

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).

3, Page 14 -- §1B1.3

We object to this Amendment. Further, we believe that the Commission should revisit the issue of Relevant Conduct under §1B1.3 and other provisions. Specifically, we object to convicting and sentencing a defendant for conduct based on hearsay, secondhand statements.

Example:

A defendant pleads guilty to possession of 1 ounce of cocaine. A D.E.A. agent says he heard that defendant told an informant that

he would deliver 5 kilograms. The defendant is sentenced for 5 kilograms and an ounce because the district judge found by a preponderance of the evidence that this could happen.

We believe that the Commission should raise the standard of evidence required to include, in creating the sentencing range, conduct beyond the offense of conviction. We suggest that the Commission should require, at minimum, clear and convincing evidence.

Unlike pre-Guidelines sentencing, where the Judge had the option to take other conduct into account, now, when the Probation Officer plugs the unconvicted conduct into the Guidelines, the Judge must sentence in the Guideline range for 5 kilos and 1 ounce.

This is clearly the single, most significant fairness issue raised by the Guidelines and these amendments. We hope that the Commission will respond affirmatively to the Federal Defender suggestion and raise the evidentiary standard to clear and convincing.

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

3. . NACDL opposes the modification to USSG §1B1.3. The hypothetical in the proposed "Application Note" assumes that the Government can establish, by an appropriate quantum of proof, that all alleged acts and omissions would constitute factors which warrant consideration under the multiple counts rule. In this regard, it is NACDL's position that disputed facts or factors relevant to sentencing should be established by the Government under the standard of clear and convincing evidence. Finally, NACDL is not unmindful of the Ninth Circuit's action granting en banc consideration in the matter of United States v. Restrepo, 883 F.2d 781 (9th Cir. 1989).