



United States Department of Justice

DEPUTY ASSISTANT ATTORNEY GENERAL

CRIMINAL DIVISION
WASHINGTON 20530

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

Re: Emergency Amendment Comments

Dear Billy:

We have reviewed the proposed emergency sentencing guideline amendments recently proposed by the Sentencing Commission concerning cocaine base ("crack") and obscene materials. We urge the Commission not to promulgate these amendments as emergency amendments because we believe that the authority of the Commission to issue them under section 21 of the Sentencing Act of 1987 is questionable. We also have serious reservations about the substance of these amendments and, therefore, urge the Commission not to promulgate them in their present form when the opportunity arises under the normal amendment process.

Emergency Amendment Authority

We turn first to the issue of the use of the emergency amendment authority under section 21(a)(2) of the Sentencing Act of 1987, Pub. L. No. 100-182, to promulgate the amendments in question. This provision authorizes the Commission, in the case of the creation of a new offense or amendment of an existing offense, to promulgate "a temporary guideline or amendment to an existing guideline, to remain in effect until and during the pendency of the next report to Congress" under the regular amendment process, 28 U.S.C. §994(p). A section-by-section analysis that appeared with the bill that became the Sentencing Act of 1987, S. 1822, when it was passed by the House, states that a narrow construction of the Commission's emergency powers should apply:

It is expected that the Commission will use the authority to promulgate emergency guidelines only in truly emergency circumstances. If a guideline is invalidated, a new offense is created, or an existing offense is modified, an emergency guideline may be unnecessary because 18 U.S.C. 3553(b) may adequately addresses

[sic] situations where there is no applicable guideline. In such circumstances, the Commission should submit a new or revised guideline to Congress in manner [sic] called for in 28 U.S.C. 994(p). 133 Cong. Rec. H10019 (daily ed. Nov. 16, 1987).

We agree with the view that the Commission should judiciously exercise its emergency amendment power, which allows it temporarily to by-pass the normal period of guideline review by Congress. However, neither the proposed crack amendments nor the proposed obscenity amendments in our opinion reflect this approach. On the contrary, they result from an overly broad reading of the Commission's emergency amendment authority and one that will likely cause considerable litigation and may result in an unfavorable ruling. Such litigation would divert Department resources from more important sentencing and other criminal law matters, possibly engender a negative reaction to the emergency amendment process in general on the part of the judiciary and the Congress, and ultimately undermine the Commission's ability successfully to seek an extension of the emergency authority, which is due to expire November 1, 1989, should the Commission wish to pursue this course. Moreover, we point out that overreaching by the Commission in the use of its emergency amendment authority and revising of guidelines related to, but not directly affected by, a statutory change will result in unwarranted sentencing disparity between offenses committed before the effective date of a guideline change and those committed thereafter. An expansive use of the emergency amendment authority in essence violates Congress's intent reflected in the rigorous requirements of the regular amendment process.

Crack

Turning first to the crack amendments, we note that they purport to respond to an amendment of the simple possession statute, 21 U.S.C. §844, by section 6371 of the Anti-Drug Abuse Act of 1988. This provision establishes a mandatory term of imprisonment of five to 20 years for anyone convicted of possessing (1) more than five grams of a mixture or substance containing cocaine base, (2) more than three grams of such a mixture or substance after a previous conviction under section 844(a) for such possession, and (3) more than one gram of such a mixture or substance after two or more previous convictions under section 844(a) for such possession. Prior to this amendment a person convicted under section 844(a) for a crack offense would have been subject to a maximum term of imprisonment of one year for a first offense, regardless of quantity; this one-year term still applies to quantities not covered by the 1988 crack amendments.

Also relevant is the statute prohibiting the manufacture, distribution, and possession with intent to distribute controlled substances, which establishes substantial mandatory penalties for specified quantities of crack. It provides a mandatory penalty

of five to 40 years for a first offense involving five or more grams of a mixture or substance containing cocaine base, 21 U.S.C. §841(b)(1)(B)(iii), and 10 years to life for a first offense involving 50 or more grams of such a mixture or substance, 21 U.S.C. §841(b)(1)(A)(iii). Thus, possession with intent to distribute crack in amounts of five grams or more was already subject to at least a five-year mandatory penalty prior to the 1988 amendment of the simple possession statute. In addition, possession with intent to distribute five grams or more of crack was already subject to higher maximum penalties -- either 40 years or life, depending upon the quantity involved -- than the 20 years now provided by the possession provision. The net effect of the Anti-Drug Abuse Act crack amendments was: (1) to eliminate the need to prove an intent to distribute (which can be inferred from sufficient quantities), and (2) to establish mandatory penalties that did not exist under the distribution statute for amounts less than five grams. However, these new mandatory penalties for less than five grams only apply to second and subsequent convictions under the simple possession statute.

The Commission's proposal amends guideline §2D2.1, applicable to simple possession offenses, by changing the offense level from six to eight for possession of crack in amounts not subject to the enhanced penalties added by the Anti-Drug Abuse Act of 1988. In addition, the Commission's proposal changes the drug quantity table in guideline §2D1.1, applicable to drug distribution offenses (including possession with intent to distribute) and drug importation offenses, by halving the amounts of crack subject to each offense level specified. Whereas under the current table five to 19 grams of crack are subject to offense level 26 (which corresponds to the mandatory-minimum five-year prison term), the proposed guideline would make this offense level applicable to just 2.5 to 9.9 grams of crack. ^{1/} The drug quantities for other drugs would remain unchanged. Finally, the proposed amendments include a cross-reference to the drug quantity table for crack possession offenses subject to the mandatory penalties of the amended possession statute. That is, the amendments direct the user of the guideline relating to simple possession, §2D2.1, to apply the drug distribution guideline, §2D1.1, which includes the drug quantity table, to offenses that involve the simple possession of the quantities of crack specified in the 1988 Anti-Drug Abuse Act amendments.

^{1/} The Commission's proposal also cuts the crack quantities in half in the proposed drug quantity table included in the sentencing amendments submitted to Congress May 1, 1989. We note that in item three of these amendments a mistake is present: "1.5 KG" should be changed to "2.5 KG" in the phrase "At least 750 G but less than 1.5 KG of Cocaine Base."

The Commission's proposed revisions increase sentences for crack possession and distribution offenses across-the-board. However, the 1988 crack amendments do not in our view reflect a congressional judgment that crack offenses generally have been subject to sentences that were too low in the past. Congress merely amended the penalties in a manner that increases them for subsequent offenses involving less than five grams of the drug. To read into the 1988 amendments an intent by Congress to bring about higher crack penalties for all amounts is simply not consistent with what Congress actually did. The 1988 statutory amendments do not, therefore, justify in any direct way the sweeping changes to the guidelines the Commission proposes.

While we do not agree with the use of the emergency authority in the manner proposed, we, nevertheless, believe there are ways the Commission can respond to the Anti-Drug Abuse Act crack amendments appropriately through use of the emergency amendment power. For example, the Commission could provide a cross-reference in guideline §2D2.1 to the existing drug quantity table in guideline §2D1.1 for cases involving conviction under 21 U.S.C. §844(a) involving the mandatory penalties, i.e., Amendment 1 of the package recently published, but without the change in the table contained in Amendment 3. In addition, it could provide an augmented offense level based on the new mandatory minimum penalties for subsequent offenses involving less than five grams of crack. The applicability of such an amendment to both subsequent simple possession and subsequent manufacture, distribution (including possession with intent to distribute), and importation offenses would be appropriate. It would reflect the belief that higher penalties for small amounts of crack involved in a simple possession case should also apply to such quantities when the government can in fact prove an intent to distribute, an importation, or other specified element of the more serious offense. (It is likely, however, that the simple possession statute will be used in such cases.)

We believe that amendments of the type we suggest are consistent with the goals of the Sentencing Reform Act of 1984. These goals are made applicable to the Commission's emergency amendment power by the requirement in section 21 of the Sentencing Act of 1987 that the Commission act in a manner "consistent with all pertinent provisions of title 28 and title 18, United States Code." We disagree with the notion that it is necessary or advisable, in order to preserve proportionality or to avoid unwarranted disparity, to amend the drug quantity table in its entirety in responding to the 1988 statutory changes relating to small quantities of crack. In the 1988 crack amendments Congress specifically provided that the possession of small quantities of crack by repeat offenders is a more serious offense than possession of small quantities of crack by first-time offenders and possession of proportionally small quantities of other controlled substances. Revising only the guidelines applicable to small quantities of crack involved in repeat offenses to reflect the new mandatory minimum penalties would not result in unwarranted

sentencing disparity in our view, but rather, a justifiable difference reflecting the congressional judgment that certain repeat crack offenses are more serious than offenses involving other drugs. In the case of repeat offenses involving less than five grams of crack, Congress has specifically negated the ratio among quantities of certain drugs set forth in 21 U.S.C. §841(b)(1)(A) and (B) and has established a new ratio.

Obscenity

We consider next the power of the Commission under its emergency amendment authority to promulgate the proposed obscenity guidelines amending §2G3.1, Amendment 4 of the package recently published for comment. The Commission's purported reason for the amendment is to establish a guideline that covers two new offenses created by the Anti-Drug Abuse Act of 1988: (1) possession with intent to sell and sale of obscene matter in areas of federal jurisdiction and on federal property, 18 U.S.C. §1460; and (2) engaging in the business of selling or transferring obscene matter, 18 U.S.C. §1466.

The Commission's proposal completely restructures guideline §23G.1, which at present applies to obscenity offenses in 18 U.S.C. §§1461-1463 and 1465, and makes this guideline applicable to the new offenses. Currently, the guideline establishes a base offense level of six, with specific offense characteristics providing: (1) an increase of at least five levels if the offense involved distribution for pecuniary gain; and (2) a four-level increase if the material portrayed sadomasochistic conduct or other type of violence. In addition, the current guideline includes a cross-reference to the guidelines on criminal enterprise and racketeering offenses.

The proposed amendments would raise the base offense level to a level selected by the Commission from between 12 and 16 if the offense involved distribution for pecuniary gain and to either six or eight otherwise. The specific offense characteristics included in the proposal provide for an increase corresponding to the retail value of the material, but this increase only comes into play if the value is more than \$2,000. A new specific offense characteristic is included for "engaging in a pattern of distributing the obscene matter to persons under eighteen years of age." Finally, a cross-reference to the child pornography guideline, §2G2.2, is included if the offense involved the visual depiction of a person under eighteen years engaging in or assisting another person to engage in sexually explicit conduct. The proposal deletes the existing specific offense characteristic for violent conduct and the cross-reference to the racketeering guideline. Depending upon which base offense level is chosen, the net effect of the changes to guideline §2G3.1 could significantly increase the punishment for material that does not portray violent conduct or lower it for conduct which does portray such conduct.

We perceive almost no relationship between the proposed amendments and the creation of the two new offenses by Congress, with the possible exception of the creation of the new cross-reference. The existing obscenity guideline applies to offenses which in our view are inherently as serious as the newly created offenses and carry maximum terms of imprisonment at least as great as those established in the new offenses. We understand the argument for restructuring the existing guideline to be that the Commission in developing a guideline to cover new offenses under its emergency amendment authority need not be bound by existing offense levels for related offenses. If the Commission determines that a higher level is appropriate for new offenses, the argument goes, it should also amend the existing, related guidelines under its emergency authority so that unwarranted disparity would not result. We believe this approach results from an overly broad reading of the Commission's emergency authority and for the reasons stated above recommend against it. To avoid unwarranted disparity between the existing guidelines and the new guidelines, the Commission can be governed by the existing guidelines until the next regular amendment period.

In this case the arguments in favor of the amendments proposed are particularly weak because the Commission included in its submission to Congress an amendment of the statutory reference in the existing guideline, §2G3.1, to make it applicable to the newly created offenses. See Amendment 97, 54 Fed. Reg. 21365 (1989). The Commission, thus, responded to the creation of a new offense. If it had believed that a restructuring of the guideline was also necessary to respond to the new offense, it should have proposed such a restructuring in the course of the development of the amendment submitted to Congress.

Policy Issues

The Commission has also requested comment on the broader policy questions associated with the proposed amendments. Specifically, the Commission has asked whether the proposed amendments appropriately reflect congressional intent regarding sentencing for the newly created offenses or closely related ones. In addition, the Commission has asked whether the proposed amendments reflect sound public policy. Since we recommend against the promulgation of these amendments under the Commission's emergency amendment authority because of the need for a prudent construction of such authority, we interpret these questions as seeking comment on whether there are sound policy reasons for the Commission to promulgate these amendment in the future under its regular amendment authority. For the reasons set forth below, we also recommend against the promulgation of these amendments, with a few exceptions as to isolated revisions, for policy reasons.

First, in answer to the Commission's question whether the Anti-Drug Abuse Act amendments discussed provide a policy basis for the proposed guidelines, we believe that on the whole they do not, as explained in our analysis of the Commission's emergency

amendment authority. That is, neither the amendment of the simple possession statute relating to crack nor the creation of two new obscenity offenses in our view signals a congressional intent in favor of guideline amendments of the type proposed. Obviously, however, some fairly narrow amendments would address the statutory amendments.

Crack

Since we do not believe the 1988 statutory amendments provide a policy basis for the proposed guideline modifications, we have considered whether some other policy ground exists. We have sought information from prosecutors as to whether the current crack distribution guideline sentences are too low. The response has been, however, that the guideline sentences appear appropriate at present. In the absence of a consensus among prosecutors involved in drug cases that higher guideline sentences are needed, we are not inclined to recommend a change, particularly at a time when we are seeking to ensure proper plea bargaining procedures. We recognize that the situation may change in the future, and we may perceive a need for higher guideline sentences for certain drug offenses after more experience is gained under the current guidelines.

Obscenity

The obscenity guideline revisions include several aspects which are worth retaining but others that we strongly oppose. The incorporation in the base offense level of the pecuniary gain factor is a change we favor since most obscenity distribution offenses involve distribution for pecuniary gain. We recommend that the base offense level selected by the Commission be between 12 and 14 where there is pecuniary gain and eight otherwise.

We point out, however, that we would not favor such restructuring of the guideline if pecuniary gain were incorporated in the base offense level in a way that did not provide at least a base offense level of 12. That is, the fact of pecuniary gain, without the need to show a significant dollar amount, should result in a substantial increase in the offense level over non-pecuniary gain cases because in obscenity prosecutions the government must prove the obscenity of each item of pornography at issue. It is unlikely that the charged material will ever be very high in retail value, unless in an unusual case the defendant is found to have shipped numerous copies of the same film or magazine. It should be noted that the proposed specific offense characteristic, proposed §2G3.1(b)(1), relating to pecuniary gain does not provide a floor increase as does the existing characteristic.

Our greatest problem with the proposed guideline is the deletion of the existing four-level increase for material that portrays sadomasochistic conduct or other types of violence. The proposed guideline makes no distinction between types of obscenity,

such as sadomasochistic conduct or bestiality, except for the cross-reference to child pornography and the application note for pseudo-child pornography. We believe that the four-level increase for violent or sadomasochistic conduct should be retained, since violent pornography has an especially harmful effect upon society.

The deletion of the four-level increase for violent portrayals is particularly significant since the proposed aggravating factor that would take its place is nearly meaningless and will be utilized far less frequently than the violence factor. The proposed new specific offense characteristic -- increases for a pattern of distributing obscene material to minors -- comes from uncertain origins and has uncertain applications. While most states have statutes prohibiting unlawful display or distribution of pornography to minors, there is no similar federal statute. Neither is distribution to minors a factor in obscenity prosecutions which normally concern interstate distribution to undercover officers or adult bookstores. Perhaps this characteristic would apply to new section 1460 of title 18, United States Code, for selling obscene material in a PX, but this scenario would be rare. Suffice it to say, we would rather have an increase for material that portrays violence than for a "pattern of distribution to minors."

The proposed amendments also add the "pattern" characteristic to the child pornography guideline, §2G2.2. This produces the result of increasing the base level for those engaged in a pattern of distributing child pornography to children. While such a scenario could conceivably happen, in our memory, it never has.

Finally, we turn to the proposed additional cross-reference, proposed §2G3.1(c)(1), involving child pornography. We agree that this new cross-reference is appropriate to take into account that the new statute, 18 U.S.C. §1460, prohibits not only possession with intent to sell obscenity but also child pornography. While most offenses involving child pornography are normally prosecuted under the child pornography statutes, rather than 18 U.S.C. §1460, there may be some cases where section 1460 will be used. We note, however, that Application Note 2 includes "pseudo-child pornography" in this cross-reference. Since caselaw establishes that the use of adults who attempt to appear youthful contributes to the "patent offensiveness" of the material, an element of the Miller v. California obscenity test, we agree with the notion of greater punishment for pseudo-child pornography cases than for obscenity cases not making use of this charade. However, pseudo-child pornography in our view is not as serious as actual child pornography and should not subject the offender to the same punishment, as would be required by the application note in question. Instead, we believe a specific offense characteristic providing a modest increase would be more appropriate for pseudo-child pornography cases than would the cross-reference to the child pornography guideline.

I look forward to the discussion of these important issues at a future meeting.

Sincerely,

Stephen A. Saltzburg / *fu*

Stephen A. Saltzburg
Deputy Assistant Attorney General