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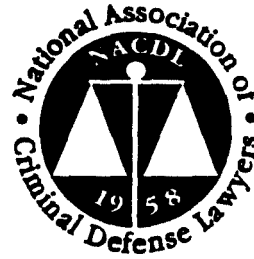
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December 16, 1996

The Honorable Richard P. Conaboy
and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Proposed 1997 Amendments to the Sentencing Guidelines

Dear Chairman Conaboy and Commissioners:

The National Association of Criminal Defense Lawyers requests that the Commission consider the enclosed amendments during the upcoming amendment cycle.

The NACDL is a nationwide organization comprised of more than 8600 attorneys actively engaged in defending criminal prosecutions, including private attorneys and public defenders; our membership also includes law professors and law students. NACDL is also affiliated with 73 state and local criminal defense organizations, allowing us to speak for more than 25,000 criminal defense lawyers nationwide.

Thank you for your consideration of NACDL's proposals. If the Commission requires additional information on any of these matters, we welcome the opportunity to provide it.

Very truly yours,

Judy Clarke
Judy Clarke
President

REPORT TO NACDL BOARD OF DIRECTORS
Exhibit 1

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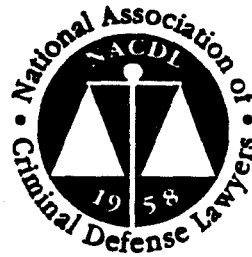
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NACDL SUMMARY OF PROPOSED AMENDMENTS

- 1. Safety Valve**
(§ 5C1.2)
Clarify that a criminal history departure operates to reduce the number of criminal history points for which a defendant will be held accountable making a defendant eligible for treatment under the safety valve
- 2. Substantial Assistance**
(§ 5K1.1)
Eliminate the requirement for a government motion for cases that do not involve a mandatory minimum sentence
- 3. Aberrant Behavior**
(§ 5K2)
Resolve a circuit conflict in favor of considering the totality of a defendant's life in assessing whether the defendant's offense amounts to a single act of aberrant behavior and move this ground from the introductory commentary of Chapter 1.

.....
EXECUTIVE DIRECTOR
Stuart M. Stutler

**PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES
FOR 1997**

1. Safety Valve

Amend the commentary to U.S.S.G. § 5C1.2, comment. (n.1) to explain that

More than 1 criminal history point, as determined under the sentencing guidelines," as used in subdivision (1), means more than one criminal history point as determined under ~~§ 4A1.1~~ ~~(Criminal History Category)~~ ~~§§ 4A1.1, 4A1.2 and 4A1.3.~~

Rationale: The departure methodology set out under § 4A1.3 involves a determination by the district court that criminal history points should be annulled (or added in) to account for criminal behavior which overrepresents (or underrepresents) the severity of a defendant's past criminal conduct. See United States v. Jones, 948 F.2d 732, 740 (D.C. Cir. 1991) (upward criminal history departure reasonable where it reflects an increased number of hypothetical criminal history points to account for behavior for which defendant has not been convicted); United States v. Summers, 893 F.3d 63, 68 (4th Cir. 1990) (sentencing court could exclude three criminal history points that corresponded to traffic offenses); see also United States v. Williams, 503 U.S. 193 (1992) (holding that § 4A1.3 departures amounted to an "incorrect application of the sentencing guidelines" as stated in 18 U.S.C. § 3742(f)(1).

This amendment will address the holding in United States v. Andrade-Valencia, 72 F.3d 770, 774 (9th Cir. 1995) which upheld the district court's determination that a defendant was not eligible for treatment under the safety valve because he had two criminal history points which resulted from two separate convictions for operating a motor vehicle while his license was suspended.

2. Substantial Assistance

Amend § 5K1.1 to read:

If the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, a downward departure may be warranted.

Rationale: This will bring § 5K1.1 in line with the congressional mandate in 28 U.S.C. § 994(n) which directs the Commission to "assure that the

NACDL PROPOSED AMENDMENTS

December 16, 1996

Page 2.

guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Section 994(n) does not make any reference to a government motion as a precondition to a lower sentence. The Supreme Court has recognized the Commission's power to promulgate such a guideline:

Although it is plain that under § 994(n), the Commission was at least authorized to create a system in which no Government motion of any kind need be filed before the district court may depart below the Guidelines minimum, neither party argues that the Commission has created such a system.

Melendez v. United States, 116 S. Ct. 2057, 2061 n.3 (1996) (emphasis original).

3. Aberrant Behavior

The Commission should resolve a split in the Circuits in favor of the rule in the First, Ninth and Tenth Circuits which requires district courts to consider the totality of a defendant's life in determining whether the offense of conviction constitutes aberrant behavior. Compare United States v. Grandmason, 77 F.3d 555 (1st Cir. 1996); United States v. Tsosi, 14 F.3d 1438, 1441-42 (10th Cir. 1994) (totality of circumstances must be viewed to see whether offense was normal conduct or a complete shock & out of character for defendant); United States v. Takai, 941 F.2d 738, 743-44 (9th Cir. 1991)(multiple incidents over six-week period were a single-act of aberrant behavior) with United States v. Marcello, 13 F.3d 752 (3d Cir. 1994); United States v. Andruska, 964 F.2d 640 (7th Cir. 1992); United States v. Glick, 946 F.2d 335 (4th Cir. 1991).