

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
President

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

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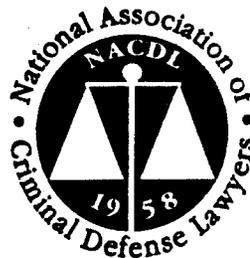
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COMMENTS ON THE 1997 AMENDMENTS - Part II

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

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. Prior Offenses - § § 2L1.1(b)(3); 2L2.1(b)(4); 2L2.2(b)(2)

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 same or similar underlying conduct 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

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.

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 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.

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.

⁵ The Supreme Court in Chapman explained the market-driven statutory scheme 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	Methamphetamine
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.