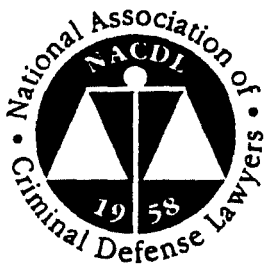

Statement Of

ALAN J. CHASET

on behalf of the

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON PROPOSED AMENDMENTS

to the

UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL

Washington, D.C.

March 24, 1994

Chairman Wilkins and Members of the Commission:

My name is Alan J. Chaset and I am appearing on behalf of the National Association of Criminal Defense Lawyers (NACDL), an organization whose membership is comprised of more than 8,000 lawyers and 25,000 affiliate members who practice in every state and federal district. NACDL is the only national bar association devoted exclusively to the defense of criminal cases. Its goals are to insure justice and due process for all persons accused of crime, to foster the independence and expertise of the criminal defense bar and to preserve the adversary system in the criminal justice arena. NACDL's ongoing efforts to achieve those goals brings me here today to share our views about your set of proposed changes to the Sentencing Guidelines.

For the past six years, I have served as the Chair or Vice-Chair of the NACDL's Sentencing and Post-Conviction Committees and, in that capacity, have had the opportunity and pleasure of working with members of the commission and its staff on several related matters including the drafting of proposed amendments, the training of various actors in the federal criminal justice system, and the preparation of numerous articles on the guidelines. In that latter regard, this year saw the introduction of a bimonthly column in the Association's periodical *The Champion* devoted almost exclusively to Sentencing Guidelines issues; copies of the first three installments of "Grid and Bear It" are being made available under separate cover.

Before presenting our specific responses to the various proposals and requests for comments, I would like to address a number of more general issues regarding the commission and its guidelines. While much of what follows has been said before and while many of these same points will be raised anew by others, I believe that it remains both necessary and appropriate to rearticulate these matters. And, while the commission has so far not seen fit to adopt these basic suggestions, NACDL appreciates the fact that, at least in this forum, we are being given more than "three-strikes" at the system.

First, NACDL continues to believe that the commission should have crafted and should now reformulate the system to focus initial attention on whether or not the individual defendant warrants incarceration for his/her offense: the "in-out" decision. Only after it is determined that some period of incarceration is required would the guidelines come into play to assist in the calculation of the length of that period of imprisonment. As a closely related corollary, we support the fundamental principle of parsimony articulated in 18 U.S.C. § 3553(a): sentences ought to be no more severe than necessary to achieve the various purposes of sentencing.

Second, we continue to believe that the guideline calculations should be based solely on the precise conduct for which the defendant has been found, or to which the defendant has pled guilty. Thus, we are supportive of amendments that move away from the "real offense" concept and towards sanctioning based upon the offense of conviction. Next, while we find laudable the move toward assuring that similar offenders who commit similar offenses are treated similarly, we still do not feel that the current system affords sufficient opportunity to highlight and weigh legitimate differences and dissimilarities, especially as concerns offender characteristics. Too much emphasis remains on factors such as drug quantities and dollar amounts; too little attention is afforded to who the offender is and what function he/she may have played in the offense.

Fourth, NACDL continues to believe that trial judges should generally be provided with broader authority and greater discretion to depart from the calculated guideline range. That flaw in the current system is most blatant and the need for change most glaring in the area of substantial assistance and cooperation. We believe that each actor in the system should be able to initiate the consideration of a departure in this regard. And we believe that the commission should formulate provisions to eliminate some of the other restrictions/limitations on the implementation and application of § 5K1.1 that have been adopted in several districts. The resulting disparity here clearly merits remedial attention.

Additionally, we believe that there have been too many and too many inappropriate changes to the guidelines over the several years of their existence. While we remain advocates for some basic changes and while we will be voicing our support for some of the proposals provided in this round of amendments, NACDL believes that the need for any amendment to the system must be demonstrated and supported by empirical data and sound analysis and must be accompanied by an assessment of the potential impact that the change might have on the population of the Bureau of Prisons. Even as our representatives several blocks away debate the potential for assigning billions of dollars for new prison construction, it remains crucial for the commission to undertake its statutory obligation to insure that the guidelines minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons.

Moreover, we believe that the commission's amendment task this year is complicated by the fact that there still is less than the full complement of commissioners and some significant questions exists as to whether some of the "holdovers" can appropriately vote to amend the system. In the face of those questions and in order to avoid unnecessary litigation, NACDL urges the commission to postpone its consideration

of all proposed amendments until it is at full strength.

In regard to those vacancies, NACDL would like to use this occasion to implore the administration to act swiftly on the appointment process. As we have stated in the past, there remains a distinct need to insure that representatives of the defense bar serve in some capacity on the commission. Whether more appropriately as a commissioner or in an *ex officio* capacity similar to the designee of the Attorney General and the Chair of the Parole Commission, it is time for such an individual to take his or her place at the table. We urge the commission to lend its full support to the effort to secure such a position.

Finally, we are acquainted with the efforts of our colleagues at the American Bar Association to craft a set of proposals concerning certain administrative rules and procedures to guide the commission in the conduct of its business. Without repeating those suggestions here, please permit me to both applaud that significant effort and to note NACDL's support for the general thrust of and the specific details contained therein. We urge the commission to fully explore those matters through the creation of a working group and we ask that a package of recommendations in this regard be included in the next round of amendments. While several of our members already participate within the responsible ABA committees, we pledge our continuing assistance in this endeavor.

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

AMENDMENT 1

NACDL opposes the amendments being proposed here for computer-related crimes as unnecessary and, in certain instances, overly broad. We share the views of (and adopt the comments provided by) the Practitioners' Advisory Group in this regard believing that there exists too little experience with these offenses to as yet craft appropriate guidelines.

AMENDMENT 2

As to 2(A), while favoring the elimination of the Specific Offense Characteristic in § 2C1.3, NACDL believes that the further consideration of the consolidation of this guideline and § 2C1.4 should be deferred pending review of the modification to 18 U.S.C. § 216. As to 2(B), while we have no specific objection to the consolidation of §§ 2C1.2 and 2C1.6, we continue to oppose level increases for more than one gratuity and remain concerned with the eight level increase for an official holding a "high-level decision-making or sensitive position; we believe that the value table and/or departure provisions can better address such matters. And, as to 2(C), NACDL opposes the consolidation of §§ 2C1.1 and 2C1.2. The differences between these two offenses are sufficiently substantial as to warrant separate guidelines.

AMENDMENT 3

NACDL would favor the modification of the base offense levels for Blackmail, Bribery Affecting Employee Benefit Plans, and Gratuities Affecting Employee Benefit Plans so that the sanctions for non-public corruption offenses are lower than those for public corruption cases and would oppose any other modification that would tend to equate the levels for those clearly different offenses. We oppose the proposed base offense level increases for §§ 2C1.1, 2C1.2 and 2C1.7 as we believe that non-incarcerative sentences should still be at least available as a potential for some of these offenses; and we favor lowering the offense level for corruption gratuity from seven to five.

AMENDMENT 4

In regard to the proposed changes to §§ 2C1.1 and 2C1.2, NACDL favors Option two which would eliminate the Specific Offense Characteristic addressing more than one incident of bribery/gratuity. With commission data reflecting the fact that the majority of cases receive this level increase, we believe that the continued use of this characteristic serves only to inappropriately increase the sentence for a factor that is already adequately addressed in the value table. Value or benefit of the payment is the better measure of offense severity. Because we favor Option 2, we see no need to comment on 4(B).

AMENDMENT 5

NACDL opposes the proposal in 5(A) to make cumulative the adjustments for the value of the payment and for high-level official in §§ 2C1.1, 2C1.2 and 2C1.7. The results that such a change would produce are clearly more severe than warranted. If, however, the commission were to adopt this proposal, we recommend that the adjustment for high-level official be reduced to two levels, permitting judges to depart in atypical, unusual cases. As to 5(B), while we favor the total elimination of any enhancement that depends upon the position of the bribee, we recommend that such an enhancement, if retained, should not exceed two levels. And, if the commission desires some sliding scale here, then we believe that the range should be from two to six levels with objective criteria developed (and clear examples provided) to guide in their application.

AMENDMENT 6

As to 6(A), NACDL does not object to the proposed clarifications in §§ 2C1.1 and 2C1.7 that the "payment" involved

in the offense need not be monetary. And, while opposing the size of the level increase, we favor the change to § 2C1.7 to clarify that private officials are not considered high-level officials for purposes of this enhancement. As to 6(B), while favoring the definition of "benefit received" as discussed in *United States v. Narvaez*, we remain uncomfortable with the commission's attempts to resolve potentially conflicting circuit interpretations and approaches to guideline issues and would allow the courts more time to address such matters. Finally, as to 6(C), NACDL opposes the proposal to add the potential for an upward departure under § 2C1.1 where the offense involves ongoing harm or a risk of ongoing harm to a government entity or program. Given the fact that the base offense level here (10) is already quite significant, any need to account for such risk can be addressed by the court's movement to a sanction in the higher part of the associated range.

AMENDMENT 7

NACDL does not share the conclusion that the holdings in the three cited cases and the requirements within 28 U.S.C. § 994(d) provide an example of a critical policy matter that warrants immediate commission attention. We believe that issues such as this should typically be allowed to additionally percolate throughout the federal court system before the commission attempts to resolve or bring cloture to them. For the present, we believe that the trial and appellate courts should be permitted to read both 28 U.S.C. § 994(d) and 18 U.S.C. § 3553(b) and then decide for themselves whatever tensions might exist between the two provisions and how to resolve same in the context of the facts and circumstances of the specific case. With the arguable exception of the "Crack" provisions, the commission has significantly and successfully performed its § 994(d) obligation and there exists no present need to revisit that effort for cultural matters in general or for public corruption cases in particular.

AMENDMENT 8

NACDL supports the proposed revisions in the Drug Quantity Table in § 2D1.1 as a step in the right direction. For many of the reasons that are discussed in our introductory remarks herein, we believe that 8(A)'s establishment of level 38 as the upper end of the scale and its keying of the mandatory minimums to the upper end of the guideline range will bring more fairness and rationality into the system as regards these offenses. Having said that, however, we remain convinced that more changes need to be made in order to address the consequences of these sanctions for these offenses as portrayed in the Department of Justice's recently released study of low-level, non-violent drug offenders. For similar reasons, we would support capping the offense level at 30 for defendants who qualify for a mitigating role adjustment as proposed in 8(C).

As to 8(B), while recognizing that an increased enhancement for weapons and firearms might be used as a "trade-off" for the quantity decreases elsewhere being proposed, NACDL continues to oppose such a change.

AMENDMENT 9

Since the principal impact of this proposal would be to count undercover law enforcement officers as participants in jointly undertaken activity for aggravating role/§ 3B1.1 purposes, NACDL opposes this amendment. We believe that the main flaw in this guideline remains the words "or otherwise extensive," a phrase whose vagueness continues to foster disparate application.

AMENDMENT 10

NACDL welcomes and strongly supports the proposed revisions to the introductory commentary accompanying the Role in the Offense adjustment in Part B of Chapter Three. The clarifying language and examples provided should assist in securing a more consistent application of these adjustments.

As regards the proposed changes to the Application Notes accompanying § 3B1.2 *Mitigating Role*, we are generally supportive of just about all of these useful clarifications. We recommend the deletion of paragraph 4 as too inflexible; the decision as regards the role decrease for "mules" should be made in the context of the specific fact pattern involved. We also recommend against the adoption of either option in paragraph 5 because it inappropriately introduces a factor (use/possession of firearms) unrelated to the concept at hand and because it can be more adequately addressed in other sections of the guidelines (specific offense characteristic). We would also recommend the deletion of the phrase "i.e., value of $1000.00 or less, generally in the form of a flat fee" in paragraph 2(C); the concept to be addressed here should be "small in relationship to the size of the conspiracy" without any additional specificity.

AMENDMENT 11

In regard to money laundering, NACDL continues to believe that the sanctioning here needs to be revisited and the guideline consequences revised. We continue to agree with the commission's study group that the sentences provided for money laundering conduct should be the same as for the underlying offense where that conduct is essentially the same; we continue to be troubled by the government's attempts to ratchet up sanctions and to inappropriately influence plea bargaining through the use and/or threatened use of the money

laundering provisions. Also, while the proposal here represents the commission's recognition of these problems and a first step to remediate same, it does not go far enough.

AMENDMENTS 12 & 20

NACDL strongly supports the changes proposed in Amendment 12(A) that would result in the elimination of the term "more than minimal planning" as a specific offense characteristic in several guidelines and that would substitute in its stead the term "sophisticated planning." We believe that this change will improve the structure of the guidelines in two significant respects.

First, the continued recognition of planning and preparation as an important factor in assessing relative culpability is consistent with the analysis that the commission conducted on pre-guideline practices. However, it appears that the courts, in interpreting the existing language, have found "more than minimal planning" in virtually all the facts and circumstances that they face. As a result, the basic guideline heartland-type concept of differentiating base offense level cases from others through the use of specific offense characteristic adjustments has seemingly been lost: if all defendants receive the associated level increase for clearly dissimilar quantities/qualities of planning, then the specific offense characteristic serves no function other than to indirectly increase the base offense level. Therefore, adopting the proposed new definition and substituting it within the various guidelines would advance the original intent of the commission in this regard and would promote fairness by providing the courts with a better mechanism to rationally distinguish between offenders and their offenses.

As regards the proposal in 12(B) that seeks to raise the base offense level in § 2B1.1 to the same as that in § 2F1.1, NACDL opposes this change. We maintain that there exists sufficient differences between and amongst larceny and theft cases and fraud and deceit cases (particularly at the low end) as to warrant the current base level differential. We believe that prior practice correctly reflected those differences and that the change proposed would tend to increase disparity by treating dissimilar cases similarly. If, however, the commission were to continue to view the need for seeming consistency as an imperative, then we suggest the formation of a working group to further study the issue. If the results of such a study were to uncover both a real need to harmonize these two provisions and a limited potential for disparate results, then NACDL would support a reduction to the base offense level in § 2F1.1 rather than an increase in that level under § 2B1.1.

Finally, as to 12(C), the commission has sought comment on changing the increments in the loss tables of §§ 2B1.1, 2F1.1 and 2T4.1, offering two options in that regard. The stated reason for such a change relates to the non-uniform slope of the existing tables. NACDL strongly opposes any such change in the tables. While we do not view the rationale offered as a sufficient reason to undertake such a change, we also remain concerned about the guideline application confusion that such a change would engender. If the commission remains convinced that this type of tinkering is important, we recommend the formation of a working group to establish and demonstrate how the new amount thresholds better differentiate between offenses.

And as to the three items proposed in Amendment 20, we likewise suggest the formation of a working group to study the entire "loss" definition issue. While consistency between §§ 2B1.1 and 2F1.1 might be a legitimate goal, NACDL is not yet convinced that the need exists for the changes being recommended.

AMENDMENT 13

In regard to the various proposals to amend some of the career offender provisions in Chapter Four, NACDL opposes 13(A) with its recommended addition to the Commentary for § 4B1.1. We believe that an offender should not be placed in the career offender category based upon a conviction for a conspiracy to commit a substantive offense or for an attempt to commit a substantive offense.

NACDL does support, however, the remaining proposals: 13(B) would appropriately avoid unwarranted double-counting by defining the term "offense statutory maximum" as the statutory maximum prior to any enhancement based on prior criminal record; 13(C), Option 1 is the more favorable method of ensuring that this provision impacts the "true recidivist" by providing that the offenses that resulted in the two qualifying prior convictions must be separated by an intervening arrest for one of the offenses; 13(D) would correctly eliminate non-residential burglaries from consideration as crimes of violence for § 4B1.2 purposes; and 13(E) serves to appropriately narrow the definition of crimes of violence that "otherwise involve conduct that presents a serious risk of physical injury" to offenses that are similar to the offenses expressly listed.

AMENDMENT 14

NACDL strongly supports this proposal in general and the bracketed language "or combination of characteristics or circumstances" in particular as providing most useful and workable guidance and clarification for the application of the departure provisions of § 5K2.0.

AMENDMENT 15

While NACDL supports all efforts to simplify the opera-

tion of the guidelines, we remain uncomfortable with the long list of changes being proposed herein because we have seen no evidence/data that these particular guideline sections have been the source of confusion and misapplication nor have we been provided with information that these changes will adequately address those problems.

AMENDMENT 16

While believing that it is most appropriate to provide more flexibility throughout the entire system as regards older and infirmed and older, infirmed defendants, NACDL recognizes that this issue does not lend itself to simple, discrete suggestions. It is recommended, therefore, that the commission form a working group (made up of commission and Bureau of Prisons staff and others) to explore this topic and its guideline and statutory ramifications. The goal of such an effort would be, amongst other things, to develop a uniform set of criteria and definitions to inform the initial sentencing decision, to develop similar criteria and definitions for changes in circumstances during the period of confinement and supervision and to develop a mechanism for addressing those changed circumstances in a uniform, expeditious manner. Given the fact that the overall federal prison population is rapidly aging and considering the fact that current legislative initiatives may result in more individuals serving longer periods of time, the need to address this issue in a more systemic manner appears imperative.

AMENDMENT 17

As to the various miscellaneous substantive, clarifying and conforming amendments contained in this item, NACDL supports 17(A) as appropriately clarifying § 1B1.3 through the addition of helpful language in the Application Notes, 17(D) as adding useful definitions for hashish/hashish oil cases, 17(M) as simplifying the application of § 3D1.2, and 17(O) as appropriately clarifying § 5G1.1. As to 17(Q), we support Option 1, providing that a false statement made to a probation officer during supervision is to be treated as a Grade C violation. As to 17(T), since NACDL favors the position taken in *United States v. Concepcion*, we oppose the clarification of the application of subsection (c) of § 2K2.1. As to the remaining proposals herein, NACDL takes no position.

AMENDMENT 18

NACDL continues to strongly support proposals that would limit the use of acquitted conduct for guideline purposes. While we believe that such conduct should also not be used for departure purposes, we credit the proposal offered by the PAG as at least providing more fairness and flexibility than currently exists within the system.

AMENDMENTS 19 & 31

While remaining concerned with some of the *ex post facto* implications of this guideline in general, NACDL supports the proposed changes to § 1B1.10. The minor clarifying revisions and the deletion of subsection (c) should assist the courts and the parties in more easily applying the provisions of this guideline. Additionally, as regards the issue for comment raised within Amendment 31, we would support a further amendment to this section that would provide that, when considering a sentence reduction where the applicable range has been lowered, the amended guideline range is to be determined by using only those amendments that have been expressly designated for retroactive application in conjunction with the manual used at the defendant's original sentencing. The existing provisions here require the use of the current manual in its entirety, effectively (and inappropriately) granting retroactive status to all of the amendments issued subsequent to the original sentencing, both those that might help and those that might harm the defendant.

AMENDMENT 21

NACDL supports this proposal that would treat all attempted conduct similarly, regardless of the language in the title of the applicable statute.

AMENDMENT 22

NACDL strongly supports Option 1 in this proposal crafted to address the limited application of § 5K2.13 *Diminished Capacity* to non-violent offenses. We believe that the favored option provides a more rationale and reasoned approach to the issue and would argue that the second paragraph in the synopsis well captures and explicates our position.

AMENDMENT 23

NACDL opposes the proposed change to § 5G1.3. While the amendment is designed to resolve the difficulty in obtaining information about prior unexpired state and local offenses and the problems in accurately applying such information to the guidelines process, we believe that that difficulty and those problems are overstated and that, in any event, this amendment affords no clear solution. While recognizing that the commission has long struggled with this issue, we see no present need to make an additional change. Moreover, we remain concerned that, while the language appears to afford more flexibility for the imposition of concurrent or consecutive sentences, the other changes contained within will actually require defendants to serve unnecessarily longer and often more disparate periods of incarceration.

AMENDMENT 24

NACDL strongly endorses the proposed change to Note 12 of § 2D1.1 that currently advises that the amount of drugs that was the subject of negotiations determines the offense level save where the defendant establishes that he did not intend *and* was not capable of delivering the negotiated amount. The amendment would change the word "and" to "or" so that either capacity *or* intent can reduce the amount negotiated. Not only would such an amendment speak to the general need to reduce the emphasis on drug amounts, but also such a change would more adequately address the fact that an offender who wants to deliver/buy more, but cannot and/or one who has the means, but does not want to be involved with more is less culpable. Additionally, it would lessen the opportunity for guideline manipulation by case agents and law enforcement officers.

AMENDMENT 25

NACDL supports the revision in Option 1 that would amend § 2P1.1 to conform the definition of non-secure custody in subsection (b)(3) to that used in subsection (b)(2).

AMENDMENT 26

While NACDL does not oppose the distinction being proposed between the base offense level in § 2H2.1 where the defendant corrupts the registration or votes of others and where the defendant corrupts only his own registration or ballot, we remain concerned with that base level remaining at 12 for obstruction of the right to vote by forgery, fraud, theft, bribery or deceit because it exceeds the base offense level of 10 for bribery (§ 2C1.1), a more serious offense.

AMENDMENT 27

NACDL continues to oppose any and all proposals that would attempt to add adjustments or other base offense level increases as a function of membership in or association with a gang, criminal or otherwise. For the present, we believe that the role adjustment in § 3B1.1 is sufficient to address this issue.

AMENDMENTS 28, 29 & 30

While offering no specific comments, NACDL sees no need to amend the guidelines to provide the enhancements or increases being proposed nor does it see the present need to add any additional distinctions or categories within Chapter Four or the Sentencing Table in Chapter Five. Although we have in the past supported the development of a Criminal History Category for those with totally clean records (no arrests and no convictions), we understand and appreciate the commission's position in this regard and do not ask that that decision be revisited.

AMENDMENT 32

While welcoming opportunities to expand the coverage of and the rewards to be received under the provisions of § 2E1.1 even for those defendants who proceed to trial, NACDL opposes this otherwise well intended proposal. The language as proposed is too vague and ambiguous and appears to suggest that those defendants who go to trial and vigorously contest the government's proof by objections, motions, etc., should be placed in a worse situation than those who do otherwise.

AMENDMENT 33

This amendment seeks comment as to the need to explore and then modify the provisions within § 2D1.1 as regards both the ratio between powder cocaine and crack cocaine and the equivalency between marijuana and marijuana plants. NACDL believes strongly that each of these issues merit commission attention and remedial action to eliminate what we perceive as amongst the most grossly unfair, illogical and racially biased provisions of the guidelines. While we recognize that the commission has already commenced a study of the crack cocaine issue, we believe that a similar effort should be undertaken as to marijuana. Additionally, we believe that the commission should likewise urge Congress to revisit these matters and, in the meanwhile, it should on its own at least reduce the sanctions here as regards those drug amounts above the mandatory minimum levels.

AMENDMENT 34

NACDL opposes the creation of a new adjustment within Chapter Three to address harm caused when there is more than one victim. There is no empirical basis available that demonstrates either the need for such an adjustment or the fact that existing provisions (including departures) are inadequate to address this factor. Similarly, we see no need for the creation of a generalized victim table. If data are developed that demonstrate such a need for particular offense categories, the proper way to address such would be the development of a specific offense characteristic for those offenses.

AMENDMENT 35

NACDL opposes the proposal to provide a minimum offense level of 14 for an organized scheme to steal mail. Aside from the ambiguity/vagueness in the proposed language and absent more data in this regard, current base offense levels, increases for the amounts of gain/loss and role adjustments appear sufficient to address this offense conduct. ■