



U.S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

APR 7 1987

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

One of the primary areas of concern with the Revised Draft Guidelines is the effect of the 25 percent rule set forth in 28 U.S.C. §994(b)(2) on the use of sentencing ranges consisting of several offense levels for particular offense or offender characteristics. To the extent the guidelines authorize the sentencing judge to choose, in the exercise of broad discretion, from among various offense levels so that a term of imprisonment to be imposed could vary by more than 25 percent or 6 months, depending upon the particular level chosen, we firmly believe that the guidelines violate the mandate of 28 U.S.C. §994(b)(2).

Section 994(b) of title 28, United States Code, imposes significant restrictions on the Sentencing Commission in the development of sentencing guidelines. It requires the establishment of a sentencing range for each category of offense involving each category of defendant that provides no more than a 25 percent or six-month variation in a term of imprisonment, whichever is greater. The provision states:

(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

The Revised Draft Sentencing Guidelines provide a sentencing table establishing 43 offense levels, each with a range of

approximately 25 percent, except for the lowest offense levels, for which the range is six or fewer months. If the sentencing judge in all instances were limited to applying one of the offense levels for a particular factor, there would be no violation of the 25 percent rule in the law. However, there are numerous instances in which the guidelines direct the judge to increase or decrease the offense level for a particular sentencing factor by, for example, a range of one to four levels. Because each offense level provides for variation in a term of imprisonment to the maximum extent authorized by law, any direction in the guidelines to choose from among two or more levels could potentially authorize a sentence of imprisonment in which the maximum of the range exceeded the minimum by more than 25 percent or six months. The only exception to this conclusion relates to the first five offense levels, for which the full statutory six-month range has not been utilized.

The sentencing choices a judge would face under the Revised Draft Guidelines can be illustrated by a bribery case. The guidelines direct the judge to determine the base offense level by selecting a value from the range of offense levels 10 to 15, depending upon the extent and duration of the offense (§C211), and to enhance it by an additional 1 to 8 offense levels. Overall, therefore, the judge could choose an offense level from a range that varied from a minimum of 8 months to a maximum of 57 months of imprisonment -- over 700 percent. If the offense involved others and the defendant's role was one of organization or leadership, the guidelines direct the judge to increase the offense level by 1 to 6 levels (§Z211), which could increase the maximum term of imprisonment to 108 months. After this adjustment, the overall range is potentially 8 months to 9 years -- or 1350 percent. As can be seen from this example, the wide variation in the offense level for the specific offense is compounded by the application of a general offense characteristic, which also provides an unjustifiably broad range. Two offenders with similar backgrounds convicted of the same bribery offense, with the same degree of involvement, could face vastly different sentences depending upon the sentencing predilections of the particular sentencing judge, despite the fact that both sentences would be imposed under a sentencing guideline system.

Bribery is not the only offense for which the guidelines authorize the use of a range of more than one offense level. Involuntary manslaughter provides a range of four offense levels or a 350 percent range in prison terms (§A216); use of a dangerous weapon in an assault case provides a three-level range, or a 176 percent variation in prison terms (§A221); and transporting hazardous material aboard an aircraft is subject to a range of 8 levels -- a 2400 percent range (§K231). There are many more examples. In each case any direction to the judge as to how to choose a level from within the range provided is very general. For example, the guideline for various military offenses, including incitement to insubordination, disloyalty, and mutiny, qualifies a range of five offense levels by the phrase "depending upon the nature and circumstances of the offense" (§M241).

Wide ranges for offense and offender characteristics are inconsistent with, and undermine, the purposes of the Sentencing Reform Act. The essential premise behind the Sentencing Reform Act is that unfettered judicial discretion in sentencing has resulted in a system characterized by uncertainty, unwarranted disparity, and a lack of fairness. Simply stated, unwarranted disparity caused by broad judicial discretion is the ill that the Sentencing Reform Act seeks to cure. Thus, the Act specifically requires the sentencing court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. §3553(a)(6). The provisions of law that establish the Sentencing Commission restate this purpose as one of the Commission's missions. 28 U.S.C. §991(b)(1)(B).

Limitations on judicial discretion are prominent features of the Sentencing Reform Act. The requirement to develop a guideline system, the mandate to sentence within the guidelines unless the court finds an aggravating or mitigating circumstance that was not adequately considered in the formulation of the guidelines, and the appeal mechanism for sentences that are outside the guidelines or that result from their incorrect application are all designed to limit discretion in sentencing and to eliminate unwarranted sentencing disparity. However, unjustifiable disparity is built into the guideline system under the Revised Draft by virtue of the broad ranges provided for many offense and offender characteristics. In essence, broad discretion is returned to the judges in the form of guidelines. Without greater limitations on judicial discretion in a guideline system, such a system could have all of the shortcomings of past practice -- unwarranted inconsistency, lack of fairness, and lack of certainty -- without the simplicity that the old system provided.

In connection with the enactment of an exception to the 25% rule for sentences at either end of the spectrum, the House Subcommittee on Criminal Justice addressed the importance of curtailing discretion through operation of the rule and other features of the Sentencing Reform Act:

The philosophy behind the Sentencing Reform Act is to restrict the discretion of the various participants in the sentencing process. The discretion of sentencing judges is restricted by the requirement that they sentence within the applicable guideline, except in extraordinary circumstances, and by appellate review of the sentence if they do not. The 25% rule restricts the Sentencing Commission's discretion in order to guard against the return of broad discretion to the sentencing judge by the promulgation of wide sentencing guidelines. H.R. Rep. No. 614, 99th Cong. 2d Sess 6 (1986).

Congress believed that the 25 percent rule it enacted in 1984 constituted a meaningful restriction or it would have found little need in 1986 to provide an exception to it.

The legislative history of the Sentencing Reform Act itself indicates that the Senate Judiciary Committee considered the provision setting forth the 25 percent rule "of major significance." S. Rep. No. 225, 98th Cong. 1st Sess. 168 (1983). The report further reveals that the Judiciary Committee contemplated a guideline system characterized by many finely graded distinctions:

For a particular penal offense ... while there might be numerous guideline ranges, each keyed to one or more variations in relevant factors, no one particular guideline range may vary by more than 25 percent from its minimum to its maximum; all the ranges together, however, would be expected to cover the spectrum from no, or little, imprisonment to the statutory maximum, or close to it, for the applicable class of offense. ... The Committee expects the Commission to issue guidelines sufficiently detailed and refined to reflect every important factor relevant to sentencing for each category of offense and each category of offender, give appropriate weight to each factor, and deal with various combinations of factors. Id. at 168-169.

Guidelines which provide a range of several offense levels for a factor and grant the judge discretion to determine which specific level should represent the factor simply fail to meet the standard of refinement which should characterize sentencing guidelines under the Sentencing Reform Act. Moreover, general guidance to the judge as to how to choose a point within the applicable range does not save the system devised since it, too, fails to assure that unwarranted sentencing disparity will not be perpetuated. It is difficult to imagine any reasonable degree of uniformity arising under such criteria as "depending upon the use made of the weapon" (§A221) or "depending upon the nature of the defendant's conduct and any personal benefit derived or expected to be derived from the offense" (§E221). Moreover, judicial review involving these standards is unlikely to be very meaningful. Only if these criteria were transformed into specific gradations within the guideline ranges provided would they reduce unwarranted sentencing disparity sufficiently to warrant our support. To the extent these specific gradations omit a factor relevant to a particular case or fail adequately to take a factor into account, the judge would be authorized by law to sentence outside the guidelines. 18 U.S.C. §3553(b).

One final point for consideration with regard to the 25 percent rule is the suggestion that it does not apply to intermediate steps in the sentencing process under the guidelines. That is, it may have been argued by some that since the final range facing the sentencing judge after application of the

guidelines is limited to one level or 25 percent variation in the length of imprisonment, the statutory criteria are satisfied. First, the guidelines do not assure that the use of ranges is limited to intermediate steps in the sentencing process. Ranges would be used often in the final calculation under the guidelines as drafted, either with respect to specific offenses where there is no adjustment for any general characteristic or with respect to the general characteristics themselves.

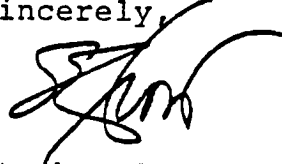
More importantly, whether broad ranges are incorporated into the guidelines at an intermediate stage or at the final application is irrelevant. In both cases the 25 percent rule would be violated. If during the sentencing process the judge may in his or her discretion increase or decrease the prior calculation by a range of, for example, one to four levels, the whole range applicable to the specific set of offense and offender characteristics is increased or decreased by one to four levels and, consequently, by more than 25 percent in the length of imprisonment. This result is no different from one that would be dictated by sentencing guidelines that provided no ranges in intermediate steps of application but which directed the judge to increase or decrease the final result by one to four levels, depending upon the nature and circumstances of the offense.

If the Sentencing Reform Act authorized the use of sentencing ranges for specific factors used in intermediate steps in the application of the guidelines, it would be difficult to make sense of the requirement imposed on the court to state the reason for imposing a sentence at a particular point within an applicable range. 18 U.S.C. §3553(c)(1). If this mandate only applied to the judge's choice of sentence from the 25 percent range represented by the one offense level finally resulting from application of the guidelines, then the judge would be required to explain his determination concerning a narrow range while free to choose from a broad range during intermediate steps without explanation. On the other hand, if this requirement to pinpoint the reason for a particular sentencing point within each range applied throughout the sentencing process, the judge would be forced to explain many decisions along the way. (The language of this provision does not on its face support the concept of many explanations.) While the guidelines are less complicated by the use of ranges, the judge's task is not.

For all of these reasons, the Department strongly urges that the guidelines be revised to conform to the 25 percent rule by

substituting for the many guideline ranges that vary by more than 25 percent in the length of imprisonment specific gradations which take into account and weigh the factors relevant to these ranges.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Trott', with a stylized flourish extending from the end.

Stephen S. Trott
Associate Attorney General