



Department of Justice

STATEMENT

OF

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BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINES AMENDMENTS

ON

MARCH 5, 1991

Chairman and Members of the Commission:

I appreciate the opportunity to appear before you on behalf of the Department of Justice to discuss the sentencing guideline amendments the United States Sentencing Commission has recently proposed. The amendments cover a number of important guideline areas, and we commend the Commission for considering many of the concerns we raised with you early in this amendment cycle.

I would like to highlight a few of the most important proposed guideline amendments in my statement today. First, in the areas of criminal history, firearms, and the reentry of aliens, the proposed amendments will significantly improve the guidelines from a law enforcement standpoint, and we urge the Commission to promulgate final amendments along the lines proposed. However, the Department believes that the amendments affecting financial institution fraud and substantial assistance either do not go far enough or create new problems.

CRIMINAL HISTORY

Category VII (Amendment 31)

The Commission has proposed a new criminal history Category VII to provide increased sentences for offenders with particularly extensive criminal backgrounds. We strongly believe that this new criminal history category is needed to provide adequate sentences for the most serious recidivists. Under the current guidelines defendants with criminal history scores of 13 or more are all included in Category VI. Unless the sentencing judge departs from the guidelines on the basis of criminal history, a defendant with a criminal history score of 18, for example, would

receive the same sentence for a particular offense as a defendant with a score of 13. Of course, a judge is not bound to depart from the guidelines, even when sentencing a defendant with a substantial criminal history score, and defendants with extremely diverse backgrounds may be sentenced alike. We urge the Commission to include an additional criminal history category in order to recognize distinctions that so far have been ignored.

The Commission has proposed three alternative approaches to creating a new Category VII. We favor the third, which provides that Category VI would include cases with 13 to 15 criminal history points and Category VII would include those with 16 to 18 points. Option three follows the pattern established for Categories III, IV, and V, each of which incorporates a three-point spread in criminal history points. Option three also specifies that courts may either sentence defendants with more than 18 criminal history points within the range prescribed for Category VII or depart upward.

Option three best addresses the need for an additional criminal history category by focusing on those offenders whose criminal history scores exceed the current cap of 13 by just several points. In addition, by authorizing upward departures, this option provides flexibility for judges sentencing defendants with even higher criminal history scores.

Related Cases (Amendment 30)

We also urge the Commission to adopt an amendment to address the problem of criminal history scoring for prior cases consolidated for trial or sentencing. The current criminal history guidelines artificially count such sentences for unrelated offenses as a single sentence.¹ The fact that cases were consolidated for trial or sentencing for purposes of efficiency in the administration of justice should not dictate criminal history results.

The Commission has proposed to address these concerns by presenting three options, all of which would exclude from consideration as "related offenses" those which resulted from separate arrests. The Department favors the adoption of option two but believes that any of the options would improve the current guidelines' treatment of related sentences.

Option two states that prior sentences are not considered related if they were for offenses that were separated by an intervening arrest or if they were not the type of offenses that would have been subject to grouping under the guidelines on groups of closely related counts. Of the three options published for comment, we believe this one most closely reflects the Commission's prior judgments about what types of cases are related for purposes of increasing or decreasing penalties. The multiple-count rules are now familiar to all components of the criminal justice system,

¹ United States Sentencing Commission, Guidelines Manual, §4A1.2(a)(2) and Application Note 3.

and extending their use to criminal history scoring should not prove overly burdensome. By contrast, the other options inject new and unfamiliar rules into the determination. If the Commission believes that further refinements are needed to address the issue of "double recidivists" -- i.e., those who committed offenses in the past following incarceration -- the guidelines could be amended to provide an addition to the criminal history score on this basis.

FIREARMS (Amendment 22)

The Commission has proposed a number of significant guideline revisions regarding firearms offenses. The proposed amendment consolidates four existing guideline sections into one comprehensive guideline on firearms offenses. In general, we believe that this proposal would substantially improve the firearms guidelines and contribute significantly to the deterrence of firearms-related crime.

While amendment 22 makes numerous changes, several stand out as being prominent from a law enforcement perspective. First, the proposal would improve proportionality in sentencing by creating several categories of sentences for offenders who have been convicted of violent felonies or drug offenses but who are not armed career criminals within the meaning of section 924(e) of title 18, United States Code. This statute imposes a mandatory minimum 15 years' imprisonment for the unlawful receipt, possession, or transportation of firearms by convicted felons who have three previous convictions for violent felonies or serious drug offenses. The Commission addressed this statutory requirement

in guideline §4B1.4 last year. However, because of the operation of the armed career criminal provision, offenders with one or two prior violent or drug offenses are sentenced at substantially lower levels than those with three prior convictions of this type. The armed career criminal provision produces a sharp cliff that can be smoothed by provisions aimed at offenders who are on their way to becoming armed career criminals but have not yet arrived.

The Commission should fill in the gaps created by Congress, which we believe rightly recognized that felons with serious drug or violent crime backgrounds require substantial punishment for unlawfully receiving or possessing firearms. The Commission has included several alternative offense levels for these intermediate armed career criminals. Since offenders with three prior violent or serious drug felonies are sentenced at level 33 and Category IV or higher (guideline §4B1.4), then the proposed offense levels of 20 and 24 for those with one or two qualifying prior convictions, respectively, are the proper choices to implement concerns of proportionality.

The proposed firearms amendments would also increase the base offense level for the receipt, possession, or transportation of firearms by convicted felons and other prohibited persons from offense level 12 to either 14, 15, or 16. For a defendant who used or possessed the firearms solely for lawful sporting purposes or collection, the offense level would be decreased to 6, 7, or 8, according to the proposal. We welcome the proposed increase in offense level for convicted felons and other prohibited persons who

unlawfully receive, possess, or transport firearms. The current level is not sufficient from a punishment and deterrence standpoint, particularly in light of the "sporting purpose" reduction. Congress has set the maximum statutory penalty for this offense at 10 years for convicted felons and most other categories of prohibited persons.² Moreover, there are lawful means available for a convicted felon to possess firearms. For example, convictions which are expunged or set aside do not generally trigger the federal prohibition against receipt or possession of guns.³ In addition, a convicted felon may seek relief from federal firearms disabilities in accordance with federal law.⁴ A convicted felon who does not successfully pursue these methods to possess firearms lawfully is, in our view, deserving of punishment when he or she violates the law. Any increase in the offense level would improve the guidelines; an increase to level 16 would send an important message to convicted felons who fail to heed the firearms laws.

We also approve the Commission's proposed change to the "sporting purpose" reduction that makes this reduction unavailable when the firearm was obtained for lawful purposes but has subsequently been possessed otherwise. The fact that a felon had initially obtained a gun for hunting should not qualify him for the

² 18 U.S.C. 922(g) and 924(a)(2).

³ 18 U.S.C. 921(a)(20).

⁴ 18 U.S.C. 925(c).

substantial "sporting purpose" reduction if he later decides to use the gun in crime.

Finally, we applaud the Commission's proposed addition of a firearms table to the guideline so that firearms receipt and possession offenses that involve more than two guns are punished more severely than those that involve only one or two. The current guidelines incorporate such a table only for gun trafficking offenses, but not gun possession offenses. A convicted felon who unlawfully possesses a stash of firearms should receive a stiffer sentence than one who possesses a single gun.

We urge the Commission to adopt these changes proposed in the published firearms amendments. There are many other significant improvements in this amendment that the Commission should also adopt. In several instances we believe that further refinements to the proposal are needed. However, these concern relatively minor points, and we would be pleased to work with the Commission to detail these refinements. In light of the level of violent crime in our country, the firearms proposals will prove to be one of the most important amendments the Commission considers in this amendment cycle. The proposed revisions could go far in addressing this serious law enforcement problem.

REENTRY OF DEPORTED ALIENS (Amendment 23)

The Department strongly supports the Commission's amendment of guideline §2L1.2 to reflect the substantial increase in the maximum penalties in the Anti-Drug Abuse Act of 1988 for unlawful reentry into the United States following deportation subsequent to

a felony conviction.⁵ Previously, the maximum penalty was two years' imprisonment. However, under the amendment the maximum prison term is five years if the defendant was deported after conviction of a felony and 15 years if the defendant was deported after conviction of an "aggravated felony."⁶ The term "aggravated felony" includes murder, drug trafficking, and illicit trafficking in firearms or destructive devices.⁷ An increased penalty of this magnitude -- two years to 15 years -- and limited to particularly defined offenses must, in our view, be reflected in the sentencing guidelines if the will of Congress is to be effectuated.

We recommend that the new specific offense characteristic designated as guideline §2L1.2(b)(2) increase the applicable guideline by 20 levels for all prior "aggravated felony" violations. While this is a steep specific offense increase, as a practical matter, we do not think it is too harsh. In the ordinary case, an alien drug dealer who illegally returns to the United States to practice his trade will continue this pattern of conduct until there is a substantial disincentive to do so. In the exceptional situation involving an illegal alien drug dealer who has some sympathetic reason to reside here illegally, the court may depart downward. A large number of United States Attorneys have brought the need for this guideline amendment to our attention, and we consider it an urgent Departmental priority. A

⁵ 8 U.S.C. 1326(b).

⁶ 8 U.S.C. 1326(b).

⁷ 8 U.S.C. 1101(a)(43).

very substantial increase in the offense level is needed to deal with this type of offender.

FRAUD INVOLVING FINANCIAL INSTITUTIONS (Amendments 4, 5, and 6)

The Department's most significant problem with the proposed amendments to the guidelines concerns fraud involving financial institutions. During the past several years, Congress has dramatically increased the penalties for financial institution fraud by making the maximum terms of imprisonment for major bank fraud and embezzlement offenses as much as 15 times greater than they were in 1988, sending what is clearly a strong signal that individuals whose criminal conduct jeopardizes the integrity of our nation's banking system should receive harsh sentences, including lengthy periods of incarceration.⁸

As recently as this past November in the Crime Control Act of 1990, Congress made significant increases in the penalties for financial fraud. In section 2504 of that Act, Congress increased the maximum terms of imprisonment from 20 to 30 years for violations of 10 major title 18 bank fraud and embezzlement offenses.⁹ In addition, in section 2507 Congress directed the Sentencing Commission to provide in the guidelines that a defendant convicted of violating, or conspiring to violate, one of these bank

⁸ See, Crime Control Act of 1990, Pub. L. 101-647, §§ 2504, 2507, 104 Stat. 4789 (1990); Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub.L. 101-73, §§961(a), 962(e)(1), 103 Stat. 1199 (1989).

⁹ Title 18, United States Code, sections 215(a); 656; 657; 1005; 1006; 1007; 1014; 1341; 1343 and 1344.

fraud statutes, as well as a newly enacted bank fraud statute,¹⁰ who derived significant personal benefit (more than \$1,000,000 in "gross receipts"), be assigned not less than offense level 24.

In section 2510 of the Crime Control Act, Congress enacted a new statute¹¹ aimed at "financial crime kingpins" which provides for a mandatory minimum penalty of 10 years and up to life imprisonment for those individuals who organized and exercised authority over the most serious fraudulent activity and received substantial personal gain.

These amendments send a forceful message that Congress considers fraud offenses involving financial institutions a more serious matter than in the past and that greater punishment is in order for such offenses than for most other fraud offenses. However, the Sentencing Commission's response to the Crime Control Act amendments is limited and, in the Department's view, inadequate to properly reflect the intent of Congress with respect to these increased penalty levels.

First, with respect to increasing the maximum bank fraud and embezzlement penalties from 20 to 30 years, the Commission proposes to amend guidelines §§2B1.1 and 2F1.1 to expand the dollar loss tables for theft and fraud offenses by adding four offense levels for cases in which the amount of the loss ranges from more than

¹⁰ 18 U.S.C. 1032 relating to concealment of assets from a conservator, receiver, or liquidating agent of a financial institution.

¹¹ 18 U.S.C. 225.

\$160 million to over one billion dollars. While we have no objection to this approach which will provide higher guideline sentences in the rare and most extraordinary cases with such high losses, it does not affect the majority of cases in the "heartland" in which the losses, while they may be substantial, are often much lower than \$160 million.

The current guidelines are structured for these fraud offenses as they existed before 1988, with two and five year maximum penalties.¹² We believe that in raising the maximum penalties for major bank fraud offenses six-fold and more, Congress intended that the sentences be increased over the entire range of offense levels, including those at the lower and middle levels. In order to respond to the Congressional concerns about financial fraud addressed in the penalty increases in the Crime Control Act and FIRREA, we urge the Commission, as we did last year, to revise the guidelines applicable to the amended statutes to provide appropriate enhancements relating to financial institutions for all offense levels. We recommend that the Commission amend the guidelines to provide in new specific offense characteristics that if the theft and fraud offenses affected a financial institution, the offense levels should be increased by at least several levels in addition to other enhancements already in these guidelines.

Second, the Commission proposes to amend the theft and fraud guidelines §§2B1.1, 2B4.1 and 2F1.1 to require that the offense level be raised to level 24 if a defendant is convicted of

¹² See Background Commentary to §2F1.1.

violating, or conspiring to violate, any of 11 fraud offenses affecting a financial institution and "derives more than \$1,000,000 in gross receipts from the offense". However, Congress has directed that level 24 serve as the minimum sentence, and that such defendants be assigned no less than offense level 24. These guidelines should be amended further to provide for increases above offense level 24.

Third, the Commission has proposed to address the financial crime kingpin statute by amending the theft and fraud guidelines §§2B1.1, 2B4.1 and 2F1.1 to apply the offense level applicable to the underlying theft and fraud offenses, apply specified adjustments, and then raise the guideline sentence to ten years if the sentence is less than ten years. This approach is wholly inadequate to implement the requirements of the statute. The Commission has created a guideline sentence which will amount to a maximum of 10 years in most cases, while Congress enacted 10 years as the mandatory minimum sentence. The 10 year mandatory minimum should not be the guideline maximum. The statute also provides that the sentence may be life imprisonment, while the proposed guideline amendment makes no provision for any sentence approaching life imprisonment. It is also unclear how the amount of "gross receipts" received by a defendant would relate to the amount of loss to the institution.

Because the financial crime kingpin legislation was modeled after the "Continuing Criminal Enterprise" drug statute in section 848 of title 21 and its provisions are completely analogous, we

strongly recommend that the Commission adopt a financial crime kingpin guideline using the same approach. A base offense level tied to the ten-year statutory minimum would be appropriate because the same rationale as under the drug kingpin statute applies, that a conviction under the statute establishes that a defendant controlled and exercised authority over one of the most serious types of ongoing criminal activity.

In summary, we strongly urge the Commission to revise the guidelines relevant to the statutes amended in the Crime Control Act in order to respond to the Congressional determination that defendants convicted of fraud affecting a financial institution in the majority of fraud cases be subject to substantially greater punishments.

SUBSTANTIAL ASSISTANCE TO AUTHORITIES (Amendment 35)

The Commission has proposed an amendment to policy statement §5K1.1 to make clear that a motion by the government is necessary before a court may depart below the applicable guideline range based on a defendant's substantial assistance to the authorities. The amendment would also state in the commentary that a court could depart downward in the absence of a government motion where the government in bad faith breaches an agreement to file the requisite motion.

While we support the Commission's clarification of this policy statement, we recommend that the proposed statement regarding bad faith be deleted from the commentary. We believe this language is ill-advised because it introduces questions of bad faith into what

has usually been a relationship of trust between prosecutor and defense counsel. It will also create the possibility of routine allegations by the defense of bad faith by the prosecutor.

If the Commission decides to retain the bad faith language, then the Department strongly urges the Commission not to adopt any changes whatsoever to the language of policy statement §5K1.1.

CONCLUSION

The Department plans to provide the Commission with its views on all of the proposed guideline amendments in the coming weeks. There are a number of additional areas in which we will urge the Commission to take final action in accordance with its proposals. For example, the proposed amendments in the areas of money laundering and restitution represent a substantial improvement in the guidelines. We will be pleased to assist the Commission in finalizing the many important guideline amendments it has proposed.