

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).

#10, Page 19 -- #2B3.1

This increase for multiple robbery offenses comes on top of last year's increase. The Commission's staff has not even been provided time to gather experience under last year's change.

Have there been upward departures in these types of cases? If yes, on what grounds? Again, the staff has not provided the necessary background data.

Neither option is appropriate.

Again, if any change is made, the clear and convincing evidence standard should apply to all "non-conviction" offenses.

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

Item 10 presents two options for amending the robbery guideline. Both options would alter the core of the Commission's widely-advertised modified real offense sentencing system by making 2B3.1 a pure real offense guideline. The explanation accompanying this major change is wholly inadequate and both proposed options should be rejected.

In the initial set of sentencing guidelines, the Commission explained with great clarity the all-important choice it faced between real offense and charge offense sentencing. In promulgating what it termed a modified real offense sentencing system, the Commission resolved a difficult issue in a reasoned, justifiable fashion. As Judge Breyer has written: "One may argue about the wisdom of the line the Commission has drawn, but we cannot say that the Commission has not drawn it." U.S. v. Blanco, 2 Fed. Sent. R. 144, 147 (1989). To continue Judge Breyer's

metaphor, if the Commission now chooses to move the line, it must explain why.

Most notably, the explanation does not inform the reader that the base offense level in 2B3.1 was raised in the last set of amendments partly in response to the argument that the then-current base offense level did not adequately reflect the case in which a defendant convicted of a single bank robbery has in fact committed multiple robberies. Now, a specific offense characteristic is proposed on precisely the same grounds to augment the increased base offense level.

Both proposed options are defective. Option 1 would make this an exceedingly real offense guideline, because the offense of conviction would not even serve as an anchor for the court's consideration of other robberies. Thus, if the defendant were convicted of a bank robbery corresponding to level 21 but was found by a preponderance of the evidence to have committed a bank robbery corresponding to level 27, the operation of the multiple count rules would, in effect, require the court to use 27 as a base offense level. In short, the defendant's sentence for the level 21 robbery would not be augmented by a post-verdict finding that he engaged in a level 27 robbery; instead, he would be punished for a level 27 robbery that had never been proved beyond a reasonable doubt. This amendment is possibly unconstitutional, probably unwise, and certainly lacking a rationale.

Option 2 seems overbroad. This option would not even limit the court's consideration to robberies committed as part of a common scheme or plan with the offense of conviction. In light of its stated purpose, the option is also poorly drafted, because an individual convicted of one robbery would be worse off than an individual convicted of two robberies, because the latter, unlike the former, would not receive an augmented sentence even if both had committed many additional robberies.

The explanatory paragraph accompanying item 10 does not sufficiently explore the real offense/charge offense implications that flow from either option. For that reason alone, the amendment should be rejected.

These examples demonstrate the hazards of amending the guidelines in a vacuum. The issues raised by the proposals are central to the operation of the guideline system, but the Commission has either not considered these ramifications, or has not made public its decision-making process in a manner that would facilitate useful public comment. In either event, the Commission has not fulfilled its statutory responsibilities and should therefore refrain from making these substantive changes in the guidelines this year.

My written submission contains comments about several other proposed amendments. I would note, however, that our ability to comment on the proposals in a thoughtful, comprehensive fashion

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U.S. SENTENCING COMMISSION COMMITTEE
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has been hampered by the abbreviated comment period, the absence of meaningful explanatory statements, and the lack of supporting data. Indeed, many of the comments we have submitted are based upon these very troublesome process issues I have already raised.

At this point I would be pleased to answer your questions.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHAMBERS OF
JON O. NEWMAN
U. S. CIRCUIT JUDGE
480 MAIN STREET
HARTFORD, CONN. 06103

A. Amendment 10. I appreciate the Commission's concern to make sure that punishment adequately reflects multiple robberies, but I caution against moving too far towards "real offense" sentencing and away from the "modified real offense" approach that underlies most of the Guidelines. Option 1 takes the extraordinary step of treating as an offense of conviction (for purposes of multi-count analysis) offenses that did not result in conviction and may not even be charged offenses. And in doing so, it would result in having the multi-count analysis start with the offense level for the most serious of the robberies, even though that one was uncharged. That approach not only undermines the basic approach of the Guidelines but also poses an undue deterrent to plea bargaining. If option 1 is nonetheless preferred, I suggest it be modified so that the multi-count analysis always starts with the offense of conviction. However, I think option 2 is preferable, provided it is limited, as option 1 is, to robberies committed as part of the same course of conduct or common scheme as the offense of conviction. Without this limitation, robberies would become pure "real offense" sentencing, and hearings would be held as to all prior robberies, regardless of when or where they occurred. That is an undue burden on sentencing courts.

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

10. NACDL does not support either of the options proposed.
See NACDL comment at item 3, supra.