National Association of Criminal Defense Lawyers
NACDL 1958

April 4, 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 to comment on two amendments that the Commission has placed on the agenda for its April 1997 meeting. These are: (1) diminished capacity (#28, issue 15, Part I) and (2) the new proposed theft, fraud, and tax amendments (#18A).

Diminished Capacity - U.S.S.G. § 5K2.13
(Amendment 28, Issue 15)

NACDL opposes Option One, the proposal to limit this departure ground to offenses that are not "crimes of violence", and that defines this term by reference to the defintion in the career offender guideline. Option One would preclude a departure if the offense of conviction is a "crime of violence" based on a categorical consideration of its elements. A categorical approach is inconsistent with the individualized nature of a departure determination and for that reason should not be adopted.

NACDL believes that the better course is Option Two, which eliminates the restriction on the type of offense altogether. In its place, it permits district judges, on a case-by-case basis, to determine the "extent to which reduced mental capacity contributed to the commission of the offense, provided that consideration of the nature and circumstances of the offense and the history and characteristics of the defendant does not indicate a need for incarceration to protect the public". This approach is more consistent with departure methodology.

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The career offender definition of "crime of violence" should not be used because that definition addresses entirely different and diametrically opposed issues. See United States v. Chatman, 986 f.2d 1446, 1451 (D.C. Cir. 1993). Section 4B1.2 deals with whether a defendant is a "career offender" and should be incarcerated longer than others who have committed the same crime. Higher sentences for "career offenders" are justified based on the greater culpability of recidivists and the general deterrence that results from sending the clear message that "repeated criminal behavior will aggravate the need for punishment with each recurrence." U.S.S.G. Ch. 4, Pt. A, Introductory Commentary (1995). Furthermore, in Congress' view, longer sentences incapacitate those offenders whose criminal record suggests a likelihood that they will commit future violent crimes and result in the efficient use of "[s]hrinking law enforcement resources . . . target[ing] those who repeatedly commit violent crimes". Chatman, at 1451, citing, 128 Cong.Rec. 26,518 (1982) (statement of Sen. Kennedy).

The definition of "crime of violence" in the career offender guideline thus "extends not only to crimes that involve actual violence, but to many crimes that have an "unrealized prospect of violence" as well. Chatman at 1451. As the Chief Judge for the D. C. Circuit explained:

> In short, § 4B1.2 can be read as depriving career offenders of the benefit of the doubt, and assuming the worst. In the service of identifying particular trends within an individual's criminal history, § 4B1.2 appears to characterize as "crimes of violence" many offenses that, taken individually on their facts, might be interpreted as non-violent.

Id.

The policy concerns that animate the definition of "crime of violence" for career offenders are not germane to departures for diminished capacity. Departures for diminished capacity are granted

> to treat with lenity those individuals whose "reduced mental capacity" contributed to commission of a crime. Such lenity is appropriate in part because . . . two of the primary rationales for punishing an individual by incarceration -- desert and deterrence -- lose some of their relevance when applied to those with

> reduced mental capacity. As to desert, "[p]ersons who find it difficult to control their conduct do not -- considerations of dangerousness to one side -- deserve as much punishment as those who act maliciously or for gain. Further, "[b]ecause legal sanctions are less effective with persons suffering from mental abnormalities, a system of punishment based on deterrence also curtails its sanction." Indeed, those defendants whose "significantly reduced mental capacity" is caused by the "voluntary" use of "drugs or other intoxicants" are logically excluded from consideration under § 5K2.13 because they have "diminished" their capacity by choice, and "legal threats may induce them to abandon their habits . . .".
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> . . .
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> Consistent with this analysis, a downward departure is disallowed where "the defendant's criminal history . . . indicates a need for incarceration to protect the public." U.S.S.G. § 5K2.13

Id. at 1451-52, citing, United States v. Poff, 926 F.2d 588, 595 (7th Cir.) (en banc), cert. denied, 502 U.S. 827 (1991) (Easterbrook, J. dissenting).

Furthermore, a factual approach which would require the sentencing court to consider the facts of the offense of conviction does not implicate "practical difficulties and potential unfairness". See Taylor v. United States, 495 U.S. 575, 600 (1990) (adopting a categorical approach to determine whether a particular offense is a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA")). A categorical approach "look[s] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions". 495 U.S. at 600. This approach avoids requiring "the sentencing court to engage in an elaborate fact-finding process regarding the defendant's prior offenses." Id. In the context of career offender and ACCA cases, the categorical approach avoids the practical problems of "retrying" the predicate convictions, years after a formal conviction was entered. Those considerations do not apply in the departure context.

In the § 5K2.13 departure situation the sentencing court will not be asked to "retry" an old case. Rather, the court must conduct fact-finding with respect to the offense of conviction for which the court will be imposing a sentence. This is a task which the

sentencing court is required to conduct in any event. 18 U.S.C. § 3553(a)(1).[1] Individualized fact-finding with respect to the offense of conviction does not impose, therefore, the practical burdens or fairness problems involved in considering past convictions. Furthermore, a factual inquiry into the offense conduct is likely to yield a more accurate picture of the offender and the offense. This facilitates the court's task of determining whether the defendant poses a danger to the public and should not be granted a departure. It also complies with the congressional mandate "to impose a sentence sufficient, but not greater than necessary to comply with the purposes" of sentencing. 18 U.S.C. § 3553(a).

Indeed, such an approach is consistent with and may be required by the congressional mandate that

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for purpose of imposing an appropriate sentence.

18 U.S.C. § 3661.

Lastly, whether the defendant's diminished capacity "should result in a departure", 35 U.S.C. § 3553(b), "embodies the traditional exercise of discretion by a sentencing court." United States v. Koon, 116 S.Ct. 2035, 2046 (1996). To resolve this question, a district court should be free to "make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." Id. at 2046-47. Option Two comports with the Supreme Court's understanding of the congressional purpose in reposing in federal district judges discretion to depart under the sentencing guidelines:

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[1] Section 3553(a) provides in pertinent part:

> The court, in determining the particular sentence to be imposed, shall consider--
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant.

> This too must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States District Judge. Discretion is reserved within the Sentencing Guidelines . . . .

Koon at 2053.

Theft, Fraud & Tax Guidelines
(Amendment 18A)

NACDL opposes changing the fraud and related guidelines in the piece-meal fashion being proposed. The most troubling problem in the application of these guidelines is the valuation of loss, especially intended loss, issues of loss causation, and the failure of the commentary to address the economic realities that impact on loss in the great variety of fraud offenses. These guidelines are also deficient because they overemphasize loss amount to the exclusion of other considerations relevant to culpability such as, for example, the offender's motivation. An offender who plans and devises a scheme to defraud is more dangerous, culpable and deserving of punishment than one who engages in opportune fraudulent acts or engages in fraud out of financial desperation with the intent, unrealized, to repay the stolen funds. As with other guidelines that focus on total amount and include relevant conduct, the fraud guideline over-punishes many of the less culpable participants who neither devise large fraudulent schemes nor profit proportionally from the loss amounts generated by such schemes of which they may be an essential but trivial part. The fraud guideline also fails to identify and encourage downward departure grounds that would more accurately reflect culpability and harm. This amendment does nothing to resolve those issues, which are the primary source of litigation in both the district and appellate courts.

NACDL supports elimination of the "more-than-minimal-planning" adjustment. Despite commentary which instructs that it "means more planning than is typical for commission of the offense in a simple form", this enhancement is applied in most fraud offenses because the commentary also provides that it is "deemed present in any case

involving repeated acts over a period of time." U.S.S.G. § 1B1.1, comment. (n.1(f)). Fraud offenses, in their simplest forms, rarely involve a single act. Because of the ambiguous commentary, this enhancement is being applied to offenders who have not exhibited culpable or harmful behavior beyond that necessary to commit the offense in its simplest form. It makes sense, therefore, to eliminate it.

NACDL opposes building the "more-than-minimal-planning" enhancement into the fraud table, however. The proposed loss table increases by one level the offense level for offenses involving a loss in excess of $2000 but less than $12,500; two levels are added above $12,500. Offenses involving a loss of less than $12,500 represent fraud offenses at their simplest form. Certainly, such relatively benign offenders do not merit any increase in the offense level and a correspondingly more severe sentencing range based on some built-in tariff for "more-than-minimal-planning."

At the higher loss levels, the enhancement is also not necessary. The current loss table sufficiently reflects the harm caused. Any enhancement should be reserved for the use of truly "sophisticated means". As currently proposed, however, the "sophisticated means" enhancement stands to suffer from the same application problem that infects the current more-than-minimal-planning enhancement -- it will be imposed with more regularity than intended or warranted. Accordingly, NACDL does not support the proposed enhancement for "sophisticated means" unless it is formulated to prevent application across-the-board of most fraud offenses.

The proposed loss tables will require a full term of imprisonment (zone D) for all first time offenders engaged in fraud offenses involving a loss in excess of $70,000 down from losses in excess of $120,000.[2] Similarly, to obtain home detention or community confinement without requiring that any part of the sentence be satisfied by imprisonment (zone B), currently the loss cannot exceed $ 40,000; under the proposed amendment, the loss cannot exceed $30,000 to obtain a sentence in zone B. These proposals will require imprisonment, with increased costs to society and to the families of the offender, for a large number of first time offenders for whom a term of imprisonment is greater than necessary

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[2] Currently, a loss of more than $120, 000 increases the base offense level by 7 and likely includes a 2-level enhancement for more-than-minimal-planning. This yields an offense level of 15. Assuming a criminal history I and a two-level reduction for acceptance of responsibility, this results in an offense level of 13 and a sentencing range of 12 to 18 months in zone D.

to dispense just punishment.[3] In this regard, this proposal contravenes the congressional mandate that:

> The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . .

28 U.S.C. § 994(j).

These fraud-related guidelines are applied in 25 to 30 percent of all federal convictions. The proposed amendments do not address the most significant loss-valuation problems that arise in the application of these guidelines. Accordingly, NACDL strongly recommends that the Commission defer all action on the fraud and related guidelines until it can consider the entirety of the problems in the current formulation of these guidelines.

Indeed, the Commission should defer consideration of these fraud-related guidelines because of the complexity of the issues, the lack of time in this amendment cycle to consider them adequately and the fact that the Commission is short two of its seven members. Furthermore, in large part the comments that have been submitted by interested parties on the fraud guidelines reflect less than complete consideration of these proposals in reliance on public pronouncements by members of the Commission that these particular amendments would likely be acted on in future amendment cycles. See 60 Crim. L. Rptr. 1523 (March 12, 1997). Thus, if the Commission amends as proposed in this most-recently published amendment, it will do so without a full and fair range of commentary and consideration of the issues. No good reason appears for the Commission's push to make the proposed flawed changes to these guidelines at this time.

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[3] Sixty-two percent (2262/3638) of fraud offenders are in criminal history category I. Table 19, U.S. Sentencing Commission, Annual Report 62 (1995).

For all these reasons, NACDL strongly recommends that the Commission defer action on Amendment 18A until it can consider the full range of issues pertaining to the theft, fraud and tax guidelines.

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 /cas

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