



U.S. Department of Justice

STATEMENT

OF

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UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINES AMENDMENTS

ON

FEBRUARY 25, 1992

Mr. 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.

DOWNWARD DEPARTURES FOR CAREER OFFENDERS AND ARMED CAREER CRIMINALS (Amendment 26(C))

We urge the Commission to adopt the proposed amendment of policy statement §4A1.3 to specify that the adequacy of a defendant's criminal history category not be a basis for downward departure when a guideline mandates a particular criminal history category, such as for career offenders and armed career criminals. In the case of a career offender, guideline §4B1.1 establishes an offense level related to the statutory maximum for the offense of conviction and places the defendant in Category VI, rather than the category that would apply to the defendant if his criminal history score were calculated under the guidelines.

However, several courts of appeals have undermined the career offender guideline by ruling that the sentencing court may depart downward from the guideline range where the court determines that Category VI overstates the defendant's criminal

history. These courts have relied on policy statement §4A1.3 on the adequacy of the criminal history category. See, e.g., United States v. Lawrence, 916 F.2d 553, 554-555 (9th Cir. 1990); United States v. Brown, 903 F.2d 540, 544-545 (8th Cir. 1990); United States v. Adkins, 937 F.2d 947, 950-953 (4th Cir. 1991). In our view the Commission's placement of a career offender in the highest criminal history category is simply a guidelines mechanism to assure fulfillment of the statutory directive in 28 U.S.C. § 994(h) that career offenders be sentenced at or near the statutory maximum for the offense of conviction. It was not meant to reflect the defendant's actual criminal history category calculated under the guidelines. Under the courts' reasoning any career offender whose actual criminal history category was less than Category VI could be eligible for a downward departure on the basis of his inadequate criminal history, and the career offender guideline would become meaningless.

A similar problem could occur with respect to the armed career criminal guideline, §4B1.4, which may place a defendant in a higher criminal history category than the criminal history calculations would otherwise provide. The criminal history component of the armed career criminal guideline operates more in the nature of a specific offense characteristic by recognizing that certain conduct (e.g., possession of a machine gun) warrants an enhanced sentence and also operates to provide a guideline sentence commensurate with the mandatory minimum 15-year term provided by statute, 18 U.S.C. § 924(e). If the defendant's

actual criminal history can be used as a basis to depart below the guidelines, the factors reflected in the criminal history component of the guideline would be lost.

To overcome these problems, policy statement §4A1.3 should provide that downward departure on the basis of the adequacy of a defendant's criminal history category is not warranted when the guidelines specify a particular criminal history category in lieu of the category that would otherwise result from calculation of the criminal history points under guideline §4A1.1.

REVISION OF DECAY FACTOR (Amendment 25(B))

In its letter proposing guideline amendments to the Commission last fall, the Department had sought the elimination of the decay factor applicable to career offenders. (Letter of October 3, 1991, from Deputy Assistant Attorney General Paul L. Maloney.) As the guideline now operates, a sentence of more than one year and a month that was neither imposed nor served during the 15 years prior to the commencement of the instant offense is not counted as a predicate offense for the career offender guideline. Similarly, a lesser sentence does not count unless it was imposed within 10 years of the commencement of the instant offense. See guideline §4B1.2, Application Note 4. These limitations are inconsistent with the statutory mandate to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for defendants who are convicted of felonies that are crimes of

violence or certain drug offenses and who have two prior convictions for such crimes. 28 U.S.C. § 994(h). In particular, it makes no sense to apply the time limitations otherwise applicable for criminal history purposes to the career offender provision, which is designed to look at the defendant's entire life span.

The Commission did not propose the simple elimination of the decay factor for career offenders, as we had suggested, but instead took a broader approach in amendment 25(B). The proposal excludes from the applicable time periods for purposes of calculating the defendant's criminal history score periods during which the defendant was continuously imprisoned if such periods exceeded a time to be designated in the guidelines of one to five years. These periods of incarceration would be excluded from the applicable time periods regardless of whether the defendant were a career offender.

Two options are presented. One excludes periods of imprisonment only in the case of the 15-year decay factor for sentences of more than one year and one month. It does not affect lesser sentences, currently subject to a 10-year decay factor. The other option excludes periods of imprisonment for all sentences but provides a uniform time period of 12 years.

We favor the first of these options and believe that the exclusion for imprisonment should apply to periods of imprisonment that lasted over one year. The uniform 12-year decay factor is too short for serious offenses. A third option

we would have preferred would have provided a uniform 15-year decay factor for all categories of sentences with exclusions for periods of imprisonment.

CRIMINAL HISTORY CATEGORY VII (Amendment 28(B))

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 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. These offenders belong in a new criminal history Category VII to reflect the more extensive nature of their criminal backgrounds. Of course, upward departures should be authorized for defendants with even more extreme criminal backgrounds under the policy statement on the adequacy of criminal history, §4A1.3 (which would require some adjustment if Category VII were adopted). The number of offenders with high criminal history scores is substantial: 39 percent of Category VI offenders had more than 15 criminal history points in fiscal year 1990 guideline cases. See Memorandum of February 21, 1992, from Phyllis Newton to the Commission.

LACK OF YOUTHFUL GUIDANCE (Amendment 33(A))

The Department strongly urges the Commission to amend its policy statements to provide expressly that a court may not consider a defendant's lack of youthful guidance as a ground for a departure from the applicable guideline range. The recent case of United States v. Floyd, 945 F.2d 1096 (9th Cir. 1991), completely undermines the guidelines by allowing -- indeed encouraging -- courts to impose unlimited downward departures for

lack of youthful guidance. We can envision defendants requesting downward departures on this ground in every case, not only complicating and lengthening sentencing hearings with complex expert psychological, medical, and social science testimony, but also introducing totally subjective factors into the sentencing process, which will lead to the kind of inequality which the guidelines were intended to replace. We believe it is necessary for the Commission explicitly to eliminate the factor of "lack of youthful guidance" as a basis for departure in order to maintain the integrity of the guidelines system and ensure uniformity in sentencing. "History of family violence" and other similar factors would also have the same effect and should not be considered as a basis for downward departure. Consistency, fairness, and certainty will not be served unless these factors are eliminated from sentencing decisions.

IMMIGRATION OFFENSES - ALIEN SMUGGLING (Amendment 8)

The Department supports, with certain modifications, the Commission's amendment of guideline §2L1.2 concerning alien smuggling, and related guidelines concerning entry or citizenship documentation. The amendments would make alien smuggling offenses increase in severity depending upon the number of aliens smuggled, transported, or harbored.

The proposed amendment provides graduated increases for smuggling six or more aliens, with a five-level increase for smuggling 100 or more. We suggest that the proposed amendment be

revised to provide for a five-level increase if the defendant smuggles 100-200 aliens and to instruct the court to consider an upward departure if the defendant is involved in smuggling over 200 unlawful aliens. Large-scale cases should not be overlooked by specific guideline enhancements.

As presently drafted, the increase for smuggling six or more aliens would apply only if the defendant committed the offense for profit. We believe the increase based on the number of aliens smuggled should apply whether or not the defendant violated the law for profit. It might be appropriate to reduce the base offense level to level six, as now required by §2L1.1(b)(1), when the defendant has smuggled three or four aliens into the country for reasons other than profit. However, smuggling many aliens, even though not for profit, should be more severely penalized to recognize serious violations of the immigration laws. Conforming amendments would also be required for the other proposed amendments to the related immigration offenses in Part L of Chapter Two.

In addition, we urge the Commission to revise the guideline language to instruct the court to consider an upward departure in cases in which a defendant is involved in smuggling, transporting, or harboring unlawful aliens who engage in or are connected with unlawful activity upon their arrival in this country. For example, certain smugglers are known to assist in the smuggling of narcotics traffickers into the United States. While these smugglers would not be convicted of conspiring to

traffic narcotics, their activity necessarily furthers the narcotics violations engaged in by the individuals whom they bring into the country.

The Department wholeheartedly supports the addition of upward adjustments to the immigration guidelines in cases involving death, bodily injury, possession of firearms, and possession of other dangerous weapons. Because of the seriousness of these offenses and the need for uniformity in the imposition of the increased punishments, we believe these factors should be addressed as enhancements rather than departures. The enhancements should be consistent with the level of similar enhancements in other sections of the guidelines.

ALTERNATIVES TO INCARCERATION (Amendment 29)

We have serious concerns about the options regarding alternatives to incarceration in Amendment 29 and strongly urge the Commission not to adopt these proposals. Fundamentally, these amendments may compromise the fair and appropriate sentences achieved through implementation of the guidelines.

The proposed amendments would bring about a number of changes, such as (1) redefining the "split sentence" to require only one month of incarceration rather than one-half the minimum term of the applicable range; (2) authorizing probation with confinement conditions at higher offense levels; (3) substituting a range of zero to six months for several categories in the Sentencing Table with higher levels of imprisonment; and

(4) making the "split sentence" available for more serious offenses than under the current guidelines. On the whole, the proposals vastly increase judicial discretion and make non-incarceration sentences available for many more offenders than under the current guidelines.

The Commission has not provided a clear justification for expanding either the number of offenders eligible for alternative sanctions or the types of alternatives available. While most state corrections systems have been motivated by severe overcrowding to implement alternatives, we cannot see that issue as justifying experiments at the federal level. Overcrowding at Bureau of Prisons minimum security facilities is not great, and it is to these facilities that the majority of offenders who would be affected by the amendments are sentenced. Moreover, the question of alternatives should be considered separately from prison population issues; overcrowding is not an appropriate rationale for implementing a program of alternatives.

The proposed amendments generally would provide a level of discretion to judges inconsistent with the Sentencing Reform Act's purpose of reducing unwarranted sentencing disparity. For example, Option 2 would authorize a probationary sentence with conditions of confinement, including home detention, for offenders through offense level 12. In addition, it would authorize imposition of a split sentence with just one month of imprisonment. As a result, two level 12 offenders, for whom the guidelines provide a sentencing range of 10-16 months, could

receive vastly different sentences. One may be sentenced to no imprisonment at all, while the other may be sentenced to 16 months' imprisonment -- both within the applicable guidelines. Of course, the former must be placed on probation with a condition of home detention (or other confinement condition) for 10 months. Thus, a range of 10-16 months of imprisonment is effectively transformed by these amendments into a range of 0-16 months, provided home detention or other condition of confinement is imposed.

Home detention, however, is simply not the same sanction as imprisonment since it protects the defendant from separation from home, family, and work. For many it is more nuisance than punishment. Clearly, the potential for significant disparity in sentences for similar offenses would be reintroduced by adopting these options. Guidelines directing a judge's decision as to **whether** to impose imprisonment are as crucial to reducing unwarranted sentencing disparity as are guidelines on **how long** a term of imprisonment to impose.

We also believe that a number of the options presented by Amendment 29 would produce guidelines that violate the statutory requirement that the maximum of an imprisonment range not exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. §994(b)(2). The purpose of this requirement is to foster the goal of reducing unwarranted sentencing disparity by creating a sentencing system whereby a judge must choose a sentence from a fairly narrow range.

Expanding the use of alternatives to incarceration may also compete with the objective of deterrence in sentencing. While alternatives to incarceration may address the just punishment and rehabilitation purposes of sentencing, fairly short prison terms followed by supervised release can also serve these objectives while providing an adequate deterrent to criminal activity. The threat of spending time behind bars is a powerful deterrent for many would-be offenders, particularly white collar offenders, and should not be jettisoned lightly.

We also see no reason to expand the use of alternatives to additional offenders when we understand from the Commission's research that the current options are underutilized. A more constructive option would be for the Commission to educate judges and prosecutors on the current alternatives. It would seem more appropriate to consider expanding the availability of alternatives after more experience has been gained with the current options available. While the Department might consider the desirability of increasing the types of alternatives available under the guidelines, support for the creation of new, intermediate punishments does not require support for their application to a greater number of offenses than are now subject to non-incarceration sentences.

The Commission specifically requested comment on whether the options listed under Amendment 29 should apply to all defendants at the offense levels specified or whether an offense-by-offense approach should be adopted. The Department believes that, if any

of the options are put into effect, certain offenders should be excluded: white collar offenders generally, those who have abused a position of trust, those convicted of firearms or controlled substance trafficking offenses, and those who have been sentenced previously for a similar offense.

One of the objectives of the sentencing guidelines was to ensure sentences for white collar offenses that are appropriate to the severity of the crime. In general, the guidelines resulted in longer sentences for these offenders. See, e.g., guideline §2T1.1, background commentary. The Department believes strongly that the fairness instituted by guideline punishments for white collar offenders should not be eroded by reducing the time served under the split-sentence option or by offering alternatives to imprisonment where currently there are none. The proposed criminal history Category zero (Amendment 28) would also contribute to this erosion of sentences for white collar offenders and in combination with the proposals expanding alternatives to incarceration would significantly rewrite the guidelines for these offenders.

In addition, the Department recommends that the Commission deny alternative sanctions to those who have previously committed a similar offense. It is obvious in these cases that the earlier sanction was insufficient to deter further similar criminal behavior. The offender needs to experience the full consequences available under the guidelines. Finally, firearms and drug

trafficking offenders should also be excluded because of the dangers they present to society.

SUBSTANTIAL ASSISTANCE TO AUTHORITIES (Amendment 34)

The Commission has proposed an amendment to policy statement §5K1.1 to eliminate the requirement that a motion by the government be made before a court may depart below the applicable guideline range to reflect a defendant's substantial assistance in investigating or prosecuting others. However, the amendment would retain this requirement in the case of departure below a mandatory minimum sentence.

We strongly oppose this amendment. It will result in routine requests by defendants for reduction of sentence and burden the courts unduly. Defense attorneys will view this area as an opportunity to escape guideline sentencing and argue for reduction in many unwarranted cases. The prosecutor is in the best position to determine whether a defendant has provided substantial assistance in investigating or prosecuting others. Even if the policy statement were amended as proposed, the court would have to give substantial weight to the government's evaluation of the defendant's conduct from the standpoint of substantial assistance, and the proposed amendment so directs. Finally, the government has an incentive to seek substantial assistance reductions where warranted in order to encourage defendants to cooperate. The Supreme Court has recently granted certiorari in a case presenting the issue whether a district

court has the authority to review the government's decision not to file a "substantial assistance" motion for a reduced sentence (where a mandatory minimum was applicable). United States v. Wade, 936 F.2d 169 (4th Cir. 1991); cert. granted, No. 91-5771 (1991). For all of these reasons, we urge the Commission to reject this proposed amendment.

SCHEDULE III, IV, AND V CONTROLLED SUBSTANCES (Amendment 7)

The Commission has asked for comment regarding the removal or modification of the current limitations on offense levels for the distribution of Schedule III, IV, and V controlled substances and Schedule I and II depressants so that violations of large quantities of these substances will result in higher sentences. We strongly urge the Commission to remove the current limitations on sentences for trafficking in these controlled substances. In our view the current provisions, which limit sentences to those applicable to 20 kilograms of the substances involved regardless of how much greater the actual quantities may be, are inconsistent with the overall approach of the guidelines.

Guideline §2D1.1 provides that a violation involving 20 kilograms or more of a Schedule I or II depressant or Schedule III substance results in offense level 20 (33-41 months for a defendant in the lowest criminal history category). The same sentence applies to 40,000 or more units of anabolic steroids. A defendant who violates the law by selling hundreds of kilograms of a Schedule I or II depressant or Schedule III

substance would be treated in the same manner as a defendant who sells 20 kilograms. Schedule I and II depressants are serious drugs of abuse and include, for example, methaqualone (Schedule I) and glutethimide (recently moved to Schedule II from Schedule III), which is used with codeine preparations as a heroin substitute. Schedule III substances include codeine preparations such as Tylenol or aspirin with codeine. The Department has prosecuted cases involving far larger quantities than 20 kilograms. Also included in Schedule III are anabolic steroids, which are often distributed illegally in large quantities because of the continuing nature of an athlete's abuse of this controlled substance. Yet, the guidelines treat sales of hundreds of thousands of units of anabolic steroids in the same manner as sales of 40,000 units.

If the current guideline reflects the concern that the guidelines should establish an offense level commensurate with the statutory maximum available, the guideline could still provide a much greater offense level for violations involving large quantities of Schedule I and II depressants, which are subject to a maximum 20-year term of imprisonment, 21 U.S.C. §841(b)(1)(C). Although the maximum term of imprisonment for offenses involving Schedule III substances is five years, 21 U.S.C. §841(b)(1)(D), offenses involving multiple transactions properly result in multiple counts, with the five-year maximum applicable to each count.

Guideline §2D1.1 also places an artificial limitation on sentences involving Schedule IV substances (level 12 for 20 kilograms or more) and Schedule V substances (level 8 for 20 kilograms or more). Schedule IV substances include, for example, Xanax, which has been abused in combination with Schedule I and II substances; and Halcion, which can produce temporary memory loss. Again, larger quantities of these drugs should result in longer sentences. This approach would be consistent with the operation of the drug guidelines for substances such as heroin and cocaine.

The extension of the guidelines for quantities of more than 20 kilograms of Schedule I and II depressants and Schedule III, IV, and V substances and more than 40,000 units of anabolic steroids would correct an unfortunate message the guidelines currently send to would-be violators -- that they may as well engage in large-scale violations since they may do so with impunity beyond the maximum quantities currently in the guidelines.

FRAUD INVOLVING FINANCIAL INSTITUTIONS (Amendment 6)

As we have repeatedly emphasized in letters and in testimony before the Commission during the past two years, the Department has serious concerns about the inadequacy of the guidelines for fraud offenses involving financial institutions. Thus, we strongly support the Commission's proposed amendment of guideline §§2B1.1, 2B4.1 and 2F1.1 to provide a four-level enhancement for

theft and fraud offenses which affect a financial institution, in addition to other enhancements already in these guidelines.

We believe adoption of amendment 6 is critical if the guidelines are to properly reflect the dramatic increases in the penalties for financial institution fraud enacted by Congress during the past several years. Congress has made the maximum terms of imprisonment for ten major title 18 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. The current guidelines are clearly inadequate and were structured for these fraud offenses as they existed before 1988, with two and five year maximum penalties. See guideline §2F1.1, background commentary. 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. The proposed amendment would do just that.

In summary, we strongly urge the Commission to adopt amendment 6 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. Our testimony with respect to the fraud and theft guidelines is limited to amendment 6

affecting financial institutions. We believe significant revisions to the fraud and theft amendment 5 are needed; the Department will discuss these in other comments to the Commission.

We also will provide comments on a number of other proposals published by the Commission, including our opposition to the proposal to end alleged "double counting" in environmental offenses and our support for increased sentences for violations of wildlife protection statutes.

This concludes my prepared comments. I will be happy to answer any questions you may have.