> sentencing, the court finds him responsible for the same misconduct. That the Double Jeopardy Clause protects him from reprosecution on the acquitted count, or that his acquittal means that his maximum potential sentence will be determined solely on the basis of the count on which he was convicted is doubtless of little comfort." Boney, 977 F.2d at 647 (Randolph, J., dissenting in part and concurring in part).

Some of our own judges have recognized that this justification could not pass the test of fairness or even common sense from the vantage point of an ordinary citizen. [FN9] The "law," however, has retreated from that standard into its own black hole of abstractions. The fact remains that when the conduct which serves as the basis for a sentence "enhancement" is in fact treated by the criminal statutes and the sentencing guidelines as a discrete crime, separately charged in the indictment, and subjected to a separate determination of guilt or innocence by a jury, treating it subsequently at the sentencing stage as just another "factor" to be considered in "enhancing" the sentence for the crime of conviction introduces an artificiality into the process that violates time honored constitutional principles designed to protect criminal defendants.

FN9. See supra note 8.

The fact that the ultimate sentence based on both convicted and acquitted conduct falls below the statutory maximum for the crime of conviction does little, if anything, to counteract the basic unfairness of counting acquitted conduct. The statutory maxima for many felonies, which can run as high as 30 or 60 years, were originally set in an era of indeterminate sentencing and parole; the prevailing ideology of punishment was rehabilitation, and the system was designed to provide that offenders would remain in prison only until they had been "rehabilitated," meaning prisoners often would be released after serving as little as one-third of their original sentences.

[FN10] The concept of guideline sentencing, on the other hand, was motivated by Congress' determination that indeterminate sentencing and parole discretion resulted in unwarranted sentence disparities, and must be replaced by more rigid formulas allowing little or no discretion on the part of the judge. [FN11] Thus the escape valves attached to the long sentences originally prescribed by statute have been slammed shut, and statutory maxima that were designed to cover the most egregious conceivable manifestations of particular crimes, and thus to far exceed the appropriate sentence in the average case, [FN12] cannot be relied on to cabin within reasonable limits the cumulative penalties for convicted and acquitted charges.

FN10. See Michael H. Tonry, Real Offense Sentencing: The Model Sentencing and Corrections Act, 72 J.CRIM. L. & CRIMINOLOGY 1550, 1593 (1981).

FN11. See 18 U.S.C. § 3553(a)(6) (1994).

FN12. See Michael Tonry, Sentencing Guidelines and the Model Penal Code, 19 RUTGERS L.J. 823, 845 (1988).

Some courts have felt themselves constrained by the Supreme Court's decision in McMillan v. Pennsylvania [FN13] to respect the "punishment/enhancement" fiction that underlies the authorization for counting acquitted conduct in § 1B1.3(a)(2). [FN14] A close reading of that opinion, and of the Specht v. Patterson [FN15] decision to which it refers, however, suggests that even that fiction has boundaries which this portion of the guidelines has crossed over.

FN13. 477 U.S. 79 (1986).

FN14. See, e.g., United States v. Mobley, 956 F.2d 450, 455 (3d Cir.1992).

FN15. 386 U.S. 605 (1967).

The statute reviewed in Specht authorized a sentencing court to determine that a person convicted of enumerated sex offenses constituted a threat to the public, or was an habitual offender and mentally ill, and on this basis to increase the sentence from the term specified in the crime of conviction to an indeterminate term between one day and life imprisonment. [FN16] The statute made no provision for notice or hearing preceding this determination. The Court held that the statute was "deficient in due process" as it provided for "the making of a new charge leading to criminal punishment" without affording the defendant the safeguards considered essential to a fair trial. [FN17]

FN16. See id. at 607-08.

FN17. Id. at 611.

In McMillan, the Supreme Court addressed a challenge to Pennsylvania's Mandatory Minimum Sentencing Act [FN18] based in the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment. The Act provided that anyone convicted of certain felonies must be sentenced to at least five years' imprisonment if the judge finds by a preponderance of the evidence that the person "visibly possessed a firearm" during the commission of the offense. [FN19] Individuals subjected to this sentence enhancement argued that the firearm possession was actually an element of the crime, and thus under In re Winship [FN20] must be proved beyond a reasonable doubt, and in the alternative that due process required that the firearm component be subject to a higher standard of proof than preponderance of the evidence. [FN21]

FN18. 42 Pa.C.S.A. § 9712 (1982).

FN19. See McMillan, 477 U.S. at 81-82.

FN20. 397 U.S. 358 (1970).

FN21. See McMillan, 477 U.S. at 83-84.

The Court found merit in neither claim, holding that Pennsylvania's "chosen course in the area of defining crimes and prescribing penalties" did not violate the standard articulated in Specht. [FN22] The Court noted that it had "never attempted to define precisely the constitutional limits noted in [Specht], i.e., the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases," and declined now to proffer any such definition, in light of other factors making it unnecessary to reach this issue. [FN23] The Court noted, first, that the Pennsylvania Act created no presumptions of guilt and did not relieve the government of its burden of proving guilt, but rather became applicable only "after a defendant has been duly convicted of the crime for which he is to be punished." [FN24] Next, the Court observed that the Act enumerated felonies carrying maximum sentences of ten or twenty years, "upp[ing] the ante" for these felonies only insofar as the minimum sentence could not fall below five years; the Court concluded that the statute gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." [FN25] The Court rejected the petitioners' invocation of Specht, noting that the statute struck down in Specht subjected the defendant to a " 'radically different situation' from the usual sentencing proceeding," whereas the Act merely raised the minimum sentence that may be imposed by the trial court. [FN26] Finally, the Court rejected the petitioners' warning that States would use any leeway the Court allowed them to restructure existing crimes in such a way as to evade the due process requirements announced in Winship, observing that Pennsylvania's legislature had not changed the definition of any existing

offense. [FN27]

FN22. See id. at 86, 91-93.

FN23. See id. at 86.

FN24. Id. at 87.

FN25. Id. at 88.

FN26. See id. at 89.

FN27. See id. at 89-90.

The Court then turned to the petitioners' "subsidiary" claim that visible possession of a firearm should be subjected to a higher standard of proof than "preponderance of the evidence." Citing to the 1949 decision in Williams v. New York, [FN28] the Court quickly dispensed with this argument on the basis of that decision's holding that due process is not violated by the sentencing court's "traditional[ ]" practice of hearing evidence and finding facts "without any prescribed burden of proof at all." [FN29]

FN28. 337 U.S. 241 (1949).

FN29. McMillan, 477 U.S. at 91-92.

In addressing both sets of arguments pressed by the petitioners, the McMillan Court not only affirmed the continued vitality of Specht, but also used language that limited its holding regarding the inapplicability of Specht to situations in which the sentence "enhancement" relates to the particular event on which the conviction is based. The Court held that the Act did not fall under Specht because it "only bec[ame] applicable after a defendant has been duly convicted of the crime for which he is to be punished." McMillan, 477

U.S. at 87 (emphasis added). Rejecting the claim that a higher burden of proof should apply, the Court noted that "[s]entencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime, without suggesting that those facts must be proved beyond a reasonable doubt." Id. at 92, (emphases added).

The Court's apparent assumption that punishment will relate to the crime of conviction, rather than to crimes for which the defendant has been acquitted, reflects a commonality of understanding about fundamental fairness shared by scores of judges and academics, [FN30] as well as every nonfederal jurisdiction in the nation that has implemented guideline sentencing. [FN31] The Federal Guidelines stand alone in perpetuating their anomalous treatment of acquittals in sentencing.

FN30. See supra note 2.

FN31. See Tonry, supra note 2, at 356-57 (noting that the Federal Sentencing Commission is the only sentencing commission in the nation to reject the "charge offense" model, whereby sentences are based solely on crimes for which a defendant has been convicted, in favor of the "real offense" model, which allows sentencing courts to consider unconvicted and even acquitted crimes in setting the sentence).

In sum, I do not believe the Supreme Court has yet sanctioned the intolerable notion that the same sentence can or must be levied on a person convicted of one crime, and acquitted of three "related" crimes, as can be imposed on his counterpart convicted of all four crimes. The result of such a system is subtly but surely to eviscerate the right to a jury trial or to proof beyond a reasonable doubt for many defendants.

> Yet we appear to have relentlessly, even mindlessly progressed down the path. It is time to turn back. The British novelist G.K. Chesterton once said: "[W]hen two great political parties agree about something, it is generally wrong." [FN32] I am afraid the same can be said in this one instance about great circuit courts.
>
> > FN32. JONATHON GREEN, THE CYNIC'S LEXICON 46 (1984).

United States v. Baylor, 97 F.2d at 549 -553.

**Amendment 10, Part B - § 2X1.1 (Attempts, Solicitation, or Conspiracy)**

NACDL opposes this amendment which would eliminate the three-level reduction for certain attempts, conspiracies and solicitations. In the guise of simplification, this amendment ignores the reduced culpability of those defendants who qualify for the § 2X1.1 reduction.

**Amendment 11 - § 1B1.10 (Retroactivity)**

NACDL opposes this amendment because it resolves a purported conflict between two circuits in a manner that disregards fundamental fairness. The amendment provides that henceforth in reducing a defendant's sentence pursuant to an amendment which the Commission has designated for retroactive application, a court may not reduce the sentence in excess of the time the defendant has already served. The practical effect of this amendment is that courts may no longer credit a defendant for the excess time he served in jail by reducing the defendant's term of supervised release.

Ironically, the Commission proposes to add background commentary which states that the designation of an amendment for retroactive treatment "reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing. . ." This proposed amendment seemingly ignores the first purpose of sentencing, "just punishment". 18 U.S.C. § 3553(a). If the reduced term of incarceration reflects just punishment then there is no good reason why the defendant should not receive credit for each excess day which he spent in prison. To accomplish this simple act of justice places absolutely no added burden on courts, the Bureau of

Prison, or the system -- it involves a simple process of addition and subtraction. Indeed, society is more likely to reap benefits from its fair and equitable treatment of defendants who are fully credited for their excess prison time.

NACDL also opposes this amendment because the Commission should not be resolving "circuit conflicts" where the conflict arises out of differing judicial interpretations of statutory language, namely 18 U.S.C. § 3624. Compare United States v. Blake, 88 F.3d 824, 825-26 (9th Cir. 1996) (holding that in view of the language of § 3624 respecting when a term of supervised release begins to run, the defendant's term of supervised release began to run on the date when he should have been released from imprisonment under the retroactive guideline calculation) with United States v. Douglas, 88 F.3d 533, 534 (8th Cir. 1996) (holding that the court was required to impose a two-year term of supervised release for the class C felony pursuant to 18 U.S.C. § 3553(a)(3) and that § 3624 did not require a different result). It is significant, moreover, that the district court judge in Douglas imposed a two-year rather than a three-year term of supervised release because the court believed that the defendant "should be given some credit for the fact that he's actually served a sentence in excess of what he would have otherwise have served." Id. at 534. In fact, no court has resolved the issue in the manner which the Commission proposes -- by absolutely precluding any credit for the excess prison time.

Where as here, the issue does not arise out of an interpretive dispute concerning a guideline, the Commission should not interfere with the quintessentially legal question of statutory construction and congressional intent.

**Amendment 12 - §§ 2F1.1 & 2B1.1 (Affected A Financial Institution)**

NACDL supports this amendment because it clarifies ambiguous language.

**Amendment 13 - § 5A1.1 (Sentencing Table & Offense Level 43)**

NACDL supports the parts of this amendment which rectify the unwarranted "cliff" between offense level 42 and 43 and which eliminate the mandatory life provision for defendants who are convicted of offenses other than first degree murder or treason.

NACDL opposes that part of the proposed commentary to § 5A1.1 which permits imposition of life without parole pursuant to a cross-reference to the first degree murder guideline. As it has in the past, NACDL strongly objects to the imposition of a sentence of life without parole by way of a cross-reference from another guideline to the first degree murder guideline. Imposition of a sentence of life imprisonment is the harshest penalty, short of the death penalty, that a sovereign may impose upon an individual. Under federal law, life imprisonment is life without parole, reduction for good time credit or other release from imprisonment while the convicted person remains alive.

NACDL opposes a cross-reference to the first degree murder guideline under any circumstances, even where the maximum penalty for the offense of conviction limits the ultimate sentence to something less than life. It corrupts the criminal justice system and our constitutional guarantees to sentence a defendant on the basis that he or she committed murder in the absence of a grand jury indictment, the right to confrontation, proof beyond a reasonable doubt to be determined by a jury and all the other constitutional and procedural guarantees afforded criminal defendants.

A sentence of life imprisonment pursuant to a cross-reference would amount to "a tail which wags the dog of the substantive offense". McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986). The Supreme Court has never upheld imposition of such a harsh sentence on the basis of a mere preponderance of the evidence. See United States v. Watts, 117 S.Ct. 633, 637-38 n.2 (1997) (declining to address the issue under the circumstances of that case but acknowledging divergence of opinion among the Circuits as to whether due process prohibits imposition of a dramatically increased penalty on a preponderance standard). Imposition of life without parole, or some other statutory maximum penalty, based on a preponderance of the evidence is simply wrong and violates the constitutional guarantee to due process of law.

**Amendment 14 - § 2B3.1 ("Express Threat of Death")**

NACDL opposes this amendment because it dilutes the requirement that the threat be express in a class of cases -- robberies -- that by their nature necessarily require an element of threat or intimidation.

**Amendment 15 - § 2B3.1 ("Carjacking Correction Act")**

NACDL opposes option 2 which would apply the definition of "serious bodily injury" that Congress enacted for carjackings to all offenses. NACDL agrees with the revised definition of "serious bodily injury" proposed by the Federal Public Defenders.

**Amendment 17 - §§ 2D1.6, 2E1.1, 2E1.2, 2E1.3**

NACDL supports the proposed amendments to the commentary to each of these guidelines. In each case, the amended commentary clarifies the operation of the pertinent guidelines.

**Amendment 18 - §§ 2B1.1, 2F1.1 and 2T1.4**

NACDL agrees with the comments submitted by the Practitioner's Advisory Group concerning this amendment and the issues for comment. NACDL also agrees with the Federal and Community Defenders that these issues warrant further consideration.

**Amendment 21 - Role in the Offense**

**Aggravating Role**

NACDL opposes the proposals that would reduce the number of participants necessary to trigger the aggravating role adjustments. The Commission has not provided any empirical evidence that indicates that the current number of participants fails to capture adequately the greater culpability of certain defendants. Additionally, the Commission should consider that the aggravating role adjustments often apply in non-violent drug offenses that already receive relatively severe sentences when compared to violent crimes. For example, an armed bank robbery where a dangerous weapon was brandished results in an offense level of 25 (no bodily injury and loss of less than $10,000). U.S.S.G. §§ 2B3.1(a), (b)(1) & (b)(2). A distribution of 5 grams of cocaine base ($575 street value) or 100 grams of methamphetamine ($9500 street value) results in an offense level of 26. U.S.S.G. § 2D1.1(c)(7). Cocaine Report, table 19.

NACDL also recommends that the Commission delete the "otherwise extensive" language in the aggravating role adjustments. This language provides little guidance in assessing this adjustment and gives rise to disparate application. The proposed language

that provides for an upward departures for persons who do not qualify for aggravating roles because though "function[ing] at a relatively high level in a drug distribution network", do not exercise supervisory control over others suffers from the same lack of specificity. Furthermore, the fact that certain persons occupy a relatively high level in a drug network will likely be reflected in a relatively high offense level based on the quantity of drugs.

**Mitigating Role**

NACDL opposes the inclusion of the phrase "a substantially less culpable defendant". The term "substantially" involves a qualitative assessment which does not simplify application of the guideline, will likely lead to disparate application of the adjustment, and seems to impose a higher standard than currently in use to qualify for a mitigating role adjustment.

NACDL also opposes deletion of the three-level intermediate adjustment. It permits district courts to exercise informed judgment when warranted.

NACDL strongly recommends that the Commission include language that provides for a four-level reduction for mules and couriers. Very often such defendants are young, vulnerable, and paid a small percentage of the value of the drugs. In many districts, couriers and mules rarely receive any mitigating role adjustment because they are arrested by themselves, cannot provide enough information to implicate others, and are deemed essential participants in the transaction for which they are being prosecuted. Yet, as the Commission pointed out in the Cocaine Report it submitted to Congress, such persons, who are easily replaced, are less culpable and dangerous than the dealers and organizers. See Cocaine Report at 168-175.

The Commission should also include language that permits a mitigating role adjustment for retail street dealers who traffic within a limited geographic area for relatively small profits. Id.

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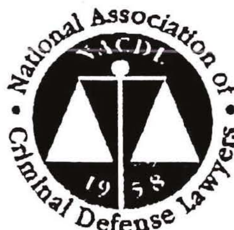


March 28, 1997

The Honorable Richard P. Conaboy
and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chairman Conaboy and Commissioners:

We write on behalf of the National Association of Criminal Defense Lawyers to comment on the proposed 1997 Amendments, Part II.

The NACDL is a nationwide organization comprised of 9000 attorneys actively engaged in defending criminal prosecutions, including private attorneys and public defenders; our membership also includes judges, law professors and law students. NACDL is also affiliated with 78 state and local criminal defense organizations, allowing us to speak for more than 25,000 members nationwide. Each of us is committed to preserving fairness within America's judicial system.

Thank you for your consideration of NACDL's comments. If the Commission desires additional information on any of these matters, we welcome the opportunity to provide it.

Very truly yours,

Judy Clarke /cott

Judy Clarke
President

Alan Chaset
Carmen Hernandez
Benson Weintraub
Co-Chairpersons
Post-Conviction and Sentencing Committee

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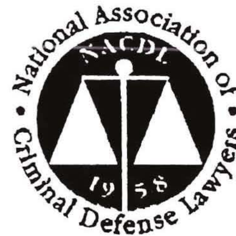


## COMMENTS ON THE 1997 AMENDMENTS - Part II

### Amendment 1 - § 2D1.11 (Listed Chemicals)

As we stated in our comments when this amendment was published as an emergency amendment, NACDL does not support it because we believe that Congress had insufficient evidence before it that the penalties available under title 21 and the guidelines were inadequate. However, because this amendment implements the congressional mandate, and no more, we recognize the Commission's limited authority in promulgating it as a permanent amendment. See Comprehensive Methamphetamine Control Act of 1996, Pub.L. 104-237, § 302.

### Amendment 2 - §§2L1.1, 2L2.1, 2L2.2, 2H4.1

For the reasons we stated in our comments when these amendment were published as emergency amendments, NACDL objects to certain of the provisions that are being re-promulgated in these permanent amendments. In particular we object to those provisions that enhance the sentence beyond that which Congress mandated in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, ("IIRIRA"), Pub. L. 104-208, Div.C. NACDL recommends that the Commission heed the comments of the Honorable George P. Kazen, who (partially based on his "handling of countless cases of this kind over seventeen years") wrote on behalf of the Committee on Criminal Law of the Judicial Conference of the United States that:

> In general, we urge the Commission to proceed cautiously in making upward adjustments higher than those mandated by Congress. Historically, most of these cases usually result in guilty pleas, at least partially because the sentences are relatively modest. If the sentences

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> are significantly enhanced and more of these cases proceeded to trial, serious logistical problems will result. Typically, these cases involve "material witnesses," namely the aliens being smuggled or transported. These witnesses inevitably must be detained. They are generally indigent, illegally in this country, very poorly educated, and require interpreters. . . .
>
> The pre-trial detention of the necessary witnesses is itself a logistical problem of no small proportion. They must be detained in crowded pretrial detention facilities, which are limited and often located far from the court location. Indeed, the Department of Justice recently wrote to me, asking the assistance of the Criminal Law Committee in conveying to all judges the fact that housing pretrial detainees has become a major problem for the Marshals Service -- in absolute numbers, in medical needs, and in transportation needs.
>
> It is also true that the defendants being prosecuted for these offenses are generally not the main organizers of smuggling rings but rather low-level underlings.

Letter to Honorable Richard P. Conaboy, dated February 4, 1997.

Three provision are of particular concern.

a. <u>Prior Offenses - § § 2L1.1(b)(3); 2L2.1(b)(4); 2L2.2(b)(2)</u>

In providing an increase of 2 or 4 offense levels if the defendant has prior convictions, these permanent amendments define the predicate priors more broadly than Congress intended when it directed an enhancement for certain priors.

Congress directed the Commission, in § 203(e)(2)(C) & (D) of IIRIRA, to

> impose an appropriate sentencing enhancement upon an offender with . . . prior felony conviction[s] arising out of . . . separate and prior prosecution[s] for offense[s] that involved the <u>same or similar underlying conduct</u> as the current offense . . .

(emphasis added).

The proposed amendment provides an increase of 2 (or 4, if there are two or more prior convictions) offense levels if

> the defendant committed any part of the instant offense after sustaining . . . conviction[s] for . . . felony immigration and naturalization offense[s] . . .

U.S.S.G. §§ 2L1.1(b)(3); 2L2.1(b)(4); 2L2.2(b)(2). By including as predicate priors any felony "immigration and naturalization offense," the Commission includes offenses that do not involve the "same or similar conduct" as the offense of conviction. As we pointed out in our comments to the emergency amendments, this broadening of the congressional mandate is unfair, unsupported by any empirical evidence, and not in keeping with the requirement that sentences be "sufficient, but not greater than necessary" to comply with the purposes of sentencing. 18 U.S.C. § 3553(a). The unfairness is exacerbated because these priors are being double-counted both as criminal history and as part of the offense level.

**b. Vicarious Liability for Firearms and for Causing Bodily Injury - § § 2L1.1(b)(4)-(6)**

NACDL opposes the amendment options that make the defendant vicariously liable for the actions of others who possess or use a firearm, or who cause bodily injury. Congress directed enhancements where the defendant himself used the firearm or caused the injury. IIRIRA, §203(e)(2)(E).[1] For the reasons that we stated above and in our comments on the emergency amendments, the NACDL recommends that the Commission not exceed the

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[1] Section 203(e)(2)(E) of IIRIRA directs the Commission to

> impose an appropriate sentencing enhancement on a defendant who, in the course of committing an offense described in this subsection--
>
> (i) murders or otherwise causes death, bodily injury, or serious bodily injury to an individual;
>
> (ii) uses or brandishes a firearm or other dangerous weapon; . . .

enhancements mandated by Congress.

c. **Cross-Reference to Murder Guidelines - § 2L1.1(c)**

NACDL opposes a cross-reference to the murder guideline under any circumstances, but especially under a theory of vicarious liability. NACDL opposes a cross-reference to the murder guideline even where the maximum penalty for the offense of conviction limits the ultimate sentence to something less than life. It corrupts the criminal justice system and our constitutional guarantees to sentence a defendant on the basis that he or she committed murder in the absence of a grand jury indictment for the murder, the right to confront the witnesses who allege the murder, proof beyond a reasonable doubt to be determined by a jury and all the other constitutional and procedural guarantees afforded criminal defendants.

**Amendment 3 - § 2L1.2 (Unlawful Entering or Remaining in the United States)**

NACDL commends the Commission for recognizing that in imposing an enhancement if the defendant was deported after a conviction for an aggravated felony, it must differentiate among the wide-range of felonies that now fit the broadened definition of "aggravated felony" established in IIRIRA. "Aggravated felonies" now include conduct as serious as "murder, rape, or sexual abuse of a minor",[2] or as relatively minor as receipt of stolen property for which the court suspends the execution of a one-year term of imprisonment and imposes a term of probation.[3]

NACDL agrees generally with the comments of the Federal Public Defenders respecting this amendment. In particular, NACDL agrees that the Commission should further refine this amendment to differentiate the severity of "aggravated felonies" by reference to the prison term served by the defendant for the prior felony. NACDL concurs that the Commission should adopt the provision proposed by the public defenders which utilizes criminal history scoring to reduce unwarranted enhancements on defendants whose past criminal conduct reflects much less serious criminal behavior.

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[2] 8 U.S.C. § 1101(a)(43)(A).

[3] 8 U.S.C. § 1101(a)(43)(G).

**Amendment 5 - § 3C1.2 (Reckless Endangerment During Flight)**

NACDL opposes this amendment which creates a mandatory minimum offense level of either 18, 19 or 20 for any offense where the "defendant recklessly created a substantial risk of death of death or seriously bodily injury to another person in the course of fleeing from a law enforcement officer." U.S.S.G. § 3C1.2. As currently formulated, this guideline provides a two-level offense enhancement but does not provide for a minimum offense level. The current formulation is better than the proposed tariff approach which focuses on a single factor and disregards other factors relevant to culpability and just punishment.

The Commission itself has explained why it should not adopt a mandatory minimum approach in promulgating amendments.

> This tariff approach has been rejected historically primarily because there were too many defendants whose important distinctions were obscured by this single flat approach to sentencing. A more sophisticated, calibrated approach that takes into account gradations of offense seriousness, ... and level of culpability has long since been recognized as a more appropriate and equitable method of sentencing.

U.S. Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 27 (1991).

**Amendment 10 - § 2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking - Methamphetamine)**

NACDL opposes the increased penalties for methamphetamine offenses which the Commission has published in this amendment. The amendment purports to "implement[] sections 301 and 303 of the Comprehensive Methamphetamine Control Act of 1996." Synopsis of Proposed Amendment, 10(A); see Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, §§ 301 & 303 (hereinafter "the Methamphetamine Act"). The amendment proposes to double the current quantity ratio in U.S.S.G. § 2D1.1 to the very same ratio that the 104th Congress considered

in two bills but did not enact.[4]

The proposed amendment fails, however, to do what Congress directed. The Methamphetamine Act provides:

> (a) In General.--Pursuant to its authority under section 994 of title 28, United States Code, the United States Commission shall determine whether the Sentencing Guidelines adequately punish the offenses described in subsection (b) and, if not, promulgate guidelines or amend existing guidelines to provide an appropriate enhancement of the punishment for a defendant convicted of such an offense.

Pub. L. 104-237, § 303. Congress directed the Commission first to determine whether the current guidelines "adequately punish" methamphetamine offenses. Only if the Commission finds that the current guidelines do not provide adequate punishment, is it directed to increase the guidelines penalties for methamphetamine offenses.

Congress enacted the Methamphetamine Act on October 3, 1996. There is no indication that since that time the Commission has conducted any studies, held any hearings or otherwise deliberately considered whether the current methamphetamine guidelines "adequately punish the offenses". Until the Commission undertakes such consideration and makes a reasoned determination that methamphetamine penalties are inadequate, it should not raise the penalties. Certainly, until such time, it is not correct for the Commission to state that the enhanced penalties it proposes "implement" the congressional directive.

Indeed, as the Commission explained in the Cocaine Report,

> In tying mandatory minimum penalties to the quantity of drug involved in trafficking offenses, Congress apparently intended that these penalties most typically would apply to discrete categories of traffickers -- specifically, "major" traffickers (ten-year minimum) and "serious" traffickers (five-year minimum). In other words, Congress had in mind a tough penalty scheme under which, to an extent, drug quantity would serve as a proxy to identify those traffickers of greatest concern.

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[4] In the summer of 1996, bills were introduced in both the House and the Senate which would have increased the penalties for methamphetamine offenses to the levels now proposed by the Commission. See e.g., 1995 S.B. 1965; H.R. 3852. Both the House and the Senate bills were amended to delete the provisions that increased the penalties.

U.S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy 118 (1995); see also Chapman v. United States, 111 S.Ct. 1919, 1927 (1991) (explaining that Congress used a market-oriented scheme in establishing the penalties for drug trafficking offenses).[5] The Cocaine Report also reflects that only crack cocaine offenses are being punished more harshly than methamphetamine offenses when considered in terms of the street-level value of the drug quantities that trigger the mandatory minimums. See Cocaine Report at 173, Table 19.[6] Absent some hard scientific evidence that methamphetamine is a more dangerous drug than heroin or powder cocaine the Commission should not deviate from the congressional purpose of targeting the mid-level and kingpin methamphetamine traffickers that Congress targeted when it established the current penalties.

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[5] The Supreme Court in Chapman explained the market-driven rationale enacted by Congress:

> We find that Congress had a rational basis for its choice of penalties for LSD distribution. The penalty scheme set out in the Anti-Drug Abuse Act of 1986 is intended to punish severely large-volume drug traffickers at any level. It assigns more severe penalties to the distribution of larger quantities of drugs. By measuring the quantity of the drugs according to the "street weight" of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component, the statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity. That is a rational sentencing scheme.

111 S. Ct. at 1927-28 (internal citations omitted).

[6] As reported in table 19 of the Cocaine Report, the street level value of different drugs at the 5-year and 10-year mandatory minimum quantities is:

| Base Offense Level/Quantity | Powder Cocaine | Crack Cocaine | Heroin | Marijuana | Methamphet-amine |
|---|---|---|---|---|---|
| 26 | $ 53,500 | $ 575 | $ 100,000 | $ 838,000 | $ 9,500 |
| 32 | $535,000 | $5,750 | $1,000,000 | $8,380,000 | $95,000 |

The Commission is charged with developing sentencing guidelines that "provide certainty and fairness" based on rational distinctions. 28 U.S.C. § 991. As the Supreme Court explained just last summer:

> The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.

Koon v. United States, 116 S.Ct. 2035, 2053 (1996). Anecdotal reports that are driving the concern about methamphetamine offenses cannot and should not form the basis for the Commission's proposed enhanced penalties for methamphetamine offenses.

The proposed revised ratio for methamphetamine offenses is not tied to any principled rationale. For example, it does not purport to reflect the "true" mid-level and kingpin dealers at the five- and ten-year mandatory minimum levels. It does not reflect dosage ratios more properly attributable to those dealers. It does not reflect profit ratios of those dealers. It does not reflect a "harm" or "addictiveness" scale. In any event, the Commission does not appear to have made any such determinations based on empirical data.

It is said that those who ignore history are doomed to repeat their mistakes. A number of parallels exist between the now universally renounced crack cocaine ratio and the proposed enhanced methamphetamine ratio. As with the proposed methamphetamine enhancements, the 100-to-1 powder/crack cocaine quantity ratio was selected without any known rational basis from among other ratios (50-to-1 and 20-to-1) contained in a number of bills introduced in Congress at the time. Cocaine Report at 117. A number of now substantially discredited assumptions about the extraordinarily addictive nature of crack and its physiological effects drove Congress to increase the penalties for crack cocaine. Id. at 118. Similar anecdotal reports about the extraordinary perils of methamphetamine use have surfaced. Methamphetamine is rumored to be the drug of choice of the less affluent, especially young women, just as users of crack cocaine were believed to include an underclass particularly vulnerable to drug abuse. Prosecution of crack cocaine cases has impacted disparately on African-American in a manner that presages the alarm over the manufacturing and importation of methamphetamine by Mexican nationals.

For all these reasons, NACDL strongly urges the Commission to follow the congressional directive and make an informed determination of whether the current penalties for methamphetamine offenses are inadequate before it undertakes to enhance willy-nilly the penalties for these offenses.

Thank you for your consideration of NACDL's comments.