

COMMENTS ON THE
SENTENCING GUIDELINES

Submitted by:

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OFFENSE CONDUCT

1.) In connection with robbery under \$2B3.1, we suggest that the Commission consider amending the guideline to give an enhancement when the robber states that he has a firearm or dangerous weapon but no object is shown. In many cases of bank robbery, the robber hands the teller a note stating that he has a gun but no object is brandished or displayed. The guideline does not seem to cover this situation.

2(a). In connection with firearms offenses under \$2K2.1, we suggest that the Commission consider lessening or eliminating the 6 level reduction for lawful sporting purposes or collection. In our experience, these cases are few and far between. Perhaps this could be covered by a departure.

2(b). Under \$3D1.2(d), we suggest that the Commission eliminate firearms cases as those that get grouped together. Possession of firearms by convicted felons are for criminal purposes and are more akin to bank robberies, etc. Separate incidents should be treated separately.

OFFENSE CONDUCT

- (1) §2D1.1(a)(3)(c)(16) Base offense level for "20 KG or more of Schedule IV substances."

Section 2 of the U.S.S.G. imposes a cap of 10 on the base offense level for schedule IV controlled substances. This means that a distributor of thousands or millions of diazepam (valium), a schedule IV substance, who may be charged in numerous counts of distribution under 21 U.S.C. 841(b)(2), can only be sentenced to 6-12 years. The offense level is too low in light of the fact that diazepam is a highly abused drug with a rampant illicit market.

- (2) False Prescriptions

There is no appropriate guideline for the crime of creating false prescriptions, which is proscribed by 21 U.S.C. 843(a)(4)(A). Other §843 crimes are found in U.S.S.G §2D2.2 and §2D3.1. The crime of creating false prescriptions as set forth in §843(a)(4)(A) is generally committed by pharmacists and doctors desiring to cover shortages in a controlled substance supply. Hence, the crime is generally committed in connection with a distribution scheme. This should be reflected in the guidelines, either in offense level or in an application note to the "Regulatory Violations" section.

OFFENSE CONDUCT

The sentencing guideline base offense level. for immigration violations does not adequately punish the crimes charged. In particular, the Sentencing Guidelines provide for a base offense level of 8 for violations of Title 8, United States Code, sections 1325 and 1326 -- illegal entry and reentry after deportation. While we do not have the same kind of border concerns as other parts of the country, we have a significant illegal alien problem. Some of these illegal aliens are also drug traffickers who deal at a level that generally escapes federal scrutiny. If arrested by the state for drug violations, they often default and are never brought to justice. A higher Sentencing Guidelines base offense level for alien cases would give federal prosecutors more of an incentive to take these cases. It would have the added benefit of materially aiding the prosecution, incarceration and deportation of illegal aliens who are also involved in the drug trade.

OFFENSE CONDUCT

With regard to 18 U.S.C. § 215, bank bribery, the applicable guideline is § 2B4.1.

It establishes a base offense level of 8 and then direct an increase in the offense level if the "greater of the value of the bribe or the benefit to be conferred" exceeds \$2,000.

This guideline is ambiguous as it does not identify which benefit or which person is to be considered in increasing the offense level.

Consider this hypothetical:

P pays \$12,000 in bribes to T, who is a bank officer, in connection with 10 loans which total \$1.2 million.

P is a mortgage broker and obtains \$10,000 from his clients in connection with these loans.

P's 10 clients have no knowledge that P is bribing the bank officer to obtain the loans.

What is the benefit to be conferred? Is it the \$1.2 million in loans?

This is the benefit conferred on the borrowers, but the borrowers have done nothing wrong and are unaware of the bribes.

Is the benefit the \$10,000 in mortgage broker fees which P received?

This seems like the most applicable interpretation to us. (Our office has a case which presents such issues.) Further clarification by the commission would be helpful.

OFFENSE CONDUCT

Some fine tuning needs to be done on the environmental guideline provisions. A few particular matters come to mind.

The commentary or language relating to "disruption of public utilities" in Section Q1.2(b)(3) should be supplemented in some way. This section should be clarified to make sure that it applies to the disruption of such public utilities as a publicly owned treatment works (i.e. a municipal sewage treatment plant). This is a type of public utility which is often disrupted by the types of crimes addressed to this section but it is unclear (at least to some judges) whether this subsection applies to the disruption of a POTW.

It would also be very helpful if the commentary or guideline provision in the next subsection, that is Section 2Q1.2(b)(4), was also supplemented or clarified. That subsection increases the offense level if offense involved transportation or disposal "without a permit or in violation of a permit". Under the environmental schemes set forth in the Clean Water Act and other provisions, the permits usually issued are State or local permits. The guidelines should make clear that this subsection applies to both Federal, State, and local permits and that the violation of any of those permits would necessitate an increase in the offense level.

These comments apply equally to Section 2Q1.3. Aside from these criticisms, we believe that offense levels for the environmental crimes are appropriate. In addition, the sentencing commission has wisely permitted some flexibility determining the specific offense characteristics by permitting judges to increase or decrease certain of the specific offense characteristics by two levels. For example, if a violation involved a "disruption of public utilities" which was significant but not poorly offensive or disruptive, the court may decrease the four level increase to only a two level increase. Likewise, the court also has the ability to increase the four level adjustment up to a six level increase.

In the environmental area in particular, many of the defendants are corporate defendants. Without the passage of sentencing guidelines for corporations, efforts to enforce the nation's environmental laws is greatly hampered. We would encourage the commission to do anything possible to obtain corporate sentencing guidelines.

ADJUSTMENTS

(Acceptance of Responsibility)

PROPOSED SENTENCING FACTOR: A two-point reduction for acceptance of responsibility should not be granted when the defendant fails to adequately account for funds, or proceeds from funds, obtained in the illegal scheme for which the defendant stands convicted.

RATIONALE: The public is rightly concerned that under the sentencing guidelines a defendant who obtains a large amount of money from an illegal scheme will hoard the money and face whatever custodial or noncustodial sentence is imposed by the court. Simply stated, a defendant would rather serve time, pay no restitution and come out rich, than serve time, pay restitution and come out poor. It seems inappropriate to reward the defendant with a reduced sentence for acceptance of responsibility, if he fails to account adequately for the money generated from his criminal conduct. While §5E1.1(a) provides that "restitution shall be ordered . . .," §3E1.1 (Acceptance of Responsibility) should make it explicit that restitution (if feasible) and a full accounting for funds or proceeds are conditions for granting the two-point reduction.

As with the other aspects of the sentencing guidelines, the defendant would bear the burden of proof by a preponderance of the evidence. The guidelines should create a presumption that illegal funds remain in the actual or constructive possession of the defendant. This would require the defendant to produce reliable evidence that the funds are no longer under his control. In this regard, the court should be encouraged to enlist the aid of the Probation Office, the victim(s) and law enforcement authorities to substantiate the location of the funds, which were obtained through the illegal scheme.

ADJUSTMENTS
(Acceptance of Responsibility)

It has been our experience that the District of Massachusetts routinely allows acceptance of responsibility whenever a defendant shows the remotest remorse. Both the courts and the probation department are very quick to assign acceptance of responsibility to any defendant before or after trial. Although we understand that acceptance of responsibility should be granted to a defendant who satisfies the application notes set forth under Section 3E1.1, even after trial, those application notes appear not to be needed. Perhaps the sentencing commission could in some way emphasize that a defendant who is convicted at trial does not obtain the credit for acceptance of responsibility, unless that trial was necessary to assert constitutional challenges or to challenge the applicability of the statute to his particular conduct. The Commission might even consider including a few examples in its commentary.

ADJUSTMENTS

Many public corruption cases are prosecuted under the mail fraud statute, 18 U.S.C. §1341. This has become even more common after the enactment of 18 U.S.C. §1346, which undid the impact of the McNally decision and statutorily included defrauding the public of its right to honest services within the scope of the mail fraud statute. However, the strange partnership of §3B1.1 (Aggravating role) with §3B1.3 (Abuse of Position of Trust or Use of Special Skill) results in certain public corruption cases losing two offense levels that common sense would dictate they deserve.

§3B1.1 provides for additional offense levels to be imposed depending on the role of the defendant in the criminal conspiracy. If the defendant is a public official who uses his official position to conspire with four private citizens to defraud a State Department of Education, and is the organizer of that activity, he would have four offense levels added to his total. However, this total is not increased at all under §3B1.3 for the defendant's abuse of official position, since that latter section declares that it may not be used in addition to §3B1.1. Consequently, a public official who organizes a scheme to defraud a State Department of Education is treated no differently than a private citizen who organizes a similar fraud. This runs counter to the expectation that a public official's abuse of trust is an aggravating feature of an offense no matter what his role in the conspiracy.

DEPARTURES

It is suggested that the Sentencing Commission determine whether a sentencing court may depart from the Career Offender Guidelines, using the very convictions which place the defendant within the Career Offender category as the basis for a departure. Particular note should be taken of two Eighth Circuit cases: United States v. Brown, No. 89-5346, (8th Cir. May 10, 1989) and United States v. Smith, 1990 WL 104618 (8th Cir. 1990).

In each of the Eighth Circuit cases, the sentencing court used its evaluation of the predicate offenses to determine that the ostensibly mandatory language of SRA Section 4B1.1 could be modified by post-sequential application of Section 4A1.3. That is, the offenses defining the defendant as a career offender were declared by the courts to have over-represented the seriousness of the defendant's criminal history.

Absent clarification from the Sentencing Commission, any court wishing to avoid the strictures of the Career Offender range is free to weight the criminal history so as to avoid the punitive consequences of repeat offenses. As a consequence, procedural difficulties and anomalies in sentences arise.

For example, there is no guidance as to the type of evaluation of the prior convictions the court may indulge. Once it is concluded that the objective record of the conviction is to be penetrated, the court may go behind the conviction to weigh evidence and assess the "correctness" of the result. In at least one instance, the sentencing court permitted current federal

defense counsel to call former state counsel as a witness to present a "review" of the state case presented at jury trial eight years previously. From that "review", the sentencing court concluded that a predicate assault conviction over-stated the defendant's criminal history because the jury "might" have convicted him on varying potential factual and legal theories. Cf. United States v. Robinson, 1990 WL 70889 (6th Cir. 1990) (court cannot adjust upward into career offender range upon court's conclusion that defendant was given a "break" in a prior offense).

If departure from the Career Offender Range is to be permitted on such speculation and the present weighing of previous convictions, the intended objectivity of the SRA in sentencing recidivists based specifically upon defined convictions is readily defeated. See United States v. Hawkins, No. 89-6192, (10th Cir. April 20, 1990) ("One is either a career offender or one is not.")

Further, once the court can depart on the subject basis there is no real constraint on the degree of the departure. Since the Career Offender Category VI classification is intended at all offense levels to be greatly higher than an otherwise applicable range, the court may easily determine that the comments to SRA section 4A1.3 do not control where the "over-represented criminal record" has greatly increased the defendant's exposure. In a multiple-defendant case, the sentencing court can use this departure to match the recidivist's

sentence to that of non-career offender co-defendants. Cf.
United States v. Ruiz, No.89-1815 (1st Cir. June 5, 1990); United
States v. Sergio, No. SCR 89-41 (N.D. Indiana April 12, 1990);
United States v. Richardson, No. 89-1066 (10th Cir. April 20,
1990); United States v. Smith, No. 89-2126 (7th Cir. March 21,
1990).

Finally, departure based on weighing the prior offenses
which define the defendant as a Career Offender permits
consideration of factors otherwise precluded. Compare United
States v. Smith, 1990 WL 104618 (8th Cir. 1990) (career offender
downward departure based on youth at time of prior convictions
and proximity of time between separate convictions), with United
States v. Williams, No. 89-1689 (1st Cir. December 15,
1989) (short time span of commission of offenses may not be basis
for departure). See also SRA Section 5H1.1.

MISCELLANEOUS

1.) The provision in S4A1.2(a)(2) concerning the lumping of cases together based on the date of sentencing should be eliminated. Serious criminals often commit many different crimes on different dates and then "package" them for disposition on one date. The guidelines arbitrarily call them related cases and count them as one sentence. Judges then are reluctant to depart upward because it creates an appellate issue. This problem would be eliminated if the prior cases were viewed realistically as what they are - separate cases.

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October 4, 1990

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Dear Mr. Budd:

On behalf of the Commission, I thank you for your recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

We appreciate you taking the time to write and share your office's comprehensive and insightful comments.

Regards,

A handwritten signature in black ink, appearing to read "P. K. Martin".

Paul K. Martin
Communications Director