



**Written Statement of  
Lawrence S. Goldman**

**on behalf of the  
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

**before the  
United States Sentencing Commission**

**Re: Proposed Amendments to the Sentencing Guidelines  
and Issues for Comment in the Federal Register**

**March 25, 2003**

LAWRENCE S. GOLDMAN, ESQ. is a graduate of Brandeis University and Harvard Law School. Since 1972, he has been practicing criminal law in New York City, specializing in white-collar cases. From 1966 through 1971, he served as an assistant district attorney in New York County. Mr. Goldman is currently the President of the National Association of Criminal Defense Lawyers, and is a former chairperson of its continuing legal education committee, its white-collar committee and its ethics advisory committee. He is a member of the New York State Commission on Judicial Conduct, the executive committee of the Criminal Justice Section of the New York State Bar Association and the Advisory Committee on the New York Criminal Procedure Law. He is a past president of the New York State Association of Criminal Defense Lawyers, and a past president of the New York Criminal Bar Association. He has lectured at numerous bar associations and law school programs on various aspects of criminal law and procedure, trial tactics, and ethics. He has received the Outstanding Practitioner Awards of the New York Criminal Bar Association, the New York State Association of Criminal Defense Lawyers (the Thurgood Marshall Award) and the New York State Bar Association Criminal Justice Section (the Charles F. Crimi Award), and the Robert C. Heeney Award of the National Association of Criminal Defense Lawyers.

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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 more than 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.*

My name is Lawrence S. Goldman, and I am the president of the National Association of Criminal Defense Lawyers (NACDL), an organization of over 10,000 attorneys. I am also a practicing criminal defense attorney in New York City specializing in white-collar crime. I spend approximately one-half of my time on federal cases. I appreciate the opportunity the Commission has afforded me to speak on behalf of the NACDL.

I agree with the positions set forth in the papers of the Practitioners' Advisory Group (PAG) and the Federal Defenders, but I hope to put forth a somewhat different perspective. I would like to speak frankly on what further increases in sentencing for economic crimes will mean to a criminal justice system that already had been, as an unintended byproduct, warped somewhat by the Guidelines and the related practices of prosecutors.

Less than two years ago, after serious, deliberate and considerable discussions, this Commission significantly revised the Guidelines in its "Economic Crimes Package" (ECP). The result undoubtedly will be more severe sentences for persons convicted of economic crimes. While I disagree strongly with those changes, I respect the reasoned process used to reach them and understand the views of their supporters and of the Commission.

I see no reason, however, less than a year and a half later, that this Commission should promulgate another revision of the economic crime guidelines and the fraud loss table that would focus on low-end offenses. While I realize the Commission is operating under a "suggestion" from Congress in the Sarbanes-Oxley Act, as a result of high-profile corporate scandals and allegedly abusive accounting practices among senior officers of large corporations, to increase the sentencing ranges for all economic offenders, Congressional attention was not focused on those who cause relatively little economic harm. I note, in passing, our belief that the changes to the high-end of the fraud loss table in the emergency guidelines are harsh and unnecessary and,

more technically, involve elements of, if not legal, then practical, double-counting, in that many of the enhancement factors will necessarily be coupled with other enhancement factors. I am not, however, addressing this issue now.

In order to understand my perspective, let me speak in general about the effect of the Guidelines, particularly with respect to white-collar crimes.

It appears that in some instances there may be wrongdoing and perhaps criminality by senior executives, lawyers and accountants in major corporations. Our nation was, like the French police chief in Casablanca, “shocked” to learn this. Our regulatory agencies charged with policing these corporations are, or at least were, weak, understaffed and ineffective, and have abdicated much of their responsibilities to self-regulating industry organizations. We are under-regulated so that no clear notice is given to corporate officers or others of what conduct is prohibited. Our corporate leaders, on the one hand, are pressured hard to increase profits and share prices for their stockholders and, on the other hand, are asked to be careful to obey the law. Very simply, as any criminal lawyer (whether for the prosecution or the defense) knows, the law concerning economic crime is particularly unclear. “Fraud” is an amorphous term, defined largely at the whim of the prosecutor and the tolerance of the judge. I have practiced criminal law for over 36 years and still cannot tell you, for instance, the difference between tax evasion (which, of course, is a crime) and tax avoidance (which, of course, is not).

In a logical society, we would initially establish rules and civil sanctions in order to let our corporate officers and professionals know what they cannot do. Then, once these rules were established, we would exercise criminal sanctions when they are violated. That is not what happens in many federal cases: what happens is that the first governmental response to a perceived wrongdoing is a criminal prosecution, with its obvious heavy consequences.

In the vast majority of federal cases, the issue is not whether the acts underlying the crimes charged were committed or whether the defendant committed them, but whether he or she acted with criminal intent or mens rea. Every criminal defense lawyer knows that a substantial percentage of our clients accused, and often convicted, of crime did not believe that they were committing a crime or violating the law. Rather, their “crime” – and I put that in quotes – is that they had dreadfully bad judgment, what I call “criminally bad judgment.”

I go through this background so that you can understand that longer sentences are not the solution. Simply put, longer sentences will not have a deterrent effect because the purported criminals rarely believe that they are indeed committing a crime. A much better solution is strong rulemaking and vigorous prosecution in areas where there is clearly defined criminal activity.

The possibility of a downward departure for cooperators pursuant to § 5K1.1 hovers over every criminal case. Approximately one in five defendants under the Guidelines – and the percentage is roughly the same in white-collar cases – receive downward departures for substantial assistance. A large number of other defendants seek downward departures but either are too late or, in the worst situation for any defendant in the federal criminal justice system, are unable to give up someone else, either because his or her cooperation is unnecessary or because he or she is totally uninvolved in any other criminality.

An unintended result, particularly in white-collar cases, is that the bar for prosecution and conviction has been lowered considerably. Immediately after being retained, defense lawyers understandably urge a sizable number of defendants to rush to the prosecutor’s office and make a proffer. The sine qua non of cooperation generally is that the defendants admit to guilt and that they intended to commit a crime. Indeed, many of these defendants and many of those against

whom they later testify actually did not believe that they were committing crimes, but juries are rarely persuaded by this defense when raised. Statistics reflect the new role of the defense lawyer: 97% of federal defendants plead guilty and roughly 17% receive downward departures for cooperation. That means that the average criminal defense lawyer represents six cooperators for every client who goes to trial.

With this background, let me address specifically the question of whether there should be further increases in the fraud table. Let me remind you, with apologies for the obvious, that every federal criminal defendant sentenced under the Guidelines may receive a prison sentence. Even the theft of a candy bar on federal territory, an Offense Level One, is punishable by up to six months in jail. The dispute is not so much whether defendants can be sentenced to jail but who controls the decision – judges or prosecutors. The prosecutors want to change the rules to give them more power – power to punish relatively small-time offenders more severely and to hold over their heads the hammer of incarceration in order to get them to testify against others. They do not need increased sentences to get people to testify against higher-ups. Practical experience with the Guidelines shows that there is a rush to the prosecutor's office of defendants at all levels anxious to cooperate. The prosecutors want to change the rules, however, to make it even easier for them to win cases, something they are able to do with high statistical rates of success. We should remember that the government is just one party to a lawsuit, but it wants to change the rules to gain a further advantage. It is as if the Yankees, in the days of Babe Ruth, wanted every home run to count for five runs.

I had a recent case in which an experienced senior judge refused to accept an agreed-upon downward departure based in part on the defendant's cooperation. He said that cooperation had made the government lazy and that it should go back to making cases the old-fashioned way

– by investigating – rather than by relying on cooperators to make all their cases. Indeed, there is some truth to this. We do not need increased sentences at all, let alone for low-level offenders.

I understand the political pressures on the Commission, but it must remain as it was conceived, as an independent and knowledgeable buffer between the various factions seeking change. Congress made no specific suggestion with relation to the lower-ends of the fraud table. We should give the 2001 Economic Crimes Package a chance. We should await the outcomes of the high-profile cases that have been brought or will be brought before we again ratchet up sentences for every economic crime. We should recognize that prisons are not free and that it costs our taxpayers money to keep someone in prison – money that, with the new costs of war, rehabilitation of a foreign nation and increased homeland security, will be even tighter.

Indeed, in many districts, the cases at the bottom range, which the Department of Justice now claims are so serious that they require mandatory jail sentences, are not prosecuted. In many districts, fraud under \$50,000 – and I have heard even higher figures – are as a matter of policy declined by federal prosecutors or referred to local authorities.

One of the purposes of the Sentencing Guidelines is uniformity of sentences throughout the country. In the death penalty area, the Department of Justice has argued that local standards are unimportant and has pressed hard for such uniformity; on that ground, the Department has overruled local prosecutors when they have chosen not to seek death. By increasing sentences for low-level economic crimes, we increase disparity. For the same conduct, prosecutors will in one district bring charges and obtain convictions for comparatively minor crimes, while prosecutors in another will not even bring charges. But this disparity is small compared to the greatest disparity in sentencing outcomes -- the disparity in sentences for those few who exercise their constitutional right to trial and those who cooperate and receive downward departures.

With respect to the continuance of the emergency guidelines at the higher end of the table, let me make a brief comment. We should be wary of sentences that are expressed in decades and scores or lifetimes, especially those that are based on factors that do not require the scrutiny of a jury or the beyond-a-reasonable-doubt standard. Many white-collar crimes are committed by those who are desperate to keep their jobs or their companies going, or out of misguided loyalty or for other understandable human reasons, or due to extremely poor judgment. The statistics show over the years that sentences for white collar crimes are continually increasing and undoubtedly will increase more substantially after we see the effects of sentences determined under the 2001 Economic Crimes Package. White-collar sentences are already at parity with sentences involving narcotics and violence.

I submit to you that we have gone far enough.

Thank you for your consideration.