodily injury, or serious bodily injury to an individual;

(ii) uses or brandishes a firearm or other dangerous weapon; or

(iii) engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury;

The Commission should cap the cumulative effects of the weapons and injury enhancements. As proposed, depending on the option chosen, a defendant's offense level may be increased by as many as 14 levels where the offense results in injury short of death (discharge of a firearm, recklessly creating risk of serious bodily injury, permanent bodily injury). This represents a substantial increase, even for a first offender, if the applicable base offense level is 23. (OL 23 & CH I = 46 to 57 months; OL 37 (23 + 14) & CH I = 210 to 262 months). If any of the other enhancements apply, the numbers would be that much greater. The Commission should keep in mind that, as proposed, these substantial penalties would apply to a defendant who would be vicariously liable for the acts of others even if he or she did not personally handle a firearm or cause the injury.

Lastly, the commentary defining "reckless conduct" is too broad. It encompasses behavior such as "transporting persons in the trunk ... of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded ... condition." Proposed application note 9. This definition includes conduct that is typical for the offense -- smuggling, transporting, or harboring unlawful aliens -- in its simplest form. As such it is inconsistent with the structure utilized by the Commission in other guidelines. It is particularly inappropriate to add a specific offense adjustment for such conduct when the base offense level for this offense is relatively high.

**7. Downward Adjustments - § 2L1.1(b)(1)**

NACDL opposes the Commission's proposal to delete the existing 3-level adjustment applicable "[i]f the defendant committed the offense other than for profit and the base offense level is determined under subsection (a)(2)". Congress did not direct abolition of this adjustment although it appears clear from the specificity with which it drafted § 203 that Congress was familiar with the current guideline when it directed a number of changes.

NACDL opposes the Commission proposal to replace the existing § 2L1.1(b)(1) adjustment with the one suggested by Congress where the "offense is a first offense and involves the smuggling only of the alien's spouse or child." IIRIRA, § 203(e)(2)(F). The existing adjustment and the one suggested by Congress address different mitigating factors. The former could involve other family members or humanitarian motives. Because profit or greed is generally deemed a good indicator of culpability, the existing downward adjustment should not be deleted. Also, the existing adjustment applies only to the less serious offenses covered under § 2L1.1(a)(2).

Furthermore, Congress did not provide the Commission emergency authority to delete this provision.

NACDL recommends that the Commission add the downward adjustment identified by Congress but leave untouched the existing adjustment. Further, NACDL recommends that the existing downward adjustment be increased to maintain a proportional reduction in the offense level. The existing adjustment reduced the base offense level from 9 to 6, a 1/3 reduction. Having increased the base offense level as a result of this amendment, the Commission should maintain the proportionality of this reduction by increasing this downward adjustment from 3 to 4 levels. If the adjustment were found to be applicable, the base offense level under the emergency amendment would be decreased from 12 to 8, maintaining the 1/3 reduction.

**8. Upward Adjustment for a Previously Deported Alien**

NACDL opposes this new upward adjustment (§ 2L1.1(b)(7)). This adjustment potentially may cause triple counting of a prior offense if the deportation involved a prior conviction. It also is not warranted in light of the relatively high base offense level vis a vis violent offenses. As it is not directed by Congress and there is no empirical evidence that it represents a factor requiring emergency attention by the Commission, it should not be promulgated.

**Amendment 3 - §§ 2L2.1 & 2L2.2 (Immigration Document Fraud)**

Many of the comments made with respect to emergency amendment 2 apply with equal force to emergency amendment 3.

**1. Base Offense Level - § 2L2.1<sup>2</sup>**

The Commission should not raise the base offense level beyond the 2 levels mandated by § 211(b)(2)(A) of IIRIRA. There is no empirical evidence to support a greater increase during this emergency cycle. The base offense level would increase from 9 to 11. Other enhancements directed by Congress would enhance the sentence for those offenders engaging in more aggravated conduct.

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<sup>2</sup> As it pertains to this amendment, these guidelines apply to convictions for offenses under 18 U.S.C. §§ 1028(b)(1) (fraudulent use of government-issued documents), 1425 (unlawful procurement of citizenship or naturalization), 1426 (fraudulent naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (issuance of passport without authority), 1542 (false statement in application or use of passport), 1543 (forgery or false use of passport), 1544 (misuse of passport), and 1546(a) (fraud and misuse of visas, permits, and other documents).

**2. Number of Documents - § 2L2.1(b)(2)**

Here also, the Commission should comply with the statutory directive, not go it one better. Without providing a reasoned basis, the Commission should not surpass Congress' suggested increase. With respect to the number of documents involved in the offense, IIRIRA directs the Commission to "increase the upward adjustment by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act." § 211(b)(2)(B).

NACDL recommends a plain reading of the congressional directive -- the Commission should take the specific offense characteristic currently in effect and increase the applicable levels by 50%. In contrast, the proposed amendment reformulates the adjustment and disproportionately increases it for the mid-level offenders.

The following table illustrates our point.

| Number of Documents | Current Adjustment | NACDL Recommendation (% increase) | Proposed Amendment # of docs - adjust - (% increase) |
|---------------------|--------------------|-----------------------------------|------------------------------------------------------|
| -                   | -                  |                                   | 3-5 - add 1 - (new)                                  |
| 6-24                | add 2              | add 3 (50%)                       | 6-11 - add 3 - (50%)                                 |
|                     |                    |                                   | 12-24 - add 5 - (150%)                               |
| 25-99               | add 4              | add 6 (50%)                       | 25-99 - add 7 - (75%)                                |
| 100 or more         | add 6              | add 9 (50%)                       | 100 - add 9 - (50%)<br>or more                       |
|                     |                    |                                   |                                                      |

**3. Enhancement for Prior Similar Convictions**

NACDL opposes both options proposed by this amendment. The proposed amendment is harsher than necessary to comply with the congressional directive. It is also unduly broad in its definition of similar offenses. In surpassing the congressional directive, the amendment seemingly ignores the cumulative effect of the double counting and increased enhancements provided in this amended guideline.

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NACDL proposes that if the defendant has one prior, the offense level be increased by 1 (rather than 2 as proposed by the amendment); a second prior would increase the offense level by 2 (rather than 4, as proposed by the amendment). In addition, NACDL proposes that "similar" prior conduct be limited to those offenses covered by U.S.S.G. § 2L2.1. Lastly, NACDL proposes that the enhancement apply only to true recidivists, those who had been convicted prior to committing the instant offense.

Congress directs the Commission to "impose an appropriate sentencing enhancement" upon offenders with "1 prior felony conviction arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense". IIRIRA, § 211(b)(2)(C). Congress also directs that the priors be double counted -- they should serve to increase both the criminal history and the offense level. *Id.*

Because the prior convictions are being double counted, there is no need to pile on the levels when enhancing the offense level. A one-level increase in the offense level or a two-level increase if there are two prior convictions is sufficient in the absence of a directive by Congress and in the absence of empirical data supporting any greater increase.

For the same reason, the enhancement should apply only if the prior conviction existed at the time of the instant offense. This would be in keeping with the rationale for such an increase -- a person who, once having been apprehended and convicted, persists in criminal conduct is more blameworthy than one who is engaged in continuing wrongful conduct but has not been chastened by an arrest and conviction. *See e.g.*, U.S.S.G. § 4A1.2, comment. (n. 3) (related cases). It is also consistent with the manner in which prior convictions are counted under the career offender guideline (§ 4B1.2(3)) and under the gun guidelines (§ 2K2.1).

For similar reasons, a plain reading of the phrase "the same or similar conduct" should be utilized. The proposed amendment would include any immigration or naturalization offense covered by U.S.S.G. § 2L as a prior, even if the conduct is dissimilar. NACDL recommends that only offenses scored under the same guideline, § 2L2.1, would amount to the same or similar conduct.

**4. Downward Adjustments - § 2L2.1(b)(1)**

NACDL opposes the Commission's proposal to delete the existing 3-level adjustment applicable "[i]f the defendant committed the offense other than for profit". Congress did not direct abolition of this adjustment although it appears clear from the specificity with which it drafted § 211 that Congress was familiar with the current guideline when it directed a number of changes.

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NACDL opposes the Commission proposal to amend the existing § 2L2.1(b)(1) to require in addition that the defendant not have been convicted of a prior immigration offense. Because of the double counting directed by Congress for priors (as part of the offense level in addition to the criminal history), this additional impediment based also on a prior offense would amount to triple counting of the prior conviction. No other offenses, except perhaps, obstruction of justice impose such triple counting of a single aggravating factor. The existing adjustment and the one proposed as option 2 (if the documents relate only to the defendant's spouse or child) address different mitigating factors. The existing one which requires that the defendant have committed the offense other than for profit could involve family members (other than a spouse or child) or humanitarian motives. Because profit or greed is generally deemed a good indicator of culpability, the existing downward adjustment should not be deleted or be limited if a prior conviction exists.

NACDL recommends that the Commission not amend the existing adjustment for offenses committed other than for profit. Further, NACDL recommends that the existing downward adjustment be increased to maintain a proportional reduction in the offense level. The existing adjustment reduced the base offense level from 9 to 6, a 1/3 reduction. Having increased the base offense level as a result of this amendment, the Commission should maintain the proportionality of this reduction by increasing this downward adjustment from 3 to 4 levels.

NACDL also recommends that the Commission amend § 2L2.1 to provide an additional adjustment if the offense involved documents related only to the defendant's spouse and child.

**5. Base Offense Level - § 2L2.2**

NACDL recommends, for the reasons previously stated, that the Commission not raise the base offense level beyond the 2 levels mandated by § 211(b)(2)(A) of IIRIRA. This would result in a base offense level of 8 from the existing 6.

**6. Enhancement for Prior Similar Convictions - § 2L2.2(b)(2)**

NACDL opposes both options proposed by this amendment, for the reasons stated with respect to emergency amendments 1 and 2. The proposed amendment is harsher than necessary to comply with the congressional directive. In recognition of the double counting of the prior convictions, (as a basis for increasing both the offense level and the criminal history), the Commission should amend to provide a 1-level enhancement for a single prior and a 2-level enhancement for two priors.

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The proposed amendment also contains an unduly broad definition of similar prior conduct. NACDL urges the Commission, in keeping with the manner in which double-counted criminal history is scored in those few guidelines where it occurs, to adopt the enhancement only for true recidivists.

**Conclusion**

NACDL appreciates this opportunity to provide our comments to the Commission. We urge each Commissioner in considering the proposed amendments to be guided by the mandate in 18 U.S.C. § 3553(a) that sentences should be "sufficient, but not greater than necessary" to provide just punishment.