

STATEMENT OF

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ON BEHALF OF

THE AMERICAN CIVIL LIBERTIES UNION

BEFORE THE

UNITED STATES SENTENCING COMMISSION

ON

PROPOSED GUIDELINE AMENDMENTS FOR PUBLIC COMMENT

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The American Civil Liberties Union (ACLU) appreciates this opportunity to comment upon several proposed amendments to the guidelines, policy statements, and commentary in the Guidelines Manual.

The American Civil Liberties Union is a nonpartisan organization of over 275,000 members dedicated to the defense and enhancement of civil liberties. Because protection of the Bill of Rights stands at the core of our mission, we have a particular interest in ensuring that due process and equal protection of the law, as well as the right of freedom of association and freedom from disproportionate punishment, are upheld wherever threatened.

The principal purpose of the United States Sentencing Commission (Commission) "is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." United States Sentencing Commission, Guidelines Manual, § 3E1.1 (Nov. 1992), p. 1.

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984), provides for the development of guidelines that will further the basic purpose of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

As part of its statutory mission to monitor sentencing

practices in the federal courts, the Commission underscored the dynamism of the guideline-writing process, describing it as "evolutionary", with the expectation and anticipation that "continuing search, experience, and analysis will result in modifications and revisions to the guidelines ..." Id. p.2.

The Executive Branch and the Congress have increasingly responded to public pressure to "get tough on crime" through enacting legislation that creates new federal criminal offenses. Thus, emerging criminal law is not just in the purview of state courts -- now federal courts have broader jurisdiction. This trend of federalizing criminal law has decreased access to the federal courts for civil cases (especially civil rights cases) and has created a patchwork quilt of laws for which punishment is often inconsistent and, in our view, extreme. It is incumbent that this Commission not simply rationalize federal crime policies which, for the most part, have been sensationalized, but rather ensure that civil liberties are not compromised in the process.

Our comments will be specifically directed in support of drug trafficking amendments which seek to achieve consistency in drug sentencing (amendments 10, 49, 50); in favor of eradicating the distinction between powder and crack cocaine (amendments 40, 51); in opposition to increased sentences for "gang-related crime" (amendment 66); and in opposition to imposing a guideline level for the recently enacted carjacking statute (amendment 26).

Although the focus of our comments is narrowed for the purpose of this testimony, we are also in general agreement with the

concepts embodied in the following proposed amendments to the guidelines:

Amendment 25, 36: recommendation that the government disclose to the defendant information relevant to the application of the guidelines prior to the entry of a guilty plea;

Amendments 24, 29, 30, 31, 47: language clarifying and increasing the court's ability to depart tailored to individual circumstances and offender characteristics;

Amendments 1, 35: prohibiting use of acquitted conduct in determining guideline offense level;

Amendments 32, 52: imposition of sentences other than imprisonment;

Amendment 56: retroactivity of amended guideline range and ability to reduce a sentence not listed if consistent with the purposes of sentencing.

DISCUSSION

Drug Trafficking: Amendments 10, 49, 50.

With respect to the category of drug trafficking, we support a number of closely related amendments which seek to ensure consistency in drug sentencing. Amendment 10 resolves the split among circuits by providing that the term "mixture or substance" does not include uningestible, unmarketable portions of drug mixture. Amendment 49 clarifies that the weight used to determine the offense level should not include the weight of substances involved in the manufacturing process or substances to which the

drug is bonded. Amendment 50 separates the weight of the carrier from the actual weight of LSD to determine offense level.

Because a defendant's sentence pursuant to the guidelines is calibrated to the specific weight of the substance, it is essential that the substance be appropriately defined. To include noningestible portions of a substance in the calculation of drug quantity for sentencing purposes would be unjust. A differential effect would occur solely based on the weight of different carriers. There has been no showing, however, that the extra weight is related to increased culpability.

In Chapman v. United States, 111 S. Ct. 1919 (1991) the Court acknowledged that the sentences for selling a specific quantity of LSD could differ by over 2000 percent solely on the method of marketing: that is, the sentence for the sale of LSD in liquid form -- the least diluted form -- would be 10 - 16 months. However, since LSD is more widely distributed using a blotter paper carrier or on sugar cubes, the weight of the substance significantly increases as the result of the introduction of such uningestible and unmarketable components. Thus, the sentences of the people at the lower end of the chain of distribution who handle the drug in a more diluted form skyrocket: with blotter paper, the weight of the substance triples and the sentence would increase to 63 - 78 months; with sugar cubes, the weight would spiral tremendously and the penalty would leap to 188 - 235 months. The ACLU maintains that such a sentence, being disproportionate to the crime, is unconscionable and constitutionally suspect.

Pursuant to the sentencing guidelines, the penalty for distributing exactly the same amount of drugs -- 100 doses -- could range from 10 months to almost 20 years, causing the defendant to receive 19 additional years simply because of the manner of delivery of the drug. Ironically, it is typically the drug kingpin who is able to sell the drug in liquid form -- the purest form, thus receiving the lighter sentence. The people at the lower end of the drug trafficking scheme, who are usually young and poor, would unfairly be made to bare the brunt of punishment for participation in the drug economy.

Although the majority in the Chapman case held that such an arbitrary scheme of punishment was not violative of the Constitution, the dissent correctly observed that the ruling "will necessarily produce sentences so anomalous that they will undermine the very uniformity that Congress sought to achieve when it adopted the Sentencing Guidelines."¹ If we want a consistent and rational sentencing scheme that sends unambiguous messages to drug dealers, such sentencing disparity must be corrected wherever it appears in the drug laws. The adoption of these amendments would be a first step towards the implementation of a rational drug sentencing scheme which carries on the mission of the Sentencing Reform Act - the elimination of unwarranted sentencing disparity.

Crack v. Powder Cocaine: Amendments 40, 51.

Amendment 51 clarifies that the term "cocaine base" means

¹ Chapman v. United States, 114 L Ed.2d 524, 540 (1991).

"crack." Amendment 40 asks for comment regarding whether the Commission should ask Congress to modify or eliminate the provisions that distinguish between the punishment for powder and crack cocaine at the quantity ratio of 100 to 1.² The ACLU supports these amendments.

Pursuant to this Commission's preliminary report detailing statistics of race and drug types, a disproportionate impact by race is clearly demonstrated. The Commission's final sample consisted of 4122 cases filed between April 1 and July 31, 1992, and is representative of all drug cases received for FY 1992. With respect to cocaine base (crack) and cocaine powder, the study concluded that 92.6% of Black defendants were sentenced for crack as compared with 4.7% of White defendants. On the other hand, 45.2% White defendants were sentenced for cocaine as compared with 29.7% Black. With respect to simple possession only, 100.0% of the defendants sentenced for crack were Black, as compared with 0.0 of Whites. As for simple possession of cocaine, 61.8% sentenced were White, as compared with 20.6% Black. See U.S. Sentencing Commission, Monitoring Data Files, April 1 - July 31, 1992. These statistics raise grave concerns as to the racial distinctions between the punishment for powder and crack cocaine established by the 100 to 1 quantity ratio.

The available evidence indicates that cocaine base is used

² One gram of cocaine base (crack) carries the same penalty as 100 grams of cocaine powder for the purpose of determining an individual's base offense level under the Sentencing Guidelines.

principally by African Americans, while cocaine powder is used primarily by Caucasians. The overwhelming number of prosecutions in this country are for crack rather than cocaine powder, with the result being a vast disproportionate number of African Americans prosecuted for use of crack. The resulting disparate sentencing scheme dramatically impacts in a negative fashion on African Americans, who are subject to long mandatory minimum sentences for simple possession of small amounts of cocaine base while those first time offenders convicted of possession of a much larger amount of cocaine powder are subject to minimal sentences.

For example, an offender with no prior record must be sentenced to five years for possession of five grams of crack. In contrast, a defendant convicted of first possession of 4.9 grams of crack or any amount of heroin or other controlled substance is by statute subject to a maximum sentence of one year. The much harsher treatment of a form of cocaine more likely to be possessed by Blacks than that meted out for possession of another form of cocaine that is likely to be used by Whites, implicates fundamental equal protection concerns.

Although the five year minimum for possession of five grams of crack does not explicitly establish a classification based on race, the usage of crack is overwhelmingly attributed to Blacks, while powder is primarily used by Whites. There is no medical/scientific distinction between these forms of cocaine, and no objective scientific data to suggest that crack is more

addictive than powder.³ Thus, it would appear that the statute's grossly disproportionate treatment of cocaine base does establish a de facto classification based on race or, at the least, represents a facially neutral statute applied in a racially discriminatory manner. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

In 1988, the state of Minnesota enacted a law that increased the penalty for possession of crack. While the possession of three grams of powder cocaine carried a penalty of five years in prison and/or a fine of \$10,000, under the new law possession of three grams of crack cocaine carried a penalty of twenty years in prison and/or a \$250,000 fine. In challenging the constitutionality of the law, statistics were presented to the court which showed that 92.3% of all persons convicted of possession of crack in 1988 were Black, while 85.1% of all persons convicted of possession of powder cocaine in that year were White. In finding for the defendants, the court ruled that the statute violated the equal protection clause of the 14th amendment as well as a comparable provision of the Minnesota constitution. Minnesota v. Russell, Hennepin County District Court, December 27, 1990.

On appeal, the Minnesota Supreme Court upheld the lower court's decision and invalidated the disproportionate treatment of cocaine base and cocaine powder under the equal protection

³ See Proffer of Dr. George Schwartz, attached to Defendant's Motion to Declare Provisions of 21 U.S.C. § 844(a) Unconstitutional, U.S. v. Maske, Cr. No. 92-0132-01 (TFH) (D.D.C.), exhibit A.

provisions of the State constitution. State v. Russell, 477 N.W. 886 (Minn. 1991). In examining the distinction between crack and powder, the Court stated that an intermediate level review was appropriate "where the challenged classification appears to impose a substantially disproportionate burden on the very class of persons whose history inspired equal protection." Id. at 889. The court then held that equal protection was violated because of the "lack of a genuine and substantial" basis for the distinction, rejecting the State's argument that the crack/cocaine classification served to facilitate prosecution of "street level" dealers or that such disparate treatment was necessary because of the alleged more addictive and dangerous nature of cocaine base.

With the exception of the Minnesota Supreme Court, all courts to date have rejected unconstitutionality arguments advanced by critics of the distinction in sentencing between crack and powder cocaine. Although the 8th Circuit in U.S. v. Simmons⁴ declared the 100-to-1 sentencing ratio rationally related to Congress' objective of protecting public welfare and several circuits have made similar rulings, creating a separate set of tougher sentences for low income people of color is unjust, regardless of federal court interpretations. It is instructive to note, however, that the court in Simmons stated that it was "bound by precedent" to reject arguments that the sentencing scheme was constitutionally

⁴ 964 F.2d 763 (1992).

disproportionate. It stated that were it writing from a "clean slate", it might have accepted as valid that the 100:1 ratio constituted disproportionate punishment. Id. at 767.

The ACLU submits that Congress' decision to distinguish between cocaine powder and cocaine base is arbitrary and irrational and the substantially higher term for possession of crack discriminates on the basis of race in violation of the due process clause, the equal protection clause and the Eighth Amendment's prohibition against cruel and unusual punishment. Gang-related Crime: Amendment 66

The Commission requests comment on two issues: 1) whether the guidelines should provide for a 4-level enhancement for felonies committed by a member of, on behalf of, or in association with a criminal gang; and 2) whether a "criminal gang" should be defined as a group, club, organization, or association of five or more persons whose members engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or serious drug offenses.

We all want to reduce crime in urban communities, but adding years to a convicted defendant's felony sentence for membership in a "criminal gang" is the wrong way to achieve results.

a. Violation of First Amendment Right to Free Association

The First Amendment guarantees freedom of association. It protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the

group or to the truth, popularity, or social utility of the ideas and beliefs which are offered. NAACP v. Button, 371 U.S. 415 (1963). It is not accurate to assume that every single member of every "gang" is involved in criminal or drug-related activities. The motivations for joining a gang are complex and often involve issues of acceptance, trust, and responsibility. It is incorrect to classify away a whole segment of our youth because of their economic circumstances, their color, and/or where they live.

The mixture of criminal and non-criminal activities resulting from gangs demands more exacting governmental definition. For example, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1986) discusses the mixture of criminal and non-criminal activities as follows:

No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, "precision of regulation" is demanded. Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages ... Moreover, in Noto v. U.S. the Court emphasized that this intent must be judged "according to the strictest law," for "otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other unprotected purposes which he does not necessarily share."

Id. at 919, quoting Noto, 367 U.S. 290 at 299-300.

b. Vague Definition of Criminal Gang

An additional infirmity in the proposed amendment is its vagueness of terms. As our courts consistently recognize, vague

language not only deprives potential offenders of notice with regard to unlawful conduct, its effect is to open the door to arbitrary police enforcement. Under the proposed amendment, this problem is particularly acute with regard to the definition of "criminal gang". For example, the suggested language fails to specify how it is to be ascertained who a "gang member" is. Also, just what is the definition of a "serious drug offense"?

It is insufficient to define a "criminal gang" as "a group, club, organization, or association of five or more persons whose members engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or serious drug offenses." The absence of standards for making such a determination of guilt is repugnant to both our criminal justice system and to the values inherent in a free democracy.

Moreover, the definition of "criminal gang" is simultaneously too inclusive and too exclusive. The statute may be used against peaceful striking workers, whose peers may have been involved in violent activities. On the other hand, the law would not apply to inside traders or S & L swindlers, who nevertheless are engaged in "criminal" behavior (because the definition specifies violent or drug crimes). Like the crack/powder distinction, this sentencing change will be used against poor people of color while allowing wealthy, White criminals to escape enhanced penalties. Ominously, the vague definition is broad enough to include other political and union "gangs" who may be fighting for social change.

c. Inability to Ascertain Membership

Prosecutors cannot determine, with any accuracy, whether or not a defendant is or was a member of a gang, and thus subject to the penalty enhancement. The L.A. County district attorney released a report on gangs in May 1992. In the report, it was alleged that half of all Black males in the region, between the ages of 21 and 24, were involved in gang activity. According to the police, only 8.5% of Latino men and one half of 1% of Caucasian men in that age group show up in the gang database. Critics of the police in the Black community argue that African American men are being categorized as gang members because of their race, class, neighborhood, and/or the clothes that they wear, not as a result of their conduct.

In Farber v. Rochford, 407 F. Supp. 529 (1975), the District Court in Illinois ruled that an anti-loitering city ordinance targeting specific segments of the population was unconstitutional. The ordinance targeted people "known to be" drunkards, prostitutes, etc. The court ridiculed this language at length -- who would "know," the community, the police, the people themselves?

Reputation and general knowledge have no certain relation whatsoever to actual condition ... The law enforcement authorities are entitled to punish acts, but not reputation. This law is unconstitutional, as it seeks to punish an individual for what he is reputed to be, regardless of what he actually is.

Id., at 532, quoting People v. Belcastro, 356 Ill. 144 (1934).

Moreover, vagueness of statutory language gives police officers uncontrolled power to arbitrarily select individuals for arrest and jeopardizes the rights of members of unpopular or

controversial groups.. Id., p. 533. See also Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Grayned v. Rockford, 408 U.S. 104 (1972).

It is not possible for the police or prosecutors to know with any certainty whether an individual on trial is a member of a gang, whether he or she is peripheral or central to alleged criminal activities, or whether the person just "hangs out" with gang members.

It has been our experience that vague laws vesting broad discretion in police officers have inevitably resulted in sweeping within their enforcement large numbers of law-abiding persons who are not the targets of the legislative bodies that pass these laws. This clearly was the result of the efforts of the Chicago Police Department in the early 1980's when as many as a quarter of a million Chicagoans a year were swept off the streets in an effort to stop gang activity. The ACLU successfully attacked those arrests in federal court.

The thousands of persons from communities of color who contacted the ACLU to complain about the "sweep arrests" of the 1980's were decent, law-abiding people whose only "crime" was to be young, a person of color, and being present in gang-infested neighborhoods.

Finally, we are particularly concerned with the potential effect of these vague provisions. Vague statutes are typically applied in a discriminatory manner, and have an overwhelmingly detrimental effect upon the poor and upon communities of color.

Because we will all be the losers if the rights guaranteed by our Constitution are eviscerated in the midst of combatting crime, we oppose the proposed amendment and recommend its complete rejection by the Commission.

Carjacking: Amendment 26

Towards the end of the 102nd Congress, Congress approved a bill making armed carjacking a federal crime punishable by up to 15 years in prison or a life sentence if death occurs. Although vehicular theft is a serious problem, prior to the death of Maryland resident Pam Basu, carjacking was not a federal crime. After her death, however, a full scale assault on carjacking became a national priority. Carjacking, however, is simply a new name for an old crime -- robbery. Carjacking represents a tiny percentage of either auto theft or armed robbery, the two crime categories that most police departments issue it under. It is much more frequent in cities than in suburbs. A few notorious cases have occurred in the suburbs, however, and motorists died, and suddenly an old crime became a national priority with a new federal law.

Billy Davis, spokesperson for the Chicago Police Department stated, "We don't even like to say carjacking... it's robbery and its been going on for a long time. There's a lot of hype going on right now." New York Times, 12-9-92, "Carjacking: New Name for Old Crime." Deputy Inspector Charles DeRienzo of the New York City Police Department's Auto Crime Division agreed: "It's a crime that has been happening for many many years. But carjacking is a name that just rolls off the tongue and sounds good." Id.

In most states, penalties of up to 10, 20 and more years of imprisonment often apply to crimes of armed robbery or armed assault. Pursuant to the sentencing guidelines, robbery has a base offense level of 20; i.e. from 33 - 87 months. If a firearm was discharged, a seven level increase is mandated, i.e. 70 - 162 months, with other level increases dependent upon the specific offense characteristics. In conclusion, carjacking is nothing more than robbery, armed or otherwise, and sufficient penalties exist for such crimes.

Conclusion

We request that this Commission adopt those amendments which seek to eliminate distinctions which undermine concepts of due process and equal protection and reject those amendments which abridge fundamental constitutional rights. We implore the Commission to perform its task of revising guidelines to recognize that the "war" on drugs and crime need not be a "war" on the Bill of Rights.

We thank the Commission for this opportunity to comment.