

March 17, 1997

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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 on behalf of the National Association of Criminal Defense Lawyers to comment on the proposed 1997 Amendments.

The NACDL is a nationwide organization comprised of 9000 attorneys actively engaged in defending criminal prosecutions, including private attorneys and public defenders; our membership also includes judges, law professors and law students. NACDL is also affiliated with 78 state and local criminal defense organizations, allowing us to speak for more than 25,000 members nationwide. Each of us is committed to preserving fairness within America's judicial system.

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
President

Alan Chaset
Carmen Hernandez
Benson Weintraub
Co-Chairpersons
Post-Conviction and Sentencing Committee

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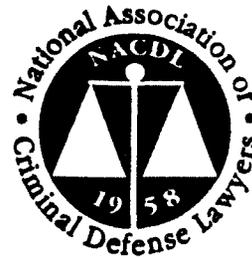
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COMMENTS ON THE 1997 AMENDMENTS - Part I

Amendment 5 - § 3A1.4 (Terrorism)

NACDL does not support this amendment for three reasons. First, it appears to have broader applicability than the enhanced penalties in 18 U.S.C. § 2332b, the section which defines a "Federal crime of terrorism". Second, it is inconsistent with the structure of the guidelines because it creates a criminal history adjustment in chapter three, the only such adjustment to be found in the guidelines. Third, because it is structured as a mandatory minimum offense level and criminal history adjustment this enhancement carries with it the evils of mandatory minimum sentencing -- it employs a "tariff-like approach" which disproportionately raises the punishment for a number of relatively less serious offenses, it may be subject to prosecutorial manipulation, and it may give rise to disparate application against minorities. See U.S. Sentencing Commission, "Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System" 26, 32, ii (1991).

NACDL recommends that the Commission revise the § 3A1.4 adjustment so that it applies only under the same circumstances as the enhanced penalties under 18 U.S.C. § 2332b, *i.e.*, where the title 18 offense (1) involved conduct transcending national boundaries and (2) involved a killing, kidnapping, maiming, or conduct resulting in serious bodily injury or that created a substantial risk of serious bodily injury. The adjustment should also be graduated to conform to the graduated penalties applicable under § 2332b which range from life imprisonment to a term of not more than 10 years imprisonment. See 18 U.S.C. § 2332b(c)(1).

This amendment proposes to make permanent a 1996 emergency amendment implementing § 730 of the Antiterrorism and Effective Death Penalty Act of 1996.¹ The amended § 3A1.4 adjustment applies in each case where the "offense is a felony that involved, or was intended to promote, a federal crime of terrorism" as defined in 18 U.S.C. § 2332b(g). The adjustment increases by 12 the offense level to a minimum offense level 32 and imposes a criminal history category VI. U.S.S.G. § 3A1.4. Thus in each case where this adjustment applies, the guideline range will be a minimum of 210 - 262 months (OL 32 & CH VI), before any adjustment for acceptance of responsibility.

Section 2332b(g) provides for enhanced penalties for "[a]cts of terrorism transcending national boundaries" where the offender "kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon...or creates a substantial risk of serious bodily injury to any other person...", or threatens, attempts or conspires to do so. 18 U.S.C. §§ 2332b(a). In the definitional section, a "Federal crime of terrorism" is defined as an offense that is "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct"

¹ Section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), provides:

§. 730. Directions to Sentencing Commission.

The United States Sentencing Commission shall forthwith, in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that section had not expired, amend the sentencing guidelines so that the chapter 3 adjustment relating to international terrorism only applies to Federal crimes of terrorism, as defined in section 2332b(g) of title 18, United States Code.

The adjustment for international terrorism (amendment 526) was promulgated in response to § 120004 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (1994) which directed the Commission to:

amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime.

and is a violation of certain specified sections of title 18. 18 U.S.C. § 2332b(g)(5)(A). Not all of the title 18 offenses specified in the definitional section, however, necessarily involve killing, kidnapping, or acts which create a substantial risk of serious bodily injury. Furthermore, many of the specified title 18 offenses can be committed wholly within the United States without involving conduct "transcending national boundaries".

The § 3A1.4 adjustment does not require any finding that (1) the conduct involved "transcend[ed] national boundaries" or (2) the offender killed, kidnapped or created a substantial risk of serious bodily injury. Yet, a number of relatively less serious offenses which are not likely to involve those two requirements are specified as "federal crime[s] of terrorism". For example, one such offense is 18 U.S.C. § "1361 (relating to injury of Government property or contracts)" which, absent the two additional requirements necessary for enhancement under § 2332b, is punishable by a fine or imprisonment up to a maximum of ten years. 18 U.S.C. § 2332b(g)(5)(B)(i). Similarly, 18 U.S.C. § 2280(a)(2) which relates to certain threats of violence against maritime navigation is punishable, absent the two additional requirements necessary for enhancement under § 2332b, by a maximum term of imprisonment of 5 years. Because of the tariff-like approach of this § 3A1.4 adjustment, conduct involving relatively less serious acts of protest may be prosecuted under these statutes and result in a guideline range harsher than intended or necessary.

Amendment 6- §§ 1B1.1, 3C1.1, 4B1.1, 4B1.2 (Application Instructions)

NACDL does not oppose the first part of this amendment which amends § 1B1.1.

NACDL opposes the second part of the amendment because it does not simplify the definition of "offense" as it purports to do. Further, the amendment which adds a new application note to § 3C1.1, though denominated a "conforming amendment", expands the scope of "during the investigation or prosecution of the instant offense" to include obstructive conduct beyond the offense of conviction. As amended, the obstruction adjustment would apply

in relation to, the investigation or prosecution of the federal offense of which the defendant is convicted and any offense or related civil violation, committed by the defendant or another person, that was part of the same investigation or prosecution, whether or not such offense resulted in

conviction or such violation resulted in the imposition of civil penalties. It is not necessary that the obstructive conduct pertain to the particular count of which the defendant was convicted.

Proposed § 3C1.1, comment (n.8). This expanded scope is inconsistent with the manner in which most circuits have interpreted this adjustment. *E.g.*, United States v. Yates, 973 F.2d 1, 4-5 (1st Cir. 1992) (holding that obstruction must occur during the investigation, prosecution, or sentencing of the offense of conviction); United States v. Perdomo, 927 F.2d 111, 118 (2d Cir. 1991) (same); United States v. Woods, 24 F.3d 514, 516-18 (3d Cir. 1994) (same); United States v. Haddad, 10 F.3d 1252, 1266 (7th Cir. 1993); United States v. Barry, 938 F.2d 1327, 1332-35 (D.C. Cir. 1991) (same). As the 10th Circuit explained in United States v. Gacnik, 50 F.3d 848, 852-53 (10th Cir. 1995):

A plain reading of U.S.S.G. § 3C1.1 compels the conclusion that this provision should be read only to cover willful conduct that obstructs or attempts to obstruct "the investigation . . . of the instant offense". . . . [T]he obstructive conduct, which must relate to the offense of conviction, must be undertaken during the investigation, prosecution, or sentencing. Obstructive conduct undertaken prior to an investigation, prosecution, or sentencing; or as regards a completely unrelated offense, does not fulfill this nexus requirement.

The Commission should not undertake to expand the scope of this adjustment in derogation of the manner in which it has been interpreted by the majority of circuit courts of appeals through this back-door "conforming" amendment. The Commission certainly should not expand the scope without some explanation of the need for the revision and empirical support for its view. Furthermore, in expanding the scope of the obstruction adjustment to include related civil violations and offenses that may not be prosecuted or as to which the defendant is not found guilty, the Commission should bear in mind that in most cases imposition of the obstruction adjustment serves to preclude a reduction for acceptance of responsibility. This has the effect of a 4- or 5-level swing in the offense level, a severe enhancement that should not be expanded lightly.

Amendment 8 - § 1B1.3 (Relevant Conduct - "same course of conduct")

NACDL does not oppose this amendment which adds language to the relevant conduct commentary that explains that "if two controlled substance transactions are conducted more than one year apart, the fact that the transactions involved the same controlled substance, without more information is insufficient to show that they are part of the same course of conduct or common scheme or plan". Proposed amendment to § 1B1.3, comment (n.9(B)). This language, derived from the holding in United States v. Hill, 79 F.3d 1477 (6th Cir. 1996), provides a helpful illustration of the outer limits of "same course of conduct" in drug transactions.

Indeed, NACDL recommends that the commentary be expanded to explain that the mere fact that the same controlled substance is involved in other transactions is never enough, without more information, to show that the other transactions are part of the same course of conduct as the offense of conviction. Other factors, including "the degree of similarity of the offenses, [and] the regularity (repetitions) of the offenses," that provide a nexus with the other transactions should be present for multiple transactions to be deemed part of the "same course of conduct". U.S.S.G. § 1B1.3, comment. (n.9(B)).

Amendment 9 - § 1B1.3 (Relevant Conduct - Acquitted Conduct)

Of the options published by the Commission pertaining to the use of acquitted conduct in determining a defendant's offense level, NACDL prefers option 1B. This option creates a new subsection in the relevant conduct guideline which provides that:

Acquitted conduct, *i.e.*, conduct necessarily rejected by the trier of fact in finding the defendant not guilty of a charge, shall not be considered relevant conduct under this section.

Proposed amendment Option 1B (§ 1B1.3(c)).

Option 1B also proposes to create new commentary which would explain that acquitted conduct may be used to establish an enhancement under the guidelines when the elements of the enhancement differ from the elements of the offense as to which the defendant was acquitted. See Proposed § 1B1.3, comment. (n.10). The amended commentary cites as an example, that after an acquittal on a § 924(c) charge for using and carrying a firearm in connection with a drug offense the court may impose the gun bump

in U.S.S.G. § 2D1.1(b)(1) which requires only that "a dangerous weapon . . . was possessed". See e.g., United States v. Watts, ___ U.S. ___, 117 S.Ct. 633 (1997) (reversing and remanding where lower court refused to impose § 2D1.1(b)(1) gun bump because of acquittal on § 924(c) charge)).

The only issue before the Supreme Court in Watts is that addressed in the first part of the proposed amended commentary. The statements of Justice Scalia with respect to the import of 18 U.S.C. § 3661 as prohibiting any restriction by the Commission of the use by the sentencing court of acquitted conduct in determining the sentence are dicta, not part of the opinion of the court, and if correct would undo much of the sentencing guidelines which time and again restrict the use of information by courts in determining the appropriate punishment. See e.g., U.S.S.G. § 5K1.1 (requiring government motion before a court may depart based on substantial assistance; § 5K2.13 (permitting departures based on diminished capacity only where the offense is non-violent); Koon v. United States, ___ U.S. ___, 116 S. Ct. 2035, 2047 (1996). Furthermore, the Supreme Court expressly declined to address whether a sentence enhancement that results in a substantially higher punishment so as to amount to "a tail which wags the dog of the substantive offense" would violate due process of law. United States v. Watts, 117 S. Ct. At 637-38 n.2, citing McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986).

NACDL opposes the last sentence of the amended commentary, however, which provides that "acquitted conduct ...may provide a basis for an upward departure". Proposed § 1B1.3, comment. (n.10). NACDL opposes the use of acquitted conduct as basis for an upward departure and opposes the other published options which would permit the use of acquitted conduct in calculating the offense level because it believes that "[t]here is something fundamentally wrong with such a result." United States v. Baylor, 97 F.2d 542, 549 (D.C. Cir. 1996) (Wald, J., concurring specially).

The NACDL's position on this issue may best be summarized by reference to Judge Wald's concurring opinion in Baylor:

Guideline "law," I am well aware, runs overwhelmingly against Baylor's claim that a sentencing court should not use the core conduct underlying an acquittal to increase an offender's base offense level for the crimes of which he was convicted. This circuit has gone along with most other circuits in ruling that the guidelines and the law authorizing

their creation permit such use, and that this practice is constitutional. See United States v. Boney, 977 F.2d 624, 635-36 (D.C. Cir.1992) (citing cases from all circuits except the Ninth). Only the Ninth Circuit has held to the contrary, claiming that "[w]e would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted." United States v. Brady, 928 F.2d 844, 851 (9th Cir.1991).

But this consensual surface is eroded by a growing body of resistance to what commentators and scholars recognize as a blatant injustice. Despite the near unanimity of the circuit holdings, many individual judges have expressed in concurrences and dissents the strongest concerns, bordering on outrage, about the compatibility of such a practice with the basic principles underlying our system of criminal justice.
[FN2]

FN2. See, e.g., United States v. Frias, 39 F.3d 391, 392-94 (2d Cir.1994) (Oakes, J., concurring) ("This is jurisprudence reminiscent of Alice in Wonderland. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'"); United States v. Hunter, 19 F.3d 895, 897-98 (4th Cir.1994) (Hall, J., concurring) ("[A]s regards charges on which the jury has acquitted the defendant, ['pricing' these charges at the same level of severity as convicted conduct for sentencing purposes] is just wrong."); United States v. Concepcion, 983 F.2d 369, 395-96 (2d Cir.1992) (Newman, J., dissenting from the denial of a request for rehearing in banc) ("In some way, the law must be modified. A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal."); Boney, 977 F.2d at 637-47 (D.C. CIR.1992) (Randolph, J., dissenting in part and concurring in part) ("My analysis, and my colleagues'

... rests somewhat uneasily with the 'special weight' the Supreme Court has accorded acquittals in its Double Jeopardy jurisprudence."); United States v. Galloway, 976 F.2d 414, 436-44 (8th Cir.1992) (Bright, J., dissenting) ("If the former Soviet Union or a third world country had permitted [the practice of punishing people for conduct that had not been the subject of indictment or trial] human rights observers would condemn those countries."); United States v. Restrepo, 946 F.2d 654, 664-79 (9th Cir.1991) (Norris, J., dissenting) (arguing that the 'preponderance of the evidence' standard for counting conduct underlying acquitted charges in sentencing should be rejected) ("Circuit has followed circuit without, in some cases, even a vestige of independent analysis. ... There are signs, however, that the dam is finally cracking, signs of an emerging awareness of the truly profound implications of the changes the Guidelines have wrought." (citing Brady)); United States v. Kikumura, 918 F.2d 1084, 1100-01 (3d Cir.1990) ("This [twelve-fold increase in the sentence] is perhaps the most dramatic example imaginable of a sentencing hearing that functions as 'a tail which wags the dog of the substantive offense.' (Quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)). In this extreme context, we believe, a court cannot reflexively apply the truncated procedures that are perfectly adequate for all of the more mundane, familiar sentencing determinations."); United States v. Jones, 863 F.Supp. 575, 578 (N.D. Ohio 1994) ("The right to a trial by jury means little if a sentencing judge can effectively veto the jury's acquittal on one charge and sentence the defendant as though he had been convicted of that charge." (citing Brady)); United States v. Cordoba-Hincapie, 825 F.Supp. 485, 487 (E.D.N.Y.1993) ("Can the guarantees of a jury trial to determine the substantive predicates of criminality be shortcircuited

by characterizing a critical element of great significance in deciding punishment as one for the judge to determine in fixing sentence--a sentence predetermined under fixed guidelines, not one imposed under a discretionary regime? ... Congress could not have intended such a bizarre and dangerous result when it adopted guideline sentences").

A parallel body of work condemning sentencing based on acquitted conduct has been growing in the academic community. See, e.g., Kein R. Reitz, Sentencing Facts: Travesties of Real-Offense Sentencing, 45 STAN. L.REV. 523 (1993); David Yellen, Illusion, Illogic, and Injustice: Real- Offense Sentencing and the Federal Sentencing Guidelines, 78 MINN. L.REV. 403 (1993); Elizabeth T. Lear, Is Conviction Irrelevant?, 40 UCLA L.REV. 1179 (1993); Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 YALE L.J. 1681 (1992); Michael Tonry, Salvaging the Sentencing Guidelines in Seven Easy Steps, 4 FED. SENTENCING REP. 355, 356-57 (1992); Gerald W. Heaney, The Reality of Guidelines Sentencing: No End to Disparity, 28 AM.CRIM. L.REV. 161, 208-20 (1991).

Although I fully recognize that Boney requires affirmance on this issue, to my mind the use of acquitted conduct in an identical fashion with convicted conduct in computing an offender's sentence leaves such a jagged scar on our constitutional complexion that periodically its presence must be highlighted and reevaluated in the hopes that someone will eventually pay attention, either through a grant of certiorari to resolve the circuit split, or a revision of the guidelines by the Sentencing Commission, or legislation to bar such a result; in Chief Judge Newman's words "the law must be modified." [FN3] Time and experience show us increasingly that the assumptions underlying the decisions upholding the use of acquitted conduct to enhance sentencing are not sound.

FN3. Concepcion, 983 F.2d at 396 (Newman, J., dissenting from the denial of a petition for rehearing).

The practice of sentencing defendants on the basis of crimes for which the defendant has been acquitted has been plausibly attacked along many jurisprudential fronts, including double jeopardy, [FN4] failure to honor the right to a jury trial, [FN5] failure to satisfy the "notice" requirement of a grand jury indictment, [FN6] and due process. [FN7] The explanation offered to defendants who object that they are being punished for crimes of which they have not been convicted is invariably that they "misperceive[] the distinction between a sentence and a sentence enhancement," and that by adding the full measure of punishment specified in the guidelines for crimes of which they are not convicted, the court is merely "enhancing" the penalty for the crime of which they are convicted, not imposing liability for a separate crime. Boney, 977 F.2d at 636 (quoting United States v. Mocchiola, 891 F.2d 13, 17 (1st Cir.1989)). [FN8] The "enhanced" sentence, after all, still must fall within the statutory range set out for the crime of conviction. See Boney, 977 F.2d at 636.

FN4. See, e.g., United States v. Rodriguez-Gonzalez, 899 F.2d 177, 181- 82 (2d Cir.), cert. denied, 498 U.S. 844 (1990).

FN5. See, e.g., Jones, supra note 2.

FN6. See Lear, supra note 2, at 1229-33.

FN7. See, e.g., Restrepo, supra note 2, at 664-79 (Norris, J., dissenting).

FN8. In his separate concurring opinion, Judge Randolph recognized that "this conceptual nicety might be lost on a person who ... breathes a sigh of relief when the not guilty verdict is announced without realizing that his term of imprisonment may nevertheless be 'increased' if, at

sentencing, the court finds him responsible for the same misconduct. That the Double Jeopardy Clause protects him from re prosecution on the acquitted count, or that his acquittal means that his maximum potential sentence will be determined solely on the basis of the count on which he was convicted is doubtless of little comfort." Boney, 977 F.2d at 647 (Randolph, J., dissenting in part and concurring in part).

Some of our own judges have recognized that this justification could not pass the test of fairness or even common sense from the vantage point of an ordinary citizen. [FN9] The "law," however, has retreated from that standard into its own black hole of abstractions. The fact remains that when the conduct which serves as the basis for a sentence "enhancement" is in fact treated by the criminal statutes and the sentencing guidelines as a discrete crime, separately charged in the indictment, and subjected to a separate determination of guilt or innocence by a jury, treating it subsequently at the sentencing stage as just another "factor" to be considered in "enhancing" the sentence for the crime of conviction introduces an artificiality into the process that violates time honored constitutional principles designed to protect criminal defendants.

FN9. See supra note 8.

The fact that the ultimate sentence based on both convicted and acquitted conduct falls below the statutory maximum for the crime of conviction does little, if anything, to counteract the basic unfairness of counting acquitted conduct. The statutory maxima for many felonies, which can run as high as 30 or 60 years, were originally set in an era of indeterminate sentencing and parole; the prevailing ideology of punishment was rehabilitation, and the system was designed to provide that offenders would remain in prison only until they had been "rehabilitated," meaning prisoners often would be released after serving as little as one-third of their original sentences.

[FN10] The concept of guideline sentencing, on the other hand, was motivated by Congress' determination that indeterminate sentencing and parole discretion resulted in unwarranted sentence disparities, and must be replaced by more rigid formulas allowing little or no discretion on the part of the judge. [FN11] Thus the escape valves attached to the long sentences originally prescribed by statute have been slammed shut, and statutory maxima that were designed to cover the most egregious conceivable manifestations of particular crimes, and thus to far exceed the appropriate sentence in the average case, [FN12] cannot be relied on to cabin within reasonable limits the cumulative penalties for convicted and acquitted charges.

FN10. See Michael H. Tonry, Real Offense Sentencing: The Model Sentencing and Corrections Act, 72 J.CRIM. L. & CRIMINOLOGY 1550, 1593 (1981).

FN11. See 18 U.S.C. § 3553(a)(6) (1994).

FN12. See Michael Tonry, Sentencing Guidelines and the Model Penal Code, 19 RUTGERS L.J. 823, 845 (1988).

Some courts have felt themselves constrained by the Supreme Court's decision in McMillan v. Pennsylvania [FN13] to respect the "punishment/enhancement" fiction that underlies the authorization for counting acquitted conduct in § 1B1.3(a)(2). [FN14] A close reading of that opinion, and of the Specht v. Patterson [FN15] decision to which it refers, however, suggests that even that fiction has boundaries which this portion of the guidelines has crossed over.

FN13. 477 U.S. 79 (1986).

FN14. See, e.g., United States v. Mobley, 956 F.2d 450, 455 (3d Cir.1992).

FN15. 386 U.S. 605 (1967).

The statute reviewed in Specht authorized a sentencing court to determine that a person convicted of enumerated sex offenses constituted a threat to the public, or was an habitual offender and mentally ill, and on this basis to increase the sentence from the term specified in the crime of conviction to an indeterminate term between one day and life imprisonment. [FN16] The statute made no provision for notice or hearing preceding this determination. The Court held that the statute was "deficient in due process" as it provided for "the making of a new charge leading to criminal punishment" without affording the defendant the safeguards considered essential to a fair trial. [FN17]

FN16. See id. at 607-08.

FN17. Id. at 611.

In McMillan, the Supreme Court addressed a challenge to Pennsylvania's Mandatory Minimum Sentencing Act [FN18] based in the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment. The Act provided that anyone convicted of certain felonies must be sentenced to at least five years' imprisonment if the judge finds by a preponderance of the evidence that the person "visibly possessed a firearm" during the commission of the offense. [FN19] Individuals subjected to this sentence enhancement argued that the firearm possession was actually an element of the crime, and thus under In re Winship [FN20] must be proved beyond a reasonable doubt, and in the alternative that due process required that the firearm component be subject to a higher standard of proof than preponderance of the evidence. [FN21]

FN18. 42 Pa.C.S.A. § 9712 (1982).

FN19. See McMillan, 477 U.S. at 81-82.

FN20. 397 U.S. 358 (1970).

FN21. See McMillan, 477 U.S. at 83-84.

The Court found merit in neither claim, holding that Pennsylvania's "chosen course in the area of defining crimes and prescribing penalties" did not violate the standard articulated in Specht. [FN22] The Court noted that it had "never attempted to define precisely the constitutional limits noted in [Specht], i.e., the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases," and declined now to proffer any such definition, in light of other factors making it unnecessary to reach this issue. [FN23] The Court noted, first, that the Pennsylvania Act created no presumptions of guilt and did not relieve the government of its burden of proving guilt, but rather became applicable only "after a defendant has been duly convicted of the crime for which he is to be punished." [FN24] Next, the Court observed that the Act enumerated felonies carrying maximum sentences of ten or twenty years, "upp[ing] the ante" for these felonies only insofar as the minimum sentence could not fall below five years; the Court concluded that the statute gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." [FN25] The Court rejected the petitioners' invocation of Specht, noting that the statute struck down in Specht subjected the defendant to a "'radically different situation' from the usual sentencing proceeding," whereas the Act merely raised the minimum sentence that may be imposed by the trial court. [FN26] Finally, the Court rejected the petitioners' warning that States would use any leeway the Court allowed them to restructure existing crimes in such a way as to evade the due process requirements announced in Winship, observing that Pennsylvania's legislature had not changed the definition of any existing

offense. [FN27]

FN22. See id. at 86, 91-93.

FN23. See id. at 86.

FN24. Id. at 87.

FN25. Id. at 88.

FN26. See id. at 89.

FN27. See id. at 89-90.

The Court then turned to the petitioners' "subsidiary" claim that visible possession of a firearm should be subjected to a higher standard of proof than "preponderance of the evidence." Citing to the 1949 decision in Williams v. New York, [FN28] the Court quickly dispensed with this argument on the basis of that decision's holding that due process is not violated by the sentencing court's "traditional[]" practice of hearing evidence and finding facts "without any prescribed burden of proof at all." [FN29]

FN28. 337 U.S. 241 (1949).

FN29. McMillan, 477 U.S. at 91-92.

In addressing both sets of arguments pressed by the petitioners, the McMillan Court not only affirmed the continued vitality of Specht, but also used language that limited its holding regarding the inapplicability of Specht to situations in which the sentence "enhancement" relates to the particular event on which the conviction is based. The Court held that the Act did not fall under Specht because it "only bec[ame] applicable after a defendant has been duly convicted of the crime for which he is to be punished." McMillan, 477

U.S. at 87 (emphasis added). Rejecting the claim that a higher burden of proof should apply, the Court noted that "[s]entencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime, without suggesting that those facts must be proved beyond a reasonable doubt." *Id.* at 92, (emphases added).

The Court's apparent assumption that punishment will relate to the crime of conviction, rather than to crimes for which the defendant has been acquitted, reflects a commonality of understanding about fundamental fairness shared by scores of judges and academics, [FN30] as well as every nonfederal jurisdiction in the nation that has implemented guideline sentencing. [FN31] The Federal Guidelines stand alone in perpetuating their anomalous treatment of acquittals in sentencing.

FN30. See supra note 2.

FN31. See Tonry, supra note 2, at 356-57 (noting that the Federal Sentencing Commission is the only sentencing commission in the nation to reject the "charge offense" model, whereby sentences are based solely on crimes for which a defendant has been convicted, in favor of the "real offense" model, which allows sentencing courts to consider unconvicted and even acquitted crimes in setting the sentence).

In sum, I do not believe the Supreme Court has yet sanctioned the intolerable notion that the same sentence can or must be levied on a person convicted of one crime, and acquitted of three "related" crimes, as can be imposed on his counterpart convicted of all four crimes. The result of such a system is subtly but surely to eviscerate the right to a jury trial or to proof beyond a reasonable doubt for many defendants.

Yet we appear to have relentlessly, even mindlessly progressed down the path. It is time to turn back. The British novelist G.K. Chesterton once said: "[W]hen two great political parties agree about something, it is generally wrong." [FN32] I am afraid the same can be said in this one instance about great circuit courts.

FN32. JONATHON GREEN, *THE CYNIC'S LEXICON* 46 (1984).

United States v. Baylor, 97 F.2d at 549 -553.

Amendment 10, Part B - § 2X1.1 (Attempts, Solicitation, or Conspiracy)

NACDL opposes this amendment which would eliminate the three-level reduction for certain attempts, conspiracies and solicitations. In the guise of simplification, this amendment ignores the reduced culpability of those defendants who qualify for the § 2X1.1 reduction.

Amendment 11 - § 1B1.10 (Retroactivity)

NACDL opposes this amendment because it resolves a purported conflict between two circuits in a manner that disregards fundamental fairness. The amendment provides that henceforth in reducing a defendant's sentence pursuant to an amendment which the Commission has designated for retroactive application, a court may not reduce the sentence in excess of the time the defendant has already served. The practical effect of this amendment is that courts may no longer credit a defendant for the excess time he served in jail by reducing the defendant's term of supervised release.

Ironically, the Commission proposes to add background commentary which states that the designation of an amendment for retroactive treatment "reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing. . ." This proposed amendment seemingly ignores the first purpose of sentencing, "just punishment". 18 U.S.C. § 3553(a). If the reduced term of incarceration reflects just punishment then there is no good reason why the defendant should not receive credit for each excess day which he spent in prison. To accomplish this simple act of justice places absolutely no added burden on courts, the Bureau of

Prison, or the system -- it involves a simple process of addition and subtraction. Indeed, society is more likely to reap benefits from its fair and equitable treatment of defendants who are fully credited for their excess prison time.

NACDL also opposes this amendment because the Commission should not be resolving "circuit conflicts" where the conflict arises out of differing judicial interpretations of statutory language, namely 18 U.S.C. § 3624. Compare United States v. Blake, 88 F.3d 824, 825-26 (9th Cir. 1996) (holding that in view of the language of § 3624 respecting when a term of supervised release begins to run, the defendant's term of supervised release began to run on the date when he should have been released from imprisonment under the retroactive guideline calculation) with United States v. Douglas, 88 F.3d 533, 534 (8th Cir. 1996) (holding that the court was required to impose a two-year term of supervised release for the class C felony pursuant to 18 U.S.C. § 3553(a)(3) and that § 3624 did not require a different result). It is significant, moreover, that the district court judge in Douglas imposed a two-year rather than a three-year term of supervised release because the court believed that the defendant "should be given some credit for the fact that he's actually served a sentence in excess of what he would have otherwise have served." Id. at 534. In fact, no court has resolved the issue in the manner which the Commission proposes -- by absolutely precluding any credit for the excess prison time.

Where as here, the issue does not arise out of an interpretive dispute concerning a guideline, the Commission should not interfere with the quintessentially legal question of statutory construction and congressional intent.

Amendment 12 - §§ 2F1.1 & 2B1.1 (Affected A Financial Institution)

NACDL supports this amendment because it clarifies ambiguous language.

Amendment 13 - § 5A1.1 (Sentencing Table & Offense Level 43)

NACDL supports the parts of this amendment which rectify the unwarranted "cliff" between offense level 42 and 43 and which eliminate the mandatory life provision for defendants who are convicted of offenses other than first degree murder or treason.

NACDL opposes that part of the proposed commentary to § 5A1.1 which permits imposition of life without parole pursuant to a cross-reference to the first degree murder guideline. As it has in the past, NACDL strongly objects to the imposition of a sentence of life without parole by way of a cross-reference from another guideline to the first degree murder guideline. 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 federal law, life imprisonment is life without parole, reduction for good time credit or other release from imprisonment while the convicted person remains alive.

NACDL opposes a cross-reference to the first degree murder guideline under any circumstances, even where the maximum penalty for the offense of conviction limits the ultimate sentence to something less than life. It corrupts the criminal justice system and our constitutional guarantees to sentence a defendant on the basis that he or she 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 amount to "a tail which wags the dog of the substantive offense". McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986). 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). Imposition of life without parole, or some other statutory maximum penalty, based on a preponderance of the evidence is simply wrong and violates the constitutional guarantee to due process of law.

Amendment 14 - § 2B3.1 ("Express Threat of Death")

NACDL opposes this amendment because it dilutes the requirement that the threat be express in a class of cases -- robberies -- that by their nature necessarily require an element of threat or intimidation.

Amendment 15 - § 2B3.1 ("Carjacking Correction Act")

NACDL opposes option 2 which would apply the definition of "serious bodily injury" that Congress enacted for carjackings to all offenses. NACDL agrees with the revised definition of "serious bodily injury" proposed by the Federal Public Defenders.

Amendment 17 - §§ 2D1.6, 2E1.1, 2E1.2, 2E1.3

NACDL supports the proposed amendments to the commentary to each of these guidelines. In each case, the amended commentary clarifies the operation of the pertinent guidelines.

Amendment 18 - §§ 2B1.1, 2F1.1 and 2T1.4

NACDL agrees with the comments submitted by the Practitioner's Advisory Group concerning this amendment and the issues for comment. NACDL also agrees with the Federal and Community Defenders that these issues warrant further consideration.

Amendment 21 - Role in the Offense

Aggravating Role

NACDL opposes the proposals that would reduce the number of participants necessary to trigger the aggravating role adjustments. The Commission has not provided any empirical evidence that indicates that the current number of participants fails to capture adequately the greater culpability of certain defendants. Additionally, the Commission should consider that the aggravating role adjustments often apply in non-violent drug offenses that already receive relatively severe sentences when compared to violent crimes. For example, an armed bank robbery where a dangerous weapon was brandished results in an offense level of 25 (no bodily injury and loss of less than \$10,000). U.S.S.G. §§ 2B3.1(a), (b)(1) & (b)(2). A distribution of 5 grams of cocaine base (\$575 street value) or 100 grams of methamphetamine (\$9500 street value) results in an offense level of 26. U.S.S.G. § 2D1.1(c)(7). Cocaine Report, table 19.

NACDL also recommends that the Commission delete the "otherwise extensive" language in the aggravating role adjustments. This language provides little guidance in assessing this adjustment and gives rise to disparate application. The proposed language

that provides for an upward departure for persons who do not qualify for aggravating roles because though "function[ing] at a relatively high level in a drug distribution network", do not exercise supervisory control over others suffers from the same lack of specificity. Furthermore, the fact that certain persons occupy a relatively high level in a drug network will likely be reflected in a relatively high offense level based on the quantity of drugs.

Mitigating Role

NACDL opposes the inclusion of the phrase "a substantially less culpable defendant". The term "substantially" involves a qualitative assessment which does not simplify application of the guideline, will likely lead to disparate application of the adjustment, and seems to impose a higher standard than currently in use to qualify for a mitigating role adjustment.

NACDL also opposes deletion of the three-level intermediate adjustment. It permits district courts to exercise informed judgment when warranted.

NACDL strongly recommends that the Commission include language that provides for a four-level reduction for mules and couriers. Very often such defendants are young, vulnerable, and paid a small percentage of the value of the drugs. In many districts, couriers and mules rarely receive any mitigating role adjustment because they are arrested by themselves, cannot provide enough information to implicate others, and are deemed essential participants in the transaction for which they are being prosecuted. Yet, as the Commission pointed out in the Cocaine Report it submitted to Congress, such persons, who are easily replaced, are less culpable and dangerous than the dealers and organizers. See Cocaine Report at 168-175.

The Commission should also include language that permits a mitigating role adjustment for retail street dealers who traffic within a limited geographic area for relatively small profits. Id.