



AMERICAN BAR ASSOCIATION Section of Criminal Justice

1800 M Street, NW, 2nd Floor
South Lobby
Washington, DC 20036-5886
202/331-2260
ABA/net: ABA128

July 5, 1989

William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Judge Wilkins:

The Sentencing Commission has solicited public comment on a set of proposed emergency guidelines pertaining to (1) possession and distribution of cocaine base (crack) and (2) distribution of obscenity. In my capacity as Chairman of the American Bar Association's Committee on the United States Sentencing Commission, I would like to offer the following comments on the proposed emergency guidelines.

I commend the Commission for again seeking public comment on not only the substantive guideline amendments but also the process by which amendments are adopted. I have followed with great interest the open process by which the Commission is considering the promulgation of guidelines on organizational sanctions. While I recognize that not all guideline issues will permit the same degree of public participation and deliberative decision making, I commend the Commission for its dedication to the process of full and open rulemaking.

I urge the Commission to not utilize the emergency amendment process as contemplated in the proposed guidelines. The emergency guideline promulgation authority contained in Section 21 of the Sentencing Act of 1987 (Pub. L. 100-182) should be used sparingly. Congress "expected that the Commission will use the authority to promulgate emergency guidelines only in truly emergency circumstances." 133 Cong. Rec. H10019 (daily ed. November 16, 1987). Emergency guidelines are not required every time Congress creates a new criminal offense, because 18 U.S.C. 3553(b) and section 2X5.1 of the guidelines provide direction to the sentencing court if the defendant has been convicted of an offense for which a guideline has not been promulgated.

CHAIRPERSON
Terence F. MacCarthy
219 S. Dearborn St., Ste. 1142
Chicago, IL 60604
(ABA/net: ABA17199)

CHAIRPERSON-ELECT
Sheldon Krantz
2378 Presido Drive
San Diego, CA 92103

VICE-CHAIRPERSON
Michael L. Bender
1775 Sherman St., Ste. 2950
Denver, CO 80203

SECRETARY
Andrew L. Sonner
50 Courthouse Sq., 5th Fl.
Rockville, MD 20850

ASSISTANT SECRETARY
Lori Levin
2650 S. California Ave., 11th Fl.
Chicago, IL 60608

SECTION DELEGATE TO
HOUSE OF DELEGATES
Richard H. Kuh
555 Fifth Avenue
New York, NY 10017

LAST RETIRING CHAIRPERSON
John M. Greacen
10th & Main Streets
Richmond, VA 23219
(ABA/net: ABA4930)

BOARD OF GOVERNORS
LIAISON
Maxwell Heiman
Newington, CT

COUNCIL
Catherine L. Anderson
Minneapolis, MN
(ABA/net: ABA2207)
Marvin E. Aspen
Chicago, IL

Raymond Banoun
Washington, DC
Charles G. Cole
Washington, DC

Tom Foley
St. Paul, MN

Fred L. Foreman
Waukegan, IL

Judith H. Friedman
Washington, DC

E. Michael McCann
Milwaukee, WI

Cara Lee Neville
Minneapolis, MN

Marvin G. Pickholz
Washington, DC

David S. Rudolf
Chapel Hill, NC

Andrew J. Shookhoff
Nashville, TN

Neal R. Sonnett
Miami, FL

William W. Taylor, III
Washington, DC

Steven J. Twist
Phoenix, AZ

Peter F. Vaira
Philadelphia, PA

LAW STUDENT DIVISION
LIAISON

Lorraine M. Augostini
Washington, DC

STAFF
Laurie Robinson
Director

Thomas C. Smith
Associate Director

Elizabeth M. Harth
Section Administrator

Diane Church
Staff Assistant

Susan W. Shaffer
Director

Criminal Justice Standards
Patricia Puritz
Director

Juvenile Justice Center
Susan W. Hillenbrand
Director

Victim/Witness Project

There does not appear to be an emergency with respect to section 6371 and Part N of the Omnibus Anti-Drug Abuse Act of 1988, because sufficiently analogous guidelines exist for possession of crack and distribution of obscenity. Even if the current circumstances constitute an "emergency," promulgation of three of the four draft guidelines published in the Federal Register would appear to exceed the Commission's authority under section 21.

The first three proposed amendments concern the subject of "crack" cocaine. The first proposal clearly falls within the Commission's emergency authority, because it is directly responsive to a new criminal statute. The other proposed amendments cannot be so characterized. The second amendment corrects what seems to be an oversight in section 2D2.1, but bears no relation to the new statute except that both concern the general subject of crack. Even more troubling is the third proposed amendment, in which the Commission contemplates a substantive revision of the drug distribution guideline as a result of the new drug possession statute. I see nothing in section 21 of the Sentencing Act of 1987 that authorizes the Commission to enact without the benefit of Congressional review guideline amendments tangentially related to the subject matter of a new statute.

The fourth proposed amendment is a wholesale revision of the obscenity guideline. Congress created two new offenses: "engaging in the business" of selling obscene matter and possession with intent to distribute obscene matter. These statutes are refinements of the existing obscenity distribution statutes (18 U.S.C. 1461 - 1465) now covered by guideline section 2G3.1 (Importing, Mailing, or Transporting Obscene Matter). In its May 1 submission to Congress, the Commission reasonably responded to the new statutes by adding them to the list of statutes covered by section 2G3.1. Thus, it is difficult to comprehend what "emergency" justifies the proposed emergency guideline. Instead, the Commission appears to have changed its mind very recently about the proper structure of section 2G3.1 and the danger exists that the Commission may be viewed as using the new statute as a pretext to effect the change.

Underlying our objection to the proposed emergency guidelines is a concern about the process by which the Commission enacts guideline amendments. By definition, the non-emergency promulgation procedure set forth in 28 U.S.C. 994(p) is more deliberative than the emergency procedure set forth in section 21 of the Sentencing Act. Proposed permanent amendments are exposed to public

hearings, following which there is a legally mandated six month review period. In contrast, these emergency amendments would become law immediately after the barest minimum of public comment.

Further deliberation would be desirable in this instance because the new crack and obscenity statutes raise profound questions about the guidelines system. In the case of the crack statute, the following are some of the questions raised: How should the Commission respond to mandatory minimum sentencing statutes? What is the relative seriousness of possession of a controlled substance, possession with intent to distribute the substance, and distribution itself? How much more serious, if at all, is possession of large amounts of crack than possession of large amounts of heroin, PCP, or other dangerous drugs?

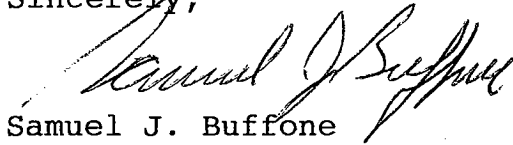
Other important questions are raised by the new obscenity statute. The Commission seeks public comment on whether the base offense level for this crime should be 12, 13, 14, 15, or 16. In its current unadorned form, the question is unanswerable. Confronted with this new statute, the Commission has not addressed past practice for related offenses so as to demonstrate why the particular offense level was selected, and why it is more appropriate than some other level. It has not published any data upon which the selection of an offense level was based. There is no public record of what legal, empirical or other principles were utilized in setting the offense levels. The important statutory responsibilities to consider specific offense characteristics are similarly absent from any public record. Given the recent court opinions on departures, the Commission should include specific comments in the proposed guidelines on the factors it considered and those that it did not as a guide to future departure decisions. Absent these types of detailed statements of reasons, those applying the guidelines are left with an inadequate basis to determine the Commission's intent.

None of these are easy issues. At its most recent meeting, my Committee began to discuss some of these issues, but reached no conclusions except to urge the Commission to proceed more slowly. Perhaps the Commission believes it has resolved these questions to its own satisfaction, but the amendments published in the Federal Register do not begin to explain the Commission's decisions to the outside world. With these and other amendments, the Commission should publish more complete statements of its reasons for adopting guideline

amendments. Such statements of reason are critical to the proper application of the guidelines in the judicial system.

In closing, I request that the Commission consider these comments in conjunction with the testimony that I delivered at the Commission's last public hearing on the guideline amendment process. There is perhaps no more serious issue facing the Commission than rationalizing the process by which it will conform its initial guidelines to application experience, new legislation and intervening events. I urge the Commission to sparingly use any emergency authority until the process issues are more clearly resolved. Emergency amendments should be viewed as a last resort and used only where there is a true emergency reason for departure from the notice, comment and congressional review requirements of the Commission's rulemaking process.

Sincerely,



Samuel J. Buffone
Chairman
A.B.A., Criminal Justice Section
Committee on the U.S. Sentencing Commission