

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

CHAPTER 1 -- Part B

2, Page 13 -- §1B1.8(b)

We object to the proposed amendment to §1B1.8(b) that creates a new subdivision (2) that would permit the use of information provided under cooperation to raise that individual's criminal history score.

The protections provided to a defendant by the cooperation agreement are destroyed by this exception. Contrary to the Reason for Amendment, Application Note 2 currently speaks of determination of criminal history adjustments from the probation interview -- not from this cooperation interrogation. This Amendment should be deleted. Indeed, the Commission should act to clarify, that in view of Fed. R. Crim. P. 11 and F.R.E. 410, any such use should be prohibited.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 2. We view with disfavor any attempt to narrow the scope of 1B1.8. This important guideline serves to encourage defendants to cooperate with the government, and the current amendment runs counter to this important policy goal.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

2. USSG §1B1.8. NACDL strenuously opposes the modification and in its place offers a proactive amendment proposal. This amendment unnecessarily serves to vest even more discretion than before in the prosecutor. By requiring the contours of USSG §1B1.8 to be construed only in the context of a plea agreement, even more so than through the existing provision, it unfairly and adversely impacts upon a defendant seeking to cooperate and plea bargain in good faith by allowing statements to be admitted into evidence in the Government's case-in-chief should the plea negotiations break down.

In a case in which I was recently consulted, immediately upon his arrest a defendant made uncounselled statements regarding the nature and extent of his activities and the activities of others in an attempt to cooperate. Ultimately, the case proceeded to trial and the defendant's statements came into evidence notwithstanding a motion to suppress. The defendant was told by an FBI Agent at the time that it would be in his "best interest" to waive his Miranda rights and tell all he knows. An Assistant United States Attorney was on the arrest scene and took the statement. Subsequent plea negotiations through counsel for the defendant and the government never reached fruition and the FBI Agent testified at trial as to the defendant's statements regarding

an additional load of drugs about which the government had been unaware. The impact upon the sentence as well as the conviction is self-evident.

This is fundamentally unfair and, in our view, contrary to the plain terms of Rule 11(e)(6), F.R.Cr.P. ("Inadmissibility of Pleas, Plea Discussions and Related Statements") and Rule 410(f), F.R.Cr.P. which excludes "any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty...").

While the proposed changes appear minor, USSG §1B1.8 needs to be strengthened rather than weakened to give substance to the principles which lead to its enactment in the first instance. The guideline assumes that a plea agreement or cooperation agreement has already been executed. In many instances, the Defendant, with or without counsel, must make an instant decision to cooperate even in the absence of an agreement. To encourage early cooperation rather than to penalize it, statements made by a Defendant in this regard should never affect the guideline calculations except as provided in the existing provisions of subsection (b).

The guidelines should be amended to expressly provide, in the text rather than through the Commentary, that statements made by a Defendant pursuant to this section "shall not be used in determining the applicable guideline range or as a basis for upward departure or adjustment expect under USSG §3E1.1."

The proposals codified at subsection (b)(2) and (b)(4) should not be adopted. Since the Commission recognizes in the Commentary that the Defendant's prior conviction(s) will generally

be obtained from the USPO "independent of information the Defendant provides," such information from the Defendant should not be used in computing the guidelines absent official documentation. Regarding the proposal to subsection (b)(4), the caselaw is replete with instances of the Government breaching plea agreements. Therefore, a Defendant should not be penalized in [further proceedings] by having statements made under USSG §1B1.8 rendered admissible in the event that the Court determines the Government has breached the agreement and the plea is vacated.

NACDL is aware that USSG §1B1.8 should be read in conjunction with 18 U.S.C. §6002 regarding immunity. However, the policies and social interests furthered by the guideline and the statute are separate. In summary, NACDL opposes the proposed change to USSG §1B1.8 and urges the Commission to expressly include language indicating that statements made under this section (1) need not be governed by a cooperation agreement, particularly in the absence of counsel; and (2) statements made pursuant to this section shall not be used in computing any adjustment or departure under the guidelines with the exception of USSG §3E1.1.