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January 5, 1988

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

Dear Chairman Wilkins:

In my capacity as chairperson of the American Bar Association's, Criminal Justice Section, Committee on the U.S. Sentencing Commission, I would like to submit the following comments on the Commission's proposed amendments to the Sentencing Guidelines manual of October, 1987. While the Association appreciates the opportunity to comment on the proposed guideline revisions, it is our belief that the manner of their adoption raises significant issues about the Commission's processes.

As you are aware the Association, through our Committee, has participated extensively in the public processes associated with the adoption of the Commission's Sentencing Guidelines. In addition we have actively participated in Congressional hearings and other public forums which have addressed the issues raised by the Sentencing Guidelines. In our most recent testimony before the United States Senate, Committee on the Judiciary, we expressed our concern that the Commission's process during the critical initial implementation phase should be a full, open and public one. The proposed guideline amendments were not made available to the American Bar Association until December 23, 1987. Given the holiday week, our preparation of our comments has been a difficult task. It is our understanding that there has been no public announcement or general distribution of the proposed amendments for public comment.

The following comments are no substitute for open public consideration of modifications to the guidelines. Regardless of the technical or minor nature of any guideline changes we urge

the Commission to adopt a policy of submitting any proposed changes for public comment. Any comment period should build-in a sufficient amount of time for the Commission to consider the comments and if appropriate, make changes in proposed guideline revisions. Additionally we urge the Commission to consider the feasibility of conducting hearings on any future proposed guideline revisions.

The emergency guideline promulgation authority established by § 21 of the Sentencing Act of 1987, Public Law 100-182, requires a finding that a change to the guidelines is "urgent and compelling." There is no indication on the face of the Sentencing Act of 1987 if such authority in any way curtails the requirements of 28 U.S.C. § 994(x) relating to publication in the Federal Register and public hearing procedures. In the event that the Commission interprets its emergency authority as not requiring compliance with these procedures, we urge the Commission as a matter of policy to adopt procedures for public comment and hearing applicable to the exercise of its emergency guideline promulgation authority.

The proposed amendments to the Sentencing Guidelines contained in draft Appendix C appear to be largely technical or corrective in nature. We have not had an opportunity to fully analyze all of the proposed amendments, but we find the majority to be without objection. The Association would, however, like to comment upon the following specific amendments.

1. Section 2B1.2. Receiving Stolen Property - Unlike the bulk of the proposed amendments which appear to be technical or clerical in nature the proposed transposition of the two subsections will have the effect of substantially increasing the potential sentences under this guideline.

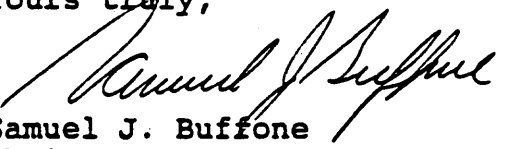
2. Section 2D1.1. Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit these Offenses) - The proposed amendment to commentary paragraph 11 invites consideration of quantities of drugs not specified in the count of conviction and references section 1B1.3(a)(2) dealing with relevant conduct. This subsection in turn permits consideration of conduct and circumstance relevant to the offense of conviction only to the extent they are relevant to the defendant's state of mind or motive in committing the offense of conviction. The Association believes that without further guidance authority to consider uncharged offenses as relevant only to the narrow determination of state of mind or motive warrants further clarification by the Commission. In general the Association believes that the relevant conduct provisions of § 1B1.3 warrant further clarification and reconsideration by the Commission.

3. Section 3A1.2. Official Victims - The proposed deletion of the term "directly victimized" in the commentary notes may lead to uncertainty over the appropriateness of considering indirect victimization or injury. Additionally the change in the second sentence creates the potential that the court will consider the victimization of an organization, agency or the government itself as an enhancing factor in the event that there is some other specified victim in addition to these organizational victims.

4. Section 3E1.1. Acceptance of Responsibility. The proposed amendment of the acceptance of responsibility standard contained in subparagraph a, to require acceptance of responsibility beyond the offense of conviction to "criminal conduct" introduces unnecessary ambiguity into this important provision of the guidelines. Limiting the acceptance of responsibility standard to offense of conviction provides clarity to the sentencing court in making this difficult determination. The proposed amendment would require the court to first ascertain the nature of criminal conduct beyond the offense of conviction. The Association anticipates that situations will frequently arise where an individual will accept responsibility for his offense of conviction in a plea bargain situation but will dispute other portions of allegations against him. Such disputes, even as to minor allegations, will preclude the downward adjustment associated with acceptance of responsibility.

The Association appreciates the opportunity to submit these comments to you. We are hopeful that they will be of assistance to the Commission.

Yours truly,

  
Samuel J. Buffone  
Chairperson  
American Bar Association  
Section of Criminal Justice  
Committee on United States  
Sentencing Commission

SJB/ro

cc: John Steer

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January 15, 1988

Samuel J. Buffone, Esq.  
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Dear Sam:

Thank you for your letter of January 5, 1988, commenting on the emergency amendments to the Sentencing Guidelines. Immediately upon receipt, your letter was circulated to all Commissioners for their information and review. We appreciate the American Bar Association's continued interest in, and contribution to, the work of the Sentencing Commission. Throughout the process leading to the adoption of these very limited amendments, the Commission has remained responsive to public input.

Although the guidelines submitted to Congress last spring were generally workable, they contained a number of clerical errors, and several key provisions did not unambiguously convey the Commission's intent. Initially, it was not within the Commission's authority to promulgate emergency guideline amendments. Consistent with its authority to clarify the commentary accompanying the Guidelines, however, the Commission issued revised and reorganized commentary in the form of its October, 1987 Guidelines Manual.

On November 20, 1987, the Commission published the entire Guidelines Manual in the Federal Register. The Commission specifically invited public comment on the revised commentary and solicited other suggestions for improving the guidelines and policy statements. Additionally, the guidelines training process, and continued review by the Commission and its staff, revealed areas in which corrective or clarifying changes might preclude unnecessary application errors and potential litigation.

Subsequently, the Sentencing Act of 1987 granted the Commission emergency guideline promulgation authority (Pub. L. No. 100-182, §21). At its December 16 meeting, the Commission

utilized its emergency authority to adopt formally the revised commentary and to adopt a small number of technical, clarifying and conforming amendments to the Guidelines. Several additional amendments were adopted by the Commission at its January 5 meeting. (These amendments were obviously not included in the material sent to you on December 23. I enclose a complete set of amendments herewith.) These amendments incorporate no new policy judgments by the Commission. The amendments are merely intended to correct clerical errors and to illuminate the Commission's intent, where necessary.

The Commission enacted these clarifying amendments promptly in order to avoid guideline application errors which might result in substantial injustice and needless litigation. The legislative history of Public Law 100-182 supports the Commission's decision to exercise its authority in this manner. In addition, the Commission concluded it was appropriate to use this opportunity to incorporate several important statutory changes embodied in recent legislation. See, e.g., §5D3.2 (maximum term of supervised release); §5E4.2 (maximum fines).

It is the Commission's understanding that the advance notice, comment and hearing provisions of the Administrative Procedure Act do not apply to the issuance of emergency guidelines under section 21 of the Sentencing Act of 1987. The lengthy periods of deliberation required by the A.P.A. are entirely inconsistent with the technical nature of these amendments and the need for their prompt adoption. In any event, the A.P.A. itself contemplates the promulgation of regulations without advance notice and comment when advance notice is "impracticable, unnecessary or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B).

The Commission intends to expose these amendments to thorough public scrutiny before they are proposed as permanent changes. Accordingly, they will be published in the Federal Register of January 15, and, although not required under the 1987 Sentencing Act, they will be forwarded to Congress. The Commission has tentatively scheduled a public hearing for March 21 and 22, at which all interested parties will have an opportunity to comment on both these emergency amendments and other proposals for improving the Sentencing Guidelines. If, as the Commission anticipates, the emergency guidelines serve a salutary purpose, they will then be formally submitted to Congress along with any other proposed amendments by May 1, 1988, pursuant to 28 U.S.C. § 994(p).

It is also important to note that there were several proposed amendments the Commission did not adopt at its December 16 and January 5 meetings because, in our judgment, they represented a shift in policy and therefore could not be fairly characterized as clarifying amendments. Such amendments will be

considered in the coming months under the more deliberative procedures embodied in the Sentencing Reform Act of 1984.

I am pleased that you conclude that the amendments "appear to be largely technical or corrective in nature." That is the Commission's view as well. Let me now respond to your specific comments about the emergency guidelines.

1. §2B1.2 (Receiving Stolen Property). You suggest that the transposition of §2B1.2(b)(2) and §2B1.2(b)(3) increases the length of sentences under this section of the Guidelines. While that may be a result of the amendment, it was not the reason for the amendment's adoption. The amendment merely corrects a clerical error in the April 13 version of the Guidelines. The Commission always intended §2B1.2 to parallel §2B1.1, under which the theft of a firearm, destructive device or controlled substance serves to increase the offense level to at least level seven before factors such as the degree of planning are considered. Evidence of the Commission's intent appears in the October commentary to §2B1.2, note (3), which directs a court to consider §2B1.2(b)(3) before §2B1.2(b)(2). The fact that the new amendment may adversely affect a defendant is no reason to refrain from correcting a clerical error.

2. Section 2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking of Controlled Substances). You do not appear to criticize the substance of amended Application Note 11. Rather, you correctly point out that the new reference to §1B1.3 in Application Note 11 makes it even more important that the meaning of §1B1.3 (Relevant Conduct) be clarified.

The Commission has long recognized that a clear understanding of relevant conduct is essential to the proper application of the Guidelines. Training programs demonstrated that the April 13 version of relevant conduct caused considerable confusion. For this reason, the Commission voted to revise §§1B1.3 and 1B1.4 at its January 5 meeting. The revision is included in the enclosed set of amendments.

Relevant conduct is such an important element of the guidelines that the Commission concluded that its clarification was "urgent and compelling" within the meaning of the Sentencing Act of 1987. Here again, the emergency amendment does not represent any new policy judgment, only a clearer articulation of what the Commission always intended and what it has explicitly stated elsewhere in the Guidelines. The meaning of Application Note 11 to §2D1.1 should be more apparent now that §1B1.3 has been reformulated.

We are aware that relevant conduct remains a difficult and controversial concept. The Commission continues to seek input in this area from interested parties.

3. §3A1.2 (Official Victims). An organization, agency, or the government may never be an "official victim" within the meaning of this section. The Commission has attempted to state this policy plainly. The section has been amended to enhance its clarity. If the amendment has not fully accomplished this purpose, the Commission welcomes public comment which may assist us to achieve clarity.

Your letter expressed concern that the revised commentary invites a court to consider "indirect victimization." If your use of the phrase "indirect victimization" refers to a defendant's unintended victimization of a law enforcement official, I would refer you to §3A1.2 itself, which precludes the enhanced penalty unless "the crime was motivated by [the victim's] status." If by "indirect victimization" you mean secondary victimization, *i.e.*, a bank robber injures both the bank teller and the uniformed police officer pursuing the defendant from the bank, the Commission intends to permit an enhancement when that aggravating circumstance is present.

4. §3E1.1 (Acceptance of Responsibility). This amendment merely clarifies what has always been the Commission's view of Acceptance of Responsibility. As you know, the Guidelines do not award the defendant an automatic sentence reduction because he pleads guilty. Rather, a defendant must demonstrate sincere remorse before he is entitled to a reduction under this section. Use of the phrase "offense of conviction" in the April 13 Guidelines inadvertently suggested that a defendant might qualify for the sentence reduction by a grudging, rehearsed admission that he engaged in conduct constituting the elements of the offense of conviction. Such a hollow expression of contrition should not entitle the defendant to the sentence reduction. Substitution of the phrase "his criminal conduct" for "the offense of conviction" authorizes a court to undertake a broader evaluation of the sincerity of a defendant's remorse.

We certainly do not intend or expect that §3E1.1 will preclude a downward adjustment for a defendant who disputes any part of the Government's allegations against him. In spite of such disputes, a court may well find that a defendant has "clearly demonstrate[d] a recognition and affirmative acceptance of personal responsibility for his criminal conduct." §3E1.1(a). The sentencing judge is uniquely qualified to make this determination. See, §3E1.1, Application Note 5.

The Commission stands by the amendments it has recently adopted and the process by which they were adopted. Without the immediate promulgation of these clarifying amendments, there was a significant possibility that key provisions in the Guidelines would be misinterpreted and inappropriate sentences would be imposed as a result.

On April 13, the Commission referred to its initial guidelines as "the first step in an evolutionary process." Sentencing Guidelines at page 1.4. The emergency amendments are yet another step; the evolutionary process continues. We welcome the continued participation of the American Bar Association in the ongoing effort to create a more honest, equitable and effective sentencing system.

With kindest regards,

Sincerely,

A handwritten signature in cursive script that reads "Billy Wilkins".

William W. Wilkins, Jr.  
Chairman

Enclosure