



Statement of

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on behalf of the

NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

before the

UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING ON PROPOSED AMENDMENTS

to the

UNITED STATES SENTENCING
COMMISSION GUIDELINES MANUAL

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Comments and remarks of Alan J. Chaset on behalf of the National Association of Criminal Defense Lawyers to be submitted to the United States Sentencing Commission concerning proposed Amendments to the Commission's Guidelines Manual

March 22, 1993

Judge Wilkins and Members of the Commission:

My name is Alan J. Chaset and I am here today on behalf of the National Association of Criminal Defense Lawyers (NACDL), an organization whose membership is comprised of more than 6,000 lawyers and 25,000 affiliate members who practice in every state and federal district throughout the nation. As you know, NACDL is the only national bar association devoted exclusively to the defense of criminal cases. Its goals are to assure justice and due process for all persons accused of crime, to foster the independence and expertise of the criminal defense bar and to preserve the adversary system in the criminal justice arena. For the past five years, I have served as the Chairman or Vice Chairman of the NACDL Sentencing and Post-Conviction Committees and have had the opportunity and pleasure of working with members of the Commission and its staff on several matters including the drafting of proposed amendments and the training of various participants in the criminal justice system. I also have the distinct privilege of serving as a member of the Commission's Practitioner's Advisory Group.

As the Commission is most aware, NACDL has long been a vocal opponent of the sentencing guidelines as promulgated by this Commission. Whether in somewhat heated public exchanges or in the relative quiet of the Commission's conference room and offices, we have consistently taken the position that the guidelines as drafted are not working and not working fairly. And we have consistently argued that newly proposed amendments merely add to the confusion and disparity already created by prior versions. While the messenger appearing before you today may be different from years past, the basic message I bring is the same: we do not like the guidelines for a number of good and sufficient reasons, but mostly because we believe that they are unnecessarily harsh and inappropriately inflexible.

Having now repeated that position and without intending to abandon that stance, please permit me to offer both some general comments about the Commission and its guidelines as well as some specific responses and comments to some of the individual proposals before us today.

First, I do want to thank the Commission for its efforts to oppose the proliferation of criminal statutes that include mandatory minimum sentencing sanctions; NACDL shares many of the same concerns as the Commission in this regard. Next, I want to commend the Commission for recognizing that future training endeavors under the guidelines need to be focused more on the defense bar; NACDL shares the concern with this problem and has already noted its willingness to help address the solution. And I want to encourage the Commission to keep providing increased access to Commission working groups and draft proposals; NACDL recognizes the need to work with the Commission at all stages of the process, rather than just appearing here when the opportunities for further change have been significantly circumscribed. Finally, I want to applaud the Commission for its willingness to publish the proposed amendments submitted by various interested groups from outside the Commission; NACDL believes that the consideration of competing proposals, including those that call for somewhat radical changes, serves to inform both the current and future amendment cycles as well as current and future Commissioners.

In that last regard, NACDL recognizes that the composition of the Commission may well change over the coming months. Obviously, we will want to be active in the attempt to secure appointments (and re-appointments) of those who more closely share our views on some of the important issues here. Regardless of that effort and its outcome, however, NACDL believes that there remains a distinct need to insure that a representative of the defense bar serve in an *ex officio* capacity on the Commission similar to the designee of the Attorney General and the Chairman of the U.S Parole Commission. We would urge the Commission to lend its full support to the effort to secure such a position.

Turning now to the amendment package published by the Commission, please permit me to state several general principles with which we have approached each of the specific proposals. Articulating where we

stand on these basic points makes it easier for us to offer comments on the many and often very detailed proposals and should similarly facilitate the Commission's understanding of where we stand and the bases for those positions.

First, NACDL believes that the sentencing guidelines should focus initial attention on the decision as to whether or not an individual needs to be incarcerated for his/her offense: the "in-out" decision. Only after it is thus determined that some period of imprisonment is warranted would the incarcerative guideline calculations come into play. As a closely related corollary, we support the fundamental principle of parsimony articulated in the Sentencing Reform Act: that sentences ought to be the least severe necessary to achieve the purposes of sentencing.

Second, we believe that the guideline calculations should be based solely on the precise conduct for which the defendant has been found, or to which the defendant has plead, guilty. We are, therefore, supportive of changes that move the system to offense-of-conviction based sentencing and away from the "real offense" concept. Next, we believe that the current system significantly undervalues and dramatically overlooks a large variety of offender characteristics, matters that we view as most critical in the fashioning of an appropriate sentence. While we support the concept that similar offenders who commit similar offenses should be treated similarly, we do not feel that the system affords sufficient opportunity to highlight and weigh legitimate differences and dissimilarities.

Fourth, NACDL believes that trial judges should be generally provided with broader authority and greater discretion to depart from the calculated guideline range. That flaw in the current system is most blatant and the need for change most glaring in the area of substantial assistance and cooperation. We believe that each actor in the system should be able to initiate the consideration of a departure in this regard. By so amending, we believe that much of the real and perceived disparity concerning the operation of §5K1.1 can be dramatically lessened.

Additionally, we share the view of many that the current version of the guidelines overemphasizes drug quantities and dollar amounts and provides insufficient emphasis on who the offender is and what function he/she may have played in the offense. While we recognize the confounding impact of mandatory minimums at this juncture, we look for changes that might provide a better and fairer mechanism for rationalizing each of these competing matters.

And finally, we believe that there have been too many inappropriate changes to the guidelines over the very few years of their existence. While we remain advocates for some basic changes, NACDL believes that the need for any amendment to the system must be demonstrated and supported by empirical data and sound analysis and must be accompanied by an assessment of the potential impact that the change might have on the population of the Bureau of Prisons. As we move into a period of government downsizing, program elimination, and general austerity, the Commission must now undertake its statutory obligation to insure that the guidelines minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons.

Turning now to the amendments and requests for comments as proposed, NACDL offers the following responses:

AMENDMENT 1

NACDL endorses the proposal to exclude acquitted conduct from the already overbroad scope of "relevant conduct." Whether viewed from our position regarding the offense-of-conviction/real offense rubric or considered on the basis of fundamental fairness and the appearance thereof, this amendment clearly warrants adoption by the Commission. Similarly, we are thus supportive of Option B under proposed Amendment 34 and Option 1 under proposed Amendment 35.

AMENDMENT 2

NACDL strongly opposes the attempt to expand the application of the Commission's significantly flawed "one book" policy to multiple count cases. We believe that §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing) is substantively violative of the *ex post facto* clause and that its adoption last cycle without opportunity for public comment is also procedurally defective.

AMENDMENT 5

NACDL opposes the proposal to eliminate the "more than minimal planning" specific offense characteristic from several guideline sections and the related modification to the applicable loss tables. While we believe that the appropriate application of the concept of "more than minimal planning" could be benefitted by further discussion and more rational examples (including the removal of the "repeated acts" language in the Notes to §1B1.1), we see its elimination as inappropriately increasing the opportunity for dissimilar offenders to be treated similarly and for further incorrectly emphasizing the amount of money involved as the primary basis for length of punishment.

As to the other amendments related to fraud offenses, we oppose AMENDMENTS 6, 7 and Option C of AMENDMENT 37 as unnecessary. And, while we wish to de-emphasize the significance of dollar amounts in the determination of guideline ranges, we are supportive of those portions of AMENDMENTS 37 & 38 that tend to more rationally and fairly define and guide loss calculations.

AMENDMENT 8

As stated above and as stressed in prior years' testimony, NACDL believes that the drug guidelines overvalue quantity and undervalue role and do so most blatantly and most unfairly at the low end of the distribution chain. We believe that this amendment makes an attempt to begin to correct this imbalance, as do some of the proposals within AMENDMENTS 39 & 48. At this juncture, however, we merely want to reiterate our basic position on the general operation of the existing drug guidelines and on the need for significant recrafting.

AMENDMENT 10

NACDL supports the effort to narrow the definition and scope of the term "mixture or substance" as used in determining drug amounts under the guidelines. While we would go further here, the thrust of this change and those reflected in AMENDMENTS 49 & 50 merit adoption by the Commission.

AMENDMENTS 12 & 13

As part of our opposition to the overvaluation of drug amounts, NACDL has long shared the growing concern about the manipulation of guideline factors and ranges by government agents, particularly in reverse sting operations. While we feel that the Commission should address other abuses than just the setting of artificially low prices, we see this clarification and this potential addition as steps in the correct direction.

AMENDMENTS 14 - 19

While offering no specific comment as to the substance of the proposals here, we would note our belief that there have been so many changes in these sections of the guidelines over the past few years that they have become some of the most difficult to follow and apply. We recommend, therefore, no additional changes here at this time.

AMENDMENT 20

As regards the proposed changes to §§ 2S1.1 - 2S1.4, NACDL is most supportive of the removal of all opportunities for sentence manipulation that result from charging practices. We agree with the Commission's Working Group here that the money laundering statute has been used often by prosecutors to "up the ante" despite the fact that the charged financial transaction offenses do not differ substantially from the underlying unlawful activity. While approving much of the contents of this proposal, we share some of the same concerns expressed by the Practitioner's Advisory Group and the ABA as regards the substitution of the fraud table as the standard measure here and as regards the factor manipulation potential in undercover/sting operations. Rather than repeat those most adequate remarks, I would merely make reference to same and note our basic agreement with the comments as written.

AMENDMENT 23

NACDL is supportive of this amendment which appears to significantly narrow the existing 2 level adjustment for "abuse of trust" so that it applies only to abuse of "special trust," a term accompanied with a definition that limits its application by stressing discretionary authority.

AMENDMENT 24

As noted above and in previous years' testimony, NACDL is strongly in favor of amending §5K1.1 to permit both the sentencing judge and the defendant to raise the issue of substantial assistance for consideration as a departure. While the concept addressed in this particular request for comment does not go far enough, it is clearly a step in the correct direction. In that latter regard, we believe that our basic position is better captured in AMENDMENTS 31 & 47 and commend those proposals for Commission adoption.

AMENDMENTS 25 & 36

NACDL has long sought to amend Rule 16 of the *Federal Rules of Criminal Procedure* to include the disclosure of sentencing relevant information and material. While we still believe that a change to the Rules is most appropriate, we support the recommended commentary here as suggested by the Commission and the Practitioner's Advisory Group as an effort to bring more "truth in sentencing."

AMENDMENTS 27 & 28

While NACDL believes that efforts to make the guidelines easier to use and apply are generally worthy of support, we are not convinced that the changes being proposed within these amendments are consequence neutral and otherwise benign. Before accepting such a long list of changes, we believe that more study and more data are needed.

AMENDMENTS 29 & 30

In line with our general comments about the need for the guidelines to place more emphasis on offender characteristics, we support the proposal of the Criminal Law Committee of the Judicial Conference of the United States to amend the introductory commentary to §5H1.1 so as to permit departures when those characteristics are present to an unusual degree and/or combined in ways important to the purposes of sentencing. We believe that that change is a step in the correct direction as would be other commentary tending to increase rather than restrict the court's ability to depart for these critically important characteristics.

AMENDMENTS 32 & 33

Consistent with our general position that the Commission should develop and implement some basic guidance as to an initial "in-out" decision before the calculation as to the amount of prison time is even addressed, we believe that these ABA proposals merit some study as a starting point or potential alternative vehicle for achieving some of the ends we seek. While we submit that the thrust of our position moves directly away from any reference to the sentencing table, given only the options suggested in these proposals, we would favor increasing the number of offense levels/criminal history categories cells where sentences other than imprisonment would be permitted. Similarly, we support the concept contained in the Federal Defenders proposal at AMENDMENT 52.

AMENDMENT 40

NACDL strongly supports and enthusiastically urges the Commission to lobby Congress to modify or eliminate the provisions that distinguish between the punishment for powder and crack cocaine at the quantity ratio of 100 to 1. At the same time, we urge the Commission to similarly lobby Congress to modify or eliminate the provisions that equate the number of marijuana plants arbitrarily with certain weight equivalents.

AMENDMENTS 53 - 56

NACDL supports each of the amendments here as proposed by the Federal Defenders.

On behalf of the National Association of Criminal Defense Attorneys, I want to thank the Commission again for this opportunity to offer written comment and testimony on the set of guideline amendments and proposals. We look forward to working with the Commission in the future and pledge our best in the effort to enhance the defense bar's knowledge of and facility with the guidelines and their associated procedures.

(end)