

**TESTIMONY OF BENSON B. WEINTRAUB, ESQ.
ON BEHALF OF THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS (NACDL) REGARDING
THE ISSUE OF "OFFENSE SEVERITY" IN A PUBLIC
HEARING BEFORE THE UNITED STATES SENTENCING
COMMISSION (APRIL 15, 1986)**

I am an attorney with the Miami Law Firm of Bierman, Sonnett, Shohat & Sale, P.A. My practice is limited to representing federal offenders in post conviction proceedings, including sentencing and parole. I am appearing in my capacity as Vice-Chairman of the National Association for Criminal Defense Lawyers Sentencing Commission Liaison Committee.

The National Association of Criminal Defense Lawyers believes that continued recognition and adherence to the Bill of Rights by the Judiciary, Legislative and Executive Branches of Government are necessary to sustain the quality of the American System of Justice. "The mission of NACDL is to preserve the adversary system of justice; to maintain and foster independent and able criminal lawyers; and, to ensure justice and due process for those persons accused of crime."

The NACDL Sentencing Commission Liaison Committee has reviewed the preliminary draft of the Commission's "Black Book" containing tentative classification of offenses. Members of the Committee are in the process of rating the relative seriousness of each offense.

The NACDL Sentencing Commission Liaison Committee has reached a consensus indicating that the sentencing scheme should take into consideration the seriousness of the offense and the

nature of the injury but should use very broad categories with specific sub-categories in establishing offense severity levels. The Parole Commission has established relatively narrow and general categories but the Sentencing Commission's ranking procedure must give more "individualized" consideration to the actual offense characteristics exhibited by the offender. The duration of actual federal confinement (parole release) under the present system depends upon a rather mechanical application of the parole guidelines as measured, for example, in drug offenses, by the quantity of drugs involved, or in property offenses through the dollar amount of the offense behavior.

Although the Parole Commission has made a valiant attempt to provide a one-step lower category for offenders with "peripheral" involvement in drug offenses, that ambiguous phrase is not always easy to apply. With amounts of money, physical injury, or drugs involved, there must be some correlative standard that delineates the participation of offenders. This will require a multiple indexing system far more complicated than the Parole Commission now uses which would be the only way to fairly and properly rate the severity of offenses in the sentencing guidelines.

In adopting a sentencing guideline system, the Commission must not lose sight of the traditional judicial caveat that "the sentencing process is intended to allow the Sentencing Judge to take individual circumstances into consideration while adhering the sentencing standards provided by statute." United

States v. Garrett, 680 F.2d 650, 652 (9th Cir. 1982); United States v. Foss, 501 F.2d 522, 528 (1st Cir. 1974); United States v. Thompson, 483 F.2d 257, 529 (3rd Cir. 1973). In establishing a system of offense severity, it is important that the Commission and Sentencing Judges be "properly informed of the role of the various participants" in the underlying offense behavior. United States v. Fields, 730 F.2d 460, 461 (6th Cir. 1984).

In preparing this testimony, I have consulted with other members of the NACDL Sentencing Commission Liaison Committee, including J. Robert Cooper, Esq., a former member of the United States Parole Commission now in private practice, and Alan Ellis, Esq., both of whom, in addition to myself, limit their practices to matters before the Parole Commission. Our collective experience in matters before the Parole Commission lead us to suggest that it is imperative for the sentencing guidelines, in rating the relative seriousness of offense behavior, to concentrate on establishing meaningful "grading factors" or features within an offense severity level to delineate between offenders according to their actual levels of culpability. The Parole Commission, through its use of aggravating or mitigating factors authorized by 18 U.S.C. §4206(c), has made an attempt to rate offense behavior according to the individual offense characteristics of the prisoner. We are suggesting the use of separate categories within the sentencing guideline range, not above or below the guidelines as the Parole Commission now operates. Our experience under the parole guideline system

suggests that the guidelines are applied rather mechanically without giving any meaningful consideration to the offender's actual level of culpability. Several federal courts have noted that the parole guidelines are strictly applied, constituting an "unyielding conduit" void of "substantial flexibility." United States ex rel Forman v. McCall, 709 F.2d 852, 862-63 (3d Cir. 1983). It has been estimated that between 88% and 94% of the Parole Commission's decisions are rendered within the range of the guidelines. Geraghty v. U.S. Parole Commission, 579 F.2d 238, 267 (3d Cir. 1978). The Parole Commission's rigid and mechanical application of the guidelines should serve as an example to this Commission of a system that does not build into its guidelines the flexibility required to hold an offender accountable only for his own conduct and not for the conduct of criminal associates over whom he or she had no knowledge of or ability to control. Many offenders, for example, convicted of conspiracy but who played a rather marginal role in the offense, are now held accountable for the full scope and breadth of the conspiracy. That practice is inherently unfair and denies individualized consideration.

In drug offenses, for example, the Parole Commission utilizes a semantic distinction between the role of various offenders in a drug transaction. The Commission distinguishes between those offenders who are "peripherally" involved in the offense and those who have "non-peripheral" involvement. 28 C.F.R. §2.20, Chapt. 13-General Notes and Definitions-Subchapt.

B-#14. Under the Parole Guidelines, the only type of person who generally qualifies for the "peripheral" category, one offense level below the non-peripheral offense level, is a person with no relevant special skills generally hired as a courier of drugs. In drug offenses, however, there are other types of offenders who have neither relevant special skills nor a proprietary interest in the drugs but who, by virtue of the strict application of the Parole Commission's definitions, do not qualify for the "peripheral" category. For example, an offender who acts as a middleman or broker is held as accountable as the principal who actually owns the drugs and is the prime organizer of the offense behavior. That practice is clearly inequitable and completely ignores the reality of the offense characteristics exhibited by drug offenders by drawing a line of demarcation only between couriers and others.

Therefore, we propose that in rating the relative seriousness of drug offenses, the Commission should create at least four sub-categories within the offense severity levels to accurately reflect the degree of culpability and offense characteristics of the individual offender. For example, the highest, most severe sub-category would be reserved for the "primary organizer." The second most severe category should reflect those offenders in "high level management," but who do not have a direct proprietary interest in the ownership of the drugs. The next level should be for "facilitators" or "low level management." The least culpable level of offender in this type

of case, the "worker" or "courier," should be rated lowest. NACDL will endeavor to develop working definitions for these categories and will supply such definitions to the Commission within the coming weeks. Through this type of extensive delineation between levels of culpability, we believe that the Commission will best be able to fulfill its statutory mandate by holding offenders accountable to society only to the extent of their actual culpability and demonstrated offense characteristics.

In terms of rating the relative seriousness of federal offenses, the members of the NACDL Sentencing Commission Liaison Committee were unable to reach a unanimous consensus. The NACDL Committee generally believed that crimes of violence and national security offenses should be rated highest. The middle range of offenses should include property offenses, including some forms of fraud. However, in rating the relative seriousness of certain fraud offenses, the Commission must develop a system of subcategories, similar to the types of categories suggested for drug offenses, reflecting, among other things, the dollar amounts of the offense behavior, the amount of money actually obtained by the offender, and most importantly, the offender's actual role in the offense itself. The Committee also believes that weapons offenses, again, dependent upon the scope of the offense behavior, including number and types of weapons, should be considered in rating the relative seriousness of any weapons type of offense. Drug offenses, we generally believe, should also be rated in the middle range, but there was a split among the

members of the Committee as to the relative seriousness of drug offenses. We recognize that the proliferation of drugs and narcotics represents American Society's greatest contemporary problem. As members of the community, we are all concerned with the devastating effects of drugs upon the fabric of the community. We believe, however, that the Sentencing Commission should differentiate between hard drugs, including cocaine and heroin, from other drugs such as marijuana. In terms of relative seriousness, we believe that cocaine and heroin offenses, according to weight and the individual offense characteristics exhibited by the offender, should be considered in classifying such offenses.

Those types of offense behavior which we believe should fall into the low end of relative seriousness include those offenses generically called "white collar" offenses. In addition to white collar offenses, including tax offenses, acts of omission, regulatory violations, etc., we believe that immigration offenses and offenses against government process, including perjury, obstruction of justice, and the like, should also be rated in the low severity range with sentencing judges able to exercise their discretion to go above that range when there are particularly aggravating circumstances or offense characteristics, such as abuse of a fiduciary position.

Our decision to recommend to the Commission that white collar offenses be treated less severely than other types of offenses discussed today is based, in large part, on the assump-

tion that traditional white collar business type offenders do not require long periods of incarceration or supervision to carry out the purposes of the Sentencing Commission's mandate, including an assurance that the guidelines reflect the general "appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense..." 28 U.S.C. §994(c) (emphasis supplied). See also, Ogren, The Ineffectiveness of the Criminal Sanction in Fraud and Corruption Cases: Losing the Battle Against White Collar Crime, 11 Am. Crim. L. Rev. 959, 975 (1973). See also, Renfrew, The Paper Label Sentences: An Evaluation, 86 Yale L.J. 590, 592-93 (1977).

There are, however, a number of offenses falling into the white collar category which should be dealt with more severely than other white collar offenses. For example, cases involving public corruption may technically involve the commission of white collar crimes, but the community has a greater interest in ensuring that the public trust is not abused by government officials than in imposing sanctions upon similar technical crimes committed by private parties. Again, our focus today is in evaluating the relative seriousness of federal offenses when compared against other federal offenses and offenses within the same category of offenses. We feel that through the extensive use of "grading factors" and other features designed to ensure individualized sentencing consideration, the

Commission can structure the offense severity levels appropriately. However, when there are particularly aggravating or mitigating factors, sentencing judges will have the discretion, for cause shown, to impose a sentence above or below the indicated guideline range. However, in rating the relative seriousness of offenses, we believe that it is critical for the Commission to incorporate distinctions within such categories to allow sentencing judges maximum flexibility within a given offense severity level, reserving the decision to go above or below the guidelines based upon more specifically individualized factors relating to the offender and the offense.

Under current Parole Commission practices, an offender convicted under the RICO statute is designated, at a minimum, to the Category 5 offense severity level indicating a range of 24-36 months to be served before release. In many cases, prosecutorial charging decisions with respect to RICO involve the application of this statute to businessmen who commit two predicate acts of racketeering, for example, mail fraud and wire fraud. The fact that the prosecutor makes an initial determination to invoke this statute serves to differentiate that offender in parole proceeding from the traditional mail fraud or wire fraud white collar offender. We urge the Sentencing Commission to use caution in that regard.

The proliferation of "organized crime" in our society is a tremendous problem. However, the government's frequent use of the anti-racketeering statutes against "ordinary" businessmen

serves to unnecessarily enhance the actual amount of time required to be served by such offenders under the parole system.

We believe that where the government demonstrates, by clear and convincing evidence, that the offender is part of a large scale criminal organization, that fact, of itself, might justify a decision above the indicated guideline range. However, it is important that a sentencing procedure similar to that established in United States v. Fatico, 579 F.2d 707 (2nd Cir. 1978) be developed to ensure that the defendant receives all necessary due process safeguards in defending himself against such charges. The point is that the issue of "organized crime" or membership in a criminal organization should not be built into the offense severity level itself. Rather, it should be left to the discretion of the Sentencing Judge to be considered as an aggravating offense characteristic warranting a decision above the indicated guideline range. This procedure would represent a quantum leap in due process safeguards which is currently found lacking in the Parole Commission's guideline system.

Finally, as representatives of the organized Defense Bar, we encourage the Commission, in developing the guidelines, to be ever mindful of the Sense of the Senate Resolution (§239) urging that prisons be used only in cases calling for incapacitation and not where the principal purpose of sentencing is deterrence or retribution. The resolution also calls for the "increased use of restitution, community service, and other alternative sentences" for "non-violent and non-serious"

offenders. The Federal Prison System is already bulging and the cost to build and operate new institutions is astronomical. In developing the sentencing guidelines, we urge the Commission, in the promulgation of its policy statements, to have Sentencing Judges first determine whether prison is an appropriate sanction at all. See generally, Lasker, J., Presumption Against Incarceration, 7 Hofstra L. Rev. 407 (1979); Herlands, J., When and How Should a Sentencing Judge Use Probation, 35 F.R.D. 487, 494 [Institute on Sentencing] (1964).

In conclusion, the National Association of Criminal Defense Lawyers believes that through a system of extensive grading factors or features within an offense severity level, the Commission and Sentencing Judges can improve the traditional function of the Courts to "individualize" criminal sentences according to the offender's level of culpability, personal background and social history, while taking into account any aggravating or mitigating factors of the case. The guidelines, if they are to be effective, should be easy to understand, practical, and preserve sufficient judicial discretion to individualize the sentence. The guideline structure should establish broad ranges for general offenses and then list sub-classes or factors which would take into account the individual offense characteristics of the offender. Probation should be available for a great many offenses, because the Court can condition probation with up to one year of confinement. The Sentencing Commission should be an independent beacon for positive federal

sentencing and correctional reform. In carrying out its mandate, we feel that the single most important factor, in determining the relative seriousness of offenses, is to consider the individual offense characteristics of the offender without over-generalizing such roles, as has been our experience with the United States Parole Commission.

I would be pleased to entertain any questions from the Commission. Thank you.