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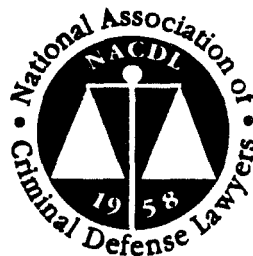
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COMMENTS ON THE 1997 EMERGENCY AMENDMENTS

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

We do not support this amendment 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.

The amendment increases by two the offense levels for list I chemicals, raising the top of the chemical quantity table to level 30 from level 28. Congress directed the Commission to effect this increase. Comprehensive Methamphetamine Control Act of 1996, Pub.L. 104-237, § 302. Section 302 also raised the maximum penalty from ten to twenty years for offenses under 21 U.S.C. §§ 841(d)(1), (2) and 960(d)(1), (3).

Amendment 2 - § 2L1.1 (Alien Smuggling)

The Commission should amend to meet the statutory directive, not go it one better. In the absence of empirical evidence to support anything more than Congress directed, the higher options would not be reasonable and warranted. The Commission also should not delete provisions currently in effect that are not addressed by the congressional directives. The grant of emergency authority is limited to "promulgat[ing] the guidelines or amendments provided for under" § 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, Div.C. The Commission has not been granted emergency authority to delete or amend existing guideline provisions that are not referred to in § 203.

IIRIRA

Section 203(e) of IIRIRA, directs the Commission to (a) increase the base offense level for alien smuggling, (b) increase or create enhancements for the number of aliens, the use of a firearm, causing death or serious bodily injury, creating a risk of such injury, and for offenders with prior felony convictions for similar conduct, and (c) consider other aggravating or mitigating circumstances.

.....
EXECUTIVE DIRECTOR
Stuart M. Stalter

1. Base Offense Level - § 2L1.1(a)(1) & (a)(2)¹

The Commission should not raise the base offense level beyond the 3 levels mandated by § 203(e)(2)(A) of IIRIRA. A three level increase would raise the base offense level from 20 to 23 for offenses under § 2L1.1(a)(1), which applies "if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony."

The Commission should consider that a 3-level increase results in a base offense level for this nonviolent offense that is equal to or greater than that for most violent offenses. E.g., § 2A2.1(a)(2) (base offense level 22 for assault with intent to commit murder, where the object of the offense would not have constituted first degree murder); § 2A2.2 (base offense level 15 for aggravated assault); § 2A3.2 (base offense level 15 for criminal sexual abuse of a minor (statutory rape)); § 2A4.1 (base offense level 24 for kidnapping and abduction); § 2B3.1 (base offense level 20 for robbery).

Section 2L1.1(a)(2), which applies to all other offenses covered under this guideline, would be raised from 9 to 12. The Commission has provided no empirical evidence or other reason why the increase should go beyond what Congress required. Most importantly, offenders who engage in conduct that involves aggravating factors will see their offense level substantially increase as a result of the other congressional directives enacted under IIRIRA.

2. Number of Aliens Smuggled - § 2L1.1(b)(2)

Here also, for the same reasons, the Commission should comply with the statutory directive, not go it one better. Without providing a reasoned basis, the Commission should not surpass Congress' increase. With respect to the number of aliens smuggled, IIRIRA directs the Commission to "increase the sentencing enhancement by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act." § 203(e)(2)(B).

We recommend a plain reading of the congressional directive -- the Commission should take the specific offense characteristic currently in effect and increase the applicable levels by 50%. In contrast, the proposed amendment reformulates the adjustment, unduly complicates it and does not follow the congressional directive.

¹ This guideline applies to convictions of offenses under 8 U.S.C. §§ 1324(a) and 1327. Section 1327 makes it a crime to aid or assist certain aliens to enter the United States. Section 1324(a), makes it a crime to unlawfully employ aliens.

Section 2L1.1(b)(2) currently reads:

If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

<u>Number of Unlawful Aliens...</u>	<u>Increase in Level</u>
(A) 6-24	add 2
(B) 25-99	add 4
(C) 100 or more	add 6

U.S.S.G. § 2L1.1(b)(2). The following table illustrates our position:

Number of Aliens	Current	NACDL Recommendation (% increase)	Proposed Amendment # of aliens - adjustment - (% increase)
			3-5 - add 1 - (new)
6-24	add 2	add 3 - (50%)	6-11 - add 3 - (50%)
			12-24 - add 5 - (150%)
25-99	add 4	add 6 - (50%)	25-99 - add 7 - (75%)
100 or more	add 6	add 9 - (50%)	100 or more - add 9 - (50%)

3. Enhancement for Prior Similar Convictions

NACDL opposes both options proposed by this amendment. The proposed amendment is harsher than necessary to comply with the congressional directive. It is also unduly broad in its definition of similar offenses. In surpassing the congressional directive, the amendment seemingly ignores the cumulative effect of the double counting and increased enhancements provided in this amended guideline.

NACDL proposes that if the defendant has one prior, the offense level be increased by 1 (rather than 2 as proposed by the amendment); a second prior would increase the offense level by 2 (rather than 4, as proposed by the amendment). In addition, NACDL proposes that "similar" prior conduct be limited to those offenses covered by U.S.S.G. § 2L1.1.

Lastly, NACDL proposes that the enhancement apply only to true recidivists, those who had been convicted prior to committing the instant offense.

Congress directs the Commission to "impose an appropriate sentencing enhancement" upon offenders with "1 prior felony conviction arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense". IIRIRA, § 203(e)(2)(C). Congress also directs that the priors be double counted -- they should serve to increase both the criminal history and the offense level. Id.

Because the prior convictions are being double counted, there is no need to pile on the levels when enhancing the offense level. A one-level increase in the offense level or a two-level increase if there are two prior convictions is sufficient in the absence of a directive by Congress and in the absence of empirical data supporting any greater increase.

For the same reason, the enhancement should apply only if the prior conviction existed at the time of the instant offense. This would be in keeping with the rationale for such an increase -- a person who, once having been apprehended and convicted, persists in criminal conduct is more blameworthy than one who is engaged in continuing wrongful conduct but has not been chastened by an arrest and conviction. See e.g., U.S.S.G. § 4A1.2, comment. (n. 3) (related cases). It is also consistent with the manner in which prior convictions are counted under the career offender guideline (§ 4B1.2(3)) and under the gun guidelines (§ 2K2.1).

For similar reasons, a plain reading of the phrase "the same or similar conduct" should be utilized. The proposed amendment would include any immigration or naturalization offense as a prior, even if the conduct is as dissimilar as obtaining a false work permit for one's own use. See 2L2.2. NACDL recommends that only offenses scored under the same guideline, § 2L1.1, would amount to the same or similar conduct.

4. Firearm Enhancements

NACDL opposes the amendment options that make the defendant vicariously liable for the actions of others in possessing or using a firearm. Congress directed enhancements where the defendant himself used the firearm or caused the injury. IIRIRA, §203(e)(2)(E). As we have previously stated, in this emergency amendment the Commission should restrict itself to the enhancements specifically directed by Congress.

NACDL also opposes the provision that requires imposition of a minimum offense level, if a firearm enhancement applies. Such minimum offense levels are not mandated by the congressional directive and are not used by the Commission in either the robbery or aggravated assault guidelines that contain similar enhancements.

5. Cross-Reference to Murder Guidelines

NACDL opposes a cross-reference to the first degree murder guideline under any circumstances. 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 our criminal laws, life imprisonment is life without parole, reduction for good time credit or other release from imprisonment while the convicted person remains alive. We believe it corrupts the criminal justice system and our constitutional guarantees to impose such a penalty on the basis that a person 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 certainly amount to "a tail which wags the dog of the substantive offense". McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986). In these circumstances, it would violate due process. 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).

Furthermore, IIRIRA does not direct the Commission to provide for a cross-reference to the murder guideline. The Commission should certainly not undertake such an enhancement under an emergency amendment.

6. Other Adjustments for Death, Bodily Injury and Risk of Injury

IIRIRA also does not direct a sentencing enhancement on the basis of vicarious liability. It directs an enhancement only where the bodily injury or death was caused by the defendant, himself. Section 203(e)(2)(E) provides in pertinent part:

(2) [T]he Commission shall . . .

(E) 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; or

(iii) engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury;

The Commission should cap the cumulative effects of the weapons and injury enhancements. As proposed, depending on the option chosen, a defendant's offense level may be increased by as many as 14 levels where the offense results in injury short of death (discharge of a firearm, recklessly creating risk of serious bodily injury, permanent bodily injury). This represents a substantial increase, even for a first offender, if the applicable base offense level is 23. (OL 23 & CH I = 46 to 57 months; OL 37 (23 + 14) & CH I = 210 to 262 months). If any of the other enhancements apply, the numbers would be that much greater. The Commission should keep in mind that, as proposed, these substantial penalties would apply to a defendant who would be vicariously liable for the acts of others even if he or she did not personally handle a firearm or cause the injury.

Lastly, the commentary defining "reckless conduct" is too broad. It encompasses behavior such as "transporting persons in the trunk ... of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded ... condition." Proposed application note 9. This definition includes conduct that is typical for the offense -- smuggling, transporting, or harboring unlawful aliens -- in its simplest form. As such it is inconsistent with the structure utilized by the Commission in other guidelines. It is particularly inappropriate to add a specific offense adjustment for such conduct when the base offense level for this offense is relatively high.

7. Downward Adjustments - § 2L1.1(b)(1)

NACDL opposes the Commission's proposal to delete the existing 3-level adjustment applicable "[i]f the defendant committed the offense other than for profit and the base offense level is determined under subsection (a)(2)". Congress did not direct abolition of this adjustment although it appears clear from the specificity with which it drafted § 203 that Congress was familiar with the current guideline when it directed a number of changes.

NACDL opposes the Commission proposal to replace the existing § 2L1.1(b)(1) adjustment with the one suggested by Congress where the "offense is a first offense and involves the smuggling only of the alien's spouse or child." IIRIRA, § 203(e)(2)(F). The existing adjustment and the one suggested by Congress address different mitigating factors. The former could involve other family members or humanitarian motives. Because profit or greed is generally deemed a good indicator of culpability, the existing downward adjustment should not be deleted. Also, the existing adjustment applies only to the less serious offenses covered under § 2L1.1(a)(2).

Furthermore, Congress did not provide the Commission emergency authority to delete this provision.

NACDL recommends that the Commission add the downward adjustment identified by Congress but leave untouched the existing adjustment. Further, NACDL recommends that the existing downward adjustment be increased to maintain a proportional reduction in the offense level. The existing adjustment reduced the base offense level from 9 to 6, a 1/3 reduction. Having increased the base offense level as a result of this amendment, the Commission should maintain the proportionality of this reduction by increasing this downward adjustment from 3 to 4 levels. If the adjustment were found to be applicable, the base offense level under the emergency amendment would be decreased from 12 to 8, maintaining the 1/3 reduction.

8. Upward Adjustment for a Previously Deported Alien

NACDL opposes this new upward adjustment (§ 2L1.1(b)(7)). This adjustment potentially may cause triple counting of a prior offense if the deportation involved a prior conviction. It also is not warranted in light of the relatively high base offense level vis a vis violent offenses. As it is not directed by Congress and there is no empirical evidence that it represents a factor requiring emergency attention by the Commission, it should not be promulgated.

Amendment 3 - §§ 2L2.1 & 2L2.2 (Immigration Document Fraud)

Many of the comments made with respect to emergency amendment 2 apply with equal force to emergency amendment 3.

1. Base Offense Level - § 2L2.1²

The Commission should not raise the base offense level beyond the 2 levels mandated by § 211(b)(2)(A) of IIRIRA. There is no empirical evidence to support a greater increase during this emergency cycle. The base offense level would increase from 9 to 11. Other enhancements directed by Congress would enhance the sentence for those offenders engaging in more aggravated conduct.

² As it pertains to this amendment, these guidelines apply to convictions for offenses under 18 U.S.C. §§ 1028(b)(1) (fraudulent use of government-issued documents), 1425 (unlawful procurement of citizenship or naturalization), 1426 (fraudulent naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (issuance of passport without authority), 1542 (false statement in application or use of passport), 1543 (forgery or false use of passport), 1544 (misuse of passport), and 1546(a) (fraud and misuse of visas, permits, and other documents).

2. Number of Documents - § 2L2.1(b)(2)

Here also, the Commission should comply with the statutory directive, not go it one better. Without providing a reasoned basis, the Commission should not surpass Congress' suggested increase. With respect to the number of documents involved in the offense, IIRIRA directs the Commission to "increase the upward adjustment by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act." § 211(b)(2)(B).

NACDL recommends a plain reading of the congressional directive -- the Commission should take the specific offense characteristic currently in effect and increase the applicable levels by 50%. In contrast, the proposed amendment reformulates the adjustment and disproportionately increases it for the mid-level offenders.

The following table illustrates our point.

Number of Documents	Current Adjustment	NACDL Recommendation (% increase)	Proposed Amendment # of docs - adjust - (% increase)
-	-		3-5 - add 1 - (new)
6-24	add 2	add 3 (50%)	6-11 - add 3 - (50%)
			12-24 - add 5 - (150%)
25-99	add 4	add 6 (50%)	25-99 - add 7 - (75%)
100 or more	add 6	add 9 (50%)	100 - add 9 - (50%) or more

3. Enhancement for Prior Similar Convictions

NACDL opposes both options proposed by this amendment. The proposed amendment is harsher than necessary to comply with the congressional directive. It is also unduly broad in its definition of similar offenses. In surpassing the congressional directive, the amendment seemingly ignores the cumulative effect of the double counting and increased enhancements provided in this amended guideline.

NACDL proposes that if the defendant has one prior, the offense level be increased by 1 (rather than 2 as proposed by the amendment); a second prior would increase the offense level by 2 (rather than 4, as proposed by the amendment). In addition, NACDL proposes that "similar" prior conduct be limited to those offenses covered by U.S.S.G. § 2L2.1. Lastly, NACDL proposes that the enhancement apply only to true recidivists, those who had been convicted prior to committing the instant offense.

Congress directs the Commission to "impose an appropriate sentencing enhancement" upon offenders with "1 prior felony conviction arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense". IIRIRA, § 211(b)(2)(C). Congress also directs that the priors be double counted -- they should serve to increase both the criminal history and the offense level. *Id.*

Because the prior convictions are being double counted, there is no need to pile on the levels when enhancing the offense level. A one-level increase in the offense level or a two-level increase if there are two prior convictions is sufficient in the absence of a directive by Congress and in the absence of empirical data supporting any greater increase.

For the same reason, the enhancement should apply only if the prior conviction existed at the time of the instant offense. This would be in keeping with the rationale for such an increase -- a person who, once having been apprehended and convicted, persists in criminal conduct is more blameworthy than one who is engaged in continuing wrongful conduct but has not been chastened by an arrest and conviction. See e.g., U.S.S.G. § 4A1.2, comment. (n. 3) (related cases). It is also consistent with the manner in which prior convictions are counted under the career offender guideline (§ 4B1.2(3)) and under the gun guidelines (§ 2K2.1).

For similar reasons, a plain reading of the phrase "the same or similar conduct" should be utilized. The proposed amendment would include any immigration or naturalization offense covered by U.S.S.G. § 2L as a prior, even if the conduct is dissimilar. NACDL recommends that only offenses scored under the same guideline, § 2L2.1, would amount to the same or similar conduct.

4. Downward Adjustments - § 2L2.1(b)(1)

NACDL opposes the Commission's proposal to delete the existing 3-level adjustment applicable "[i]f the defendant committed the offense other than for profit". Congress did not direct abolition of this adjustment although it appears clear from the specificity with which it drafted § 211 that Congress was familiar with the current guideline when it directed a number of changes.

NACDL opposes the Commission proposal to amend the existing § 2L2.1(b)(1) to require in addition that the defendant not have been convicted of a prior immigration offense. Because of the double counting directed by Congress for priors (as part of the offense level in addition to the criminal history), this additional impediment based also on a prior offense would amount to triple counting of the prior conviction. No other offenses, except perhaps, obstruction of justice impose such triple counting of a single aggravating factor. The existing adjustment and the one proposed as option 2 (if the documents relate only to the defendant's spouse or child) address different mitigating factors. The existing one which requires that the defendant have committed the offense other than for profit could involve family members (other than a spouse or child) or humanitarian motives. Because profit or greed is generally deemed a good indicator of culpability, the existing downward adjustment should not be deleted or be limited if a prior conviction exists.

NACDL recommends that the Commission not amend the existing adjustment for offenses committed other than for profit. Further, NACDL recommends that the existing downward adjustment be increased to maintain a proportional reduction in the offense level. The existing adjustment reduced the base offense level from 9 to 6, a 1/3 reduction. Having increased the base offense level as a result of this amendment, the Commission should maintain the proportionality of this reduction by increasing this downward adjustment from 3 to 4 levels.

NACDL also recommends that the Commission amend § 2L2.1 to provide an additional adjustment if the offense involved documents related only to the defendant's spouse and child.

5. Base Offense Level - § 2L2.2

NACDL recommends, for the reasons previously stated, that the Commission not raise the base offense level beyond the 2 levels mandated by § 211(b)(2)(A) of IIRIRA. This would result in a base offense level of 8 from the existing 6.

6. Enhancement for Prior Similar Convictions - § 2L2.2(b)(2)

NACDL opposes both options proposed by this amendment, for the reasons stated with respect to emergency amendments 1 and 2. The proposed amendment is harsher than necessary to comply with the congressional directive. In recognition of the double counting of the prior convictions, (as a basis for increasing both the offense level and the criminal history), the Commission should amend to provide a 1-level enhancement for a single prior and a 2-level enhancement for two priors.

The proposed amendment also contains an unduly broad definition of similar prior conduct. NACDL urges the Commission, in keeping with the manner in which double-counted criminal history is scored in those few guidelines where it occurs, to adopt the enhancement only for true recidivists.

Conclusion

NACDL appreciates this opportunity to provide our comments to the Commission. We urge each Commissioner in considering the proposed amendments to be guided by the mandate in 18 U.S.C. § 3553(a) that sentences should be "sufficient, but not greater than necessary" to provide just punishment.