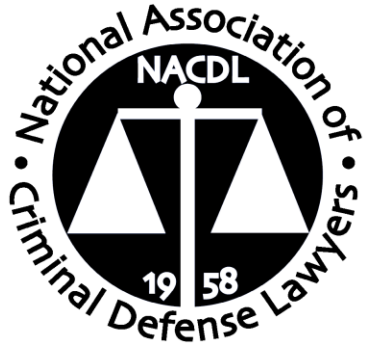

Written Statement of
Jim E. Lavine, NACDL President

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
United States Sentencing Commission

Re: Proposed Amendments to the Sentencing Guidelines
and Issues for Comment

March 17, 2011

Judge Saris and Distinguished Members of the Commission: Thank you for inviting me to testify today, on behalf of the National Association of Criminal Defense Lawyers, to present our views on the proposed amendments to the U.S. Sentencing Guidelines related to the Fair Sentencing Act of 2010.

My name is Jim E. Lavine, and I am the President of the National Association of Criminal Defense Lawyers (NACDL), an organization of over 10,000 members. NACDL is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. I am also a practicing criminal defense attorney in Houston, Texas, with extensive trial and appellate level experience in federal and state courts. I specialize in criminal law and spend approximately ninety-percent of my time on federal cases. Before moving to private practice, I was a prosecutor for over eleven years. I appreciate the opportunity to testify on behalf of NACDL today.

Introduction

In October 2010, the Commission promulgated a temporary, Emergency Amendment to implement the emergency directive in section 8 of the Fair Sentencing Act of 2010[1] (the "Act"). Prior to this promulgation, the Commission requested public comment with respect to implementation of the Act and Congressional directives to review and amend the Guidelines to "decrease penalties involving cocaine base ("crack cocaine")" and to "account for certain aggravating and mitigating circumstances in drug trafficking cases."

The Commission now proposes the re-promulgation of the temporary Emergency Amendment as a permanent amendment without change and the further amendment of the Commentary to §2D1.1 in response to the Secure and Responsible Drug Disposal Act of 2010[2] (the "Drug Disposal Act"). The Commission has set forth several issues for comment, which I will address in turn. It is important, however, to acknowledge the context of this amendment.

The Fair Sentencing Act is the culmination of decades of reform efforts to ameliorate the disparate impact and undue severity of the federal sentencing scheme for crack cocaine offenses, jointly established by the federal criminal code and the Sentencing Guidelines.

The congressionally mandated 100:1 ratio proved unfair largely due to the fact that the more severe crack cocaine penalties had a noticeably disparate racial impact on sentencing outcomes.[3] African Americans and other minorities received significantly greater sentences than their white

[1] Pub. L. No. 111-220, 124 Stat. 2372 (Aug. 3, 2010).
[2] Pub. L. No. 111-273, 124 Stat. 2858 (Oct. 12, 2010).
[3] *See* Paul J. Hofer, Kevin R. Blackwell, and Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 249 (1999).

(powder cocaine-involved) counterparts.[4] Eighth Circuit Judge Gerald Heaney "blames race-based disparity on discretionary decisions by the legislative and executive branches."[5] NACDL urges the Commission to equalize the manner in which cocaine offenders are sentenced.

NACDL's recommendations flow from the association's commitment to parity in cocaine sentencing and from the principle of parsimony, the "overarching instruction" of 18 U.S.C. § 3553(a) that a sentence must be "sufficient, but not greater than necessary" to achieve statutory sentencing purposes.[6] When addressing the directives in the Act, we encourage the Commission to assess its proposed amendments through this lens and with serious consideration of the direct implications these amendments have for the most vulnerable in our society.

Issues for Comment

A. Re-Promulgation of the Fair Sentencing Act

The Commission seeks comment on whether it should make any changes in re-promulgating the Emergency Amendment as a permanent amendment. While the Fair Sentencing Act of 2010 represents a major step forward in the effort to reduce unwarranted sentencing disparities and promote "certainty and fairness,"[7] the 18:1 ratio created by the Act will not eliminate unwarranted disparity. To achieve that goal, NACDL urges that the guidelines for all cocaine offenses be equalized.

While we realize this goes further than the dictates of the Fair Sentencing Act, it remains the most principled approach. Powder cocaine and crack cocaine are part of the same supply chain, the dangers of crack are inherent in powder, and any distinct aggravating circumstances are adequately punished by enhancements, adjustments, and guided departures.

The Commission has specifically requested comment on whether it should amend the Drug Quantity Table for crack cocaine so that the base offense levels 24 and 30, rather than 26 and 32, correspond to the Act's new mandatory minimum penalties. In 2007, NACDL fully supported the Commission's two-level decrease in the base offense level. We continue to support that decrease today and encourage the Commission to anchor the 28-gram threshold to offense level 24, rather than 26. Although we urge the Commission to consider implementing a two-level decrease for all drugs in the Drug Quantity Table, there is no need to revert to the pre-2007 base offense level for crack cocaine.

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[4] Benson Weintraub, *Hidden Disparity Under the Sentencing Guidelines*, 4 FED. SENTENCING REP. 148, 149 (1991), *citing* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 188 (1991).
[5] *Id.*
[6] *See Kimbrough v. United States*, 552 U.S. 85, 128 S. Ct. 558, 563, 169 L.Ed.2d 481 (2007).
[7] 28 U.S.C. § 991(b)(1)(B).

NACDL joined many other organizations in opposing this step backward when initially proposed by the Commission in the Emergency Amendment. There is no statutory basis for anchoring the guidelines above, or even to, the mandatory minimums, and doing so is contrary to the bipartisan legislative intent behind the Act. With the Act's passage, a nearly unanimous Congress made it clear that 28 grams trigger the 60-month sentence for a person subject to a statutory mandatory minimum. Setting the base offense level at 26, and therefore assigning a higher 63-month sentence to 28 grams, is an affront to the core objectives of the Act.

Congress was keenly aware of the Commission's decision to lower the base offense level to 24 in 2007 when it passed the Act. Had there been intent to revert to the pre-2007 level, Congress would have directed the Commission to do so. The fact that Congress chose not to, combined with the Commission's own admission that there is no statutory basis for anchoring the guidelines to mandatory minimums, strongly counsels a base offense level of 24. NACDL supports an amendment to the Drug Quantity Table for crack cocaine that returns the base offense levels to 24 and 30, rather than 26 and 32.

In addition, NACDL strongly opposes amendment of Application Note 3 to §2D1.1, providing cumulative punishment for weapon possession under subsection (b)(1) and "violence" under subsection (b)(2). We acknowledge that the amendment to Note 3 exempts the application of (b)(2) "in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence." Despite this exemption, this change will often yield sentences "greater than necessary" to achieve the purposes of sentencing and, in many cases, will result in unwarranted double counting. NACDL urges the Commission to amend Application Note 3 to §2D1.1 to prohibit the cumulative application of the enhancements in subsections (b)(1) and (b)(2) and, instead, provide that in cases in which both (b)(1) and (b)(2) apply, the enhancements merge.

NACDL encourages the Commission to reconsider the manner in which it has implemented the directives contained in section 6(3) of the Act. The Act directs the Commission to "review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional" increase (or reduction) for various factors. Rather than implementing these directives via Chapter 2 enhancements and Chapter 3 adjustments, the directives should be implemented through Chapter 5K.

Congress did not specify that its mandate must be effectuated through Chapters Two or Three to the exclusion of any other element of the sentencing calculus under the advisory Guidelines. In contrast, the pre-*Booker* Sarbanes-Oxley Act of 2002 (SOX) expressly directed the Commission to promulgate "a specific offense characteristic enhancing… [Section] 2B1.1… for a fraud offense that endangers the solvency or financial security of a substantial number of

victims."[8] SOX also directed the Commission to amend the "base offense level and existing enhancements contained in… [Section] 2J1.2…"[9] The Fair Sentencing Act lacks this specificity and leaves the manner of implementation of the directives fully in the Commission's "expert" hands.

NACDL proposes that the "violence" enhancement—and the myriad other enhancements/mitigators and adjustments subject to public comment—be incorporated into Chapter 5K as potential grounds for guided departure. This would ensure that in appropriate cases the enhancement or mitigation will incrementally increase/decrease a guideline without bearing the imprimatur of general application associated with an SOC or adjustment. Thus, as the last step in the *Booker* consultative process, the sentencing judge must find that the conduct in question is present to an extraordinary degree before departing on that basis.

As to each of the factors, irrespective of whether they enhance or mitigate the offense level, simplification of the Guidelines would be well-served by amending Chapter 5K as opposed to Chapters 2 or 3.[10] The factors significantly overlap with other Guideline sections and unnecessarily complicate sentencing. The terms of the Act are met by including the statutory increases/decreases under Chapter Five since they must be consulted by the sentencing judge in keeping with *Booker* and its progeny.

B. Possible Retroactivity of Permanent Amendment or Any Part Thereof

NACDL strongly supports the retroactive application of the proposed permanent amendment. As discussed earlier, the Act is the culmination of decades of reform efforts to ameliorate the disparate impact and undue severity of the federal sentencing scheme for crack cocaine offenses. While NACDL believes the Act did not go far enough in equalizing this disparity, there is overwhelming consensus, from all sides, that the 100:1 ratio was unfair, unjustified, and in need of remedy. There is no question that the Congressional intent behind the Act was to fix a part of this notoriously flawed scheme. Not only is retroactive application within the Commission's authority, but history dictates that it is unquestionably the right thing to do.

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[8] Pub. L. No. 107-204, 116 Stat. 745 at § 805(a)(4). Other mandates in the Sarbanes-Oxley Act contain broader language similar to that used in the FSA but which fail to specify under which Chapter of the *Guideline Manual* the amendments should be placed. *Id.* at § 905(a) ("[T]he United States Sentencing Commission shall review and, as appropriate, amend the Federal sentencing guidelines and policy statements to implement the provisions of this Act.").

[9] Pub. L. No. 107-204, 116 Stat. 745 at §805(a)(1).

[10] *See* Cynthia Cotts, *Judges Call on U.S. to Simplify Sentencing Guidelines* (July 8, 2009), http://www.bloomberg.com/apps/news? pid=newsarchive&sid=a. *See also* Kevin R. Reitz, American Law Institute, Model Penal Code: Sentencing Report (2003) (draft) (suggesting that the federal system requires simplification, decreased rigidity, and a reduction of the guidelines' current emphasis on quantifiable factors); Constitution Project's Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems*, reprinted in 17 FED. SENTENCING REP. 341, 341 (2005).

While past amendments reducing sentences in drug trafficking cases are few, the Commission has made those amendments retroactive, including the "crack minus 2" amendment. To deviate from this past practice for the proposed permanent amendment would be patently unfair. The crack cocaine sentencing scheme is perhaps the most publicized and controversial aspect of the federal sentencing system. A decision to deny retroactivity would likely undermine public confidence in the Sentencing Commission and the federal criminal justice system as a whole. Moreover, the Commission has recognized that reducing crack cocaine sentences is key to reducing the sentencing gap between blacks and whites. As the amendment contributes to that goal, there is no reason to give it purely prospective application, ignoring racial disparities among sentences currently being served.

Just like the "crack minus 2" amendment, the proposed permanent amendment merely recalibrates the guidelines' levels and would not be unduly difficult for judges to apply retroactively. No additional fact finding would be necessary. While the number of 3582 motions would admittedly be large, history shows that the federal courts are fully capable of managing a temporary influx of cases requiring a similar type of review. Regardless, we firmly believe that any temporary burden is vastly outweighed by the reasons supporting retroactivity. The proposed permanent amendment corrects a long-standing error, and it should be used to achieve greater fairness for those currently serving sentences. NACDL therefore urges the Commission to make the proposed permanent amendment retroactive without further limitations regarding the circumstances in which, and the amount by which, sentences may be reduced.

Retroactivity is also warranted for the mitigating adjustments, which address overreliance on drug quantity for less culpable participants by capping the guidelines and implementing a new reduction based on offender characteristics neglected by the Guidelines. Retroactive application of these amendments would be consistent with the intent of the Fair Sentencing Act and the language and remedial purpose of 28 U.S.C. § 994(u) ("If the Commission *reduces* the term of imprisonment . . .").

NACDL does not support retroactive application of the enhancements contained in the proposed permanent amendment. While this may appear inconsistent, there is ample justification for treating the enhancements differently. These enhancements address factors likely to have been considered in determining the initial sentencing under the advisory Guidelines. Moreover, even when the amended guideline range does not exceed the original term of imprisonment, retroactive application of the enhancements would, at the very least, result in unnecessary litigation regarding Commission authority and Ex Post Facto limitations.

C. Additional Revisions to the Drug Trafficking Guidelines

The Commission seeks comment on what changes, if any, should be made to the guidelines applicable to drug trafficking cases (§2D1.1 and related guidelines). NACDL urges the Commission to adjust the drug trafficking guidelines so that the 5- and 10-year mandatory minimum penalties correspond with base offense levels 24 and 30, instead of 26 and 32. This would ameliorate the Commission's formative decision to anchor the drug guidelines to the quantity thresholds set by Congress. While the Commission's authority to adopt wholly distinct thresholds has been the subject of debate, the Commission adhered to its original interpretation in promulgating the "crack minus 2" guideline amendment, and we understand that a 2-level reduction is the effective limit absent congressional authorization.

While falling short of the wholesale guidelines reductions we believe are necessary to achieve proportionate sentences for federal drug offenders, this proposal would be a significant step in the right direction. We recognize that the proposal would heighten the cliff effect of the mandatory minimums, but the Commission's responsibility to ensure that sentences are no greater than necessary is paramount. For defendants who are not subject to a statutory minimum sentence, the role that sentencing factors other than drug quantity play in shaping the ultimate sentence will be enhanced.

In addition, the Commission has specifically set forth two possible revisions:

> (1) "a 2-level downward adjustment in drug trafficking cases if there are no aggravated circumstances involved in the case" and
>
> (2) "expanding the 2-level downward adjustment in subsection (b)(16)—which applies to defendants who meet the 'safety valve' criteria—so that it applies to defendants who have more than 1 criminal history point but otherwise meet all other 'safety valve' criteria, or providing a similar downward adjustment to drug trafficking defendants who truthfully provide to the Government all information and evidence the defendant has concerning the offense".

NACDL fully supports both revisions. Assuming the various proposals are mutually exclusive, we strongly urge the Commission to reduce all drug sentences by two levels without regard to mitigating or aggravating factors or resort to the safety valve criteria. The problem of the drug guidelines is one of proportionality–and that is true for defendants at all levels of culpability. The only complete solution is to alleviate the overbearing effect of drug quantity on all sentences.

D. Role Adjustments

The Commission also has requested specific comment on what changes, if any, should be made to §3B1.1 (Aggravating Role) and §3B1.2 (Mitigating Role) as they apply to drug trafficking cases and whether additional application guidance is needed. NACDL believes the mitigating role adjustment is too narrow both in and of itself and as interpreted by federal courts. Too few defendants receive this adjustment and, as a result of some courts interpreting it more narrowly than others, there is a growing disparity in its application.

Specifically, the language used in the Notes to §3B1.2 expressly discourages its application. Application Note 4 explicitly provides that it should be applied infrequently. Meanwhile, Application Note 3 sets the bar for qualification high–requiring a defendant to be "*substantially* less culpable than the average participant"–and dissuades the court from relying on the "defendant's bare assertion" when making its finding. This restrictive language and the lack of clarity result in disparate application of the adjustment, with some judges and courts using it quite infrequently. Where judges are willing to apply the adjustment, however, even those most deserving may still have difficulty climbing over these hurdles.

In order to resolve these inequities, remedy the overly restrictive reading, and expand application to more defendants, the Commission should amend the Application Notes to §3B1.2 and related guidelines. NACDL fully supports the specific recommendations set forth by the Federal Public and Community Defenders on this point and encourages the Commission to implement these changes.[11]

Conclusion

NACDL applauds both Congress and the Commission for this critical extension of sentencing reform. Elimination of the 100:1 ratio and implementation of the Act by the Commission is a milestone on the path to fairer drug sentencing. Still, it is not enough. The need for retroactivity now is manifest.

Furthermore, rather than executing congressional mandates through Chapters Two and Three of the *Guidelines Manual*, NACDL respectfully recommends that any Guideline change resulting from the Act should provide an "additional penalty" in the nature of a guided departure under Chapter 5K. This, we believe, is consistent with the legislative directive and a proper construction of *Booker*.

I am grateful for the opportunity to testify on behalf of our membership and welcome any questions.

[11] *See* Statement of James Skuthan Before the United States Sentencing Commission, Washington, D.C., at 29 (March 17, 2011).