

Written Statement of
Edward A. Mallett
President, National Association of Criminal Defense Lawyers
on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
before the
United States Sentencing Commission

Re: Proposed Amendment to Ecstasy Guidelines
March 19, 2001

Judge Murphy and Distinguished Members of the Commission:

Thank you for allowing the National Association of Criminal Defense Lawyers to comment on the proposed amendment to increase the penalties applicable to MDA, MDMA and MDEA (hereinafter "ecstasy" for ease of reference).

I am here as the president of a forty-three-year-old, 10,000-member organization of criminal defense lawyers, so I will leave science to the scientists, whose statements and testimony we submit for your consideration. Instead, I will speak from my own perspective as a defense lawyer.

For thirty years I have represented ordinary people in criminal cases. I know the defendants, their mothers and fathers, sons and daughters, brothers and sisters and others affected by criminal punishments. They are all of us and probably include many in this room. For every increase in punishment, there is a cost to individuals, and that cost is not limited to the defendant. Every parent who goes to prison leaves children in a house without a mother or father, less likely to be productive and successful as an adult. Perhaps even more relevant to the issue at hand, every child who goes to jail leaves a mother and father with a sense of sublime loss, in some cases more profound than would follow death.

And so I begin by saying to you that — with all of your professional training, your commitment to public service, your willingness to accept public sector employment in service to the American people — I wish we were here today discussing how to review prisoners sentenced under the Guidelines for early release, rather than how much to increase ecstasy sentences.

Undoubtedly, the government will argue the need for higher ecstasy sentences to induce cooperation, an argument I find specious for a number of reasons. First, having practiced in federal court before the sentencing sea change of the mid-1980's, I remember a time when the government prosecuted large-scale drug cases without the current inducements to provide substantial assistance. One day after explaining the Guidelines to a client, he commented that we have a "barter system" of criminal justice in America. Another lawyer once observed that the day has passed when officers look for the fingerprints to solve a crime — now they "turn" witnesses and create crimes that might never have occurred but for the rewards they are paying witnesses under the guidelines.

Apart from how one views this change in law enforcement practices, the government has failed to offer convincing evidence that increased sentences are necessary and appropriate to the goal of increased cooperation. The proposed guideline amendment would indiscriminately increase sentences for all participants in an ecstasy conspiracy, from the least to the most culpable. But high-level traffickers already receive harsh sentences under the current ecstasy guidelines — and the incremental increase seems unlikely to affect their willingness to cooperate.¹ Is a defendant who conspires to distribute 500,000 grams of ecstasy (approximately 2 million pills)² more likely to cooperate if facing a 188-month sentence as compared to a 235-month sentence? In the 9-million pill conspiracy described in the Customs Service's testimony before Congress, defendants held accountable for the entire quantity would receive the same sentence with or without the proposed increase.³

Despite the government's claims that significantly harsher penalties will “send a strong signal to those who would import or traffic in Ecstasy,”⁴ the most obvious impact will be on low-level offenders, those who have the least to trade for a sentencing discount and who, more often than not, should be in state court (or better yet, treatment). Popular media, such as Time magazine and the New York Times Sunday magazine, has explained that on every weekend night, in every city in America, hundreds of young people are consuming this drug at “raves.” These are your new federal ecstasy defendants — members of the youthful user population who underestimate the consequences of their minor involvement with distributors. Only after enactment of the sentencing guidelines have we come to see small quantity cases filed in federal court, most conspicuously crack cases because of the greater punishments there. If the Commission passes this amendment, ecstasy prosecutions will follow suit.

Another group that will be disproportionately affected is the couriers, who the DEA reports can carry up to 20,000 tablets on their person and 50,000 in specially designed luggage. Based on the revised proposal of a 500-to-1 equivalency, this one-trip courier's base offense level would be 34 (151-188 months).⁵ To put this in perspective, consider that in one smuggling operation, the couriers were paid a flat fee of approximately \$1,500 and might have believed they were smuggling diamonds.⁶ Other smuggling operations, according to the Customs Service, have recruited teenagers as couriers.⁷

I have asked several prosecutors, lawyers and judges what they think of raising the ecstasy punishments to correspond to heroin or cocaine punishments. The overwhelming response is that

¹ See attached description of Amy Pofahl's case.

² Calculations are based on an average pill weight of 250 mg as per Michael Horowitz's letter to the Commission dated February 9, 2001. We note that the Commission's MDMA Brief Report, dated February 2001, specifies a slightly greater weight, 300 mg per pill.

³ Remarks by John C. Varrone, United States 'customs Service, before the House Subcommittee on Crime, June 15, 2000, at 7.

⁴ See Letter to the Commission from Michael Horowitz, dated Feb. 9, 2001.

⁵ Remarks by Lewis Rice, Jr., Drug Enforcement Administration, before the House Subcommittee on Crime, June 15, 2000, at 3.

⁶ *Id.* at 8.

⁷ Remarks by John C. Varrone, United States Customs Service, before the House Subcommittee on Crime, June 15, 2000, at 4.

there are so many problems with excessive punishments that the premise is wrong. That is, these heroin and cocaine punishments clearly do more harm than good and should hardly be a standard of correct thinking.

Finally, the relative popularity of various illegal drugs seems to rise in advance of legislative change, and every effort to eradicate the use of a new drug through legislation seems to be followed by the invention and mass consumption of some newer drug. Did harsh laws eliminate the popularity of heroin? Apparently not; indeed, we read that heroin use is once again on the rise. Did harsh laws stop crack cocaine in the inner-cities? Well, we certainly locked up a lot of people, but then methamphetamine and ecstasy grew in popularity. Raising punishments for ecstasy today is simply another step on the treadmill. It may provide some short-term gratification for the legislators who enacted this directive, but it will impose devastating costs on the future prisoners and their families.

The scope of the conspiracy laws and the law of parties under 18 U.S.C. § 2 is extremely broad, allowing the net of law enforcement to fall upon many who never imagined the potential consequences of their acts. This is compounded by the relevant conduct guideline and the fact that mitigation available under the guidelines' role adjustment and safety valve is insufficient to allow federal judges to adequately distinguish between those who stand to gain the most from a successful criminal enterprise and those who are marginal participants.

A recent issue of Rolling Stone describes cases of excessive guideline sentences that were commuted after they were brought to the attention of the President of the United States.⁸ Julie Stewart, the founder and President of Families Against Mandatory Minimums, is quoted as saying that she lies in bed at night thinking of all the people who are just as worthy of reconsideration who got nothing.

We hope you will find the scientific evidence helpful, but in the end, you need to be most concerned about who will be punished by this guideline amendment, and at what cost to their families, friends and communities. I thank you for keeping these ideas in mind as you determine what to do about ecstasy, and whether a significant increase in punishments is really in the interest of justice.

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NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 10,000 direct members – and 80 state and local affiliate organizations with another 28,000 members – include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

⁸ Erika Casriel, *Twenty-one Drug Offenders Freed by Clinton*, Rolling Stone, Mar. 2001, at 42.

AMY POFAHL

95559-012

Offense: Conspiracy to import and distribute MDMA (Ecstasy)**Sentence:** 24 years without parole**Priors:** None**Date of Sentencing:** 1990**Nature of Offense:**

In 1989, Amy's estranged husband Charles was arrested in Germany for manufacturing and distributing MDMA (Ecstasy). German authorities prosecuted him there and refused to extradite him to the United States for additional prosecution arguing that it would be double jeopardy. During Charles' trial in Germany, Amy went there several times to help him. In the United States, Amy was questioned by the DEA about her involvement in her husband's drug dealing. She denied that she was involved in selling drugs. She also refused to testify against her husband or other co-defendants because she didn't know anything about it. She was subsequently charged with and convicted of conspiracy to manufacture and import MDMA and money laundering.

Personal Background:

In 1985, Amy married Charles, a 45-year old Stanford Law school graduate and a successful and well-respected businessman. Charles owned at least 12 different businesses and Amy worked in one of them for 2 ½ years. She said she had little knowledge of the rest of Charles' business dealings. The couple separated in 1988 because of Charles' alcoholism.

Guideline Sentence:

Amy is serving the guideline sentence for the entire amount of MDMA involved in the conspiracy. She was also labeled a leader/manager which increased her sentence.

Sentences of Others Involved:

Two of Amy's co-defendants testified against her and received drastic reductions in their sentences. Both are free today. Amy's husband, Charles, was sentenced to six years in German prison. Charles served four years of his sentence and is now free in Germany.

Lawyer:

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