



Office of the Deputy Attorney General

Washington, D.C. 20530

March 18, 1994

044-6

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
South Lobby; Suite 2-500
Washington, D.C. 20002-8002

Dear Judge Wilkins:

The following sets forth comments of the Department of Justice regarding proposed sentencing guideline amendments which were published in December 1993.

AMENDMENTS PROPOSED BY THE DEPARTMENT OF JUSTICE (Amendments 26-30)

As the United States Sentencing Commission is aware, the Department of Justice proposed amendments addressing several important areas of concern to law enforcement. These proposals involve significant issues such as crimes of violence by organized crime members, firearms offenses by members of criminal gangs, obstructing an election or registration, possession or discharging of a firearm in a school zone, and criminal history scoring. We continue to believe that these proposals have merit and should receive favorable consideration.

LIMITATIONS ON THE IMPACT OF CONTROLLED SUBSTANCES QUANTITY ON OFFENSE LEVEL DETERMINATIONS (Amendment 8)

This amendment consists primarily of three specific proposals which are designed to: (1) reduce the impact of drug quantity on the determination of offense levels for offenses involving drugs and (2) increase the offense levels where weapons are possessed or used in drug crimes.

(A) Changes in the Drug Quantity Table The first proposal lowers the base offense levels by revising the Drug Quantity Table to reflect the 5- and 10-year mandatory minimum sentences at levels 30 (97-121 months) and 24 (51-63 months), rather than their present levels of 32 (121-151 months) and 26 (63-78 months). This is accomplished by: (1) reducing the upper limit of the Drug Quantity Table from level 42 to 38, (2) reducing the number of drug offense levels, and (3) assigning lower offense levels to specific drug quantities than in the present tables.

The Department strongly opposes this amendment. In our view the amendment represents an erosion of the seriousness with which

the Commission views narcotics offenses. We believe that even the upper limit of 38 proposed this year lessens the deterrent effect for drug traffickers who deal with the largest quantities of drugs, and the amendment creates problems with mandatory minimum provisions as well. By placing the guideline maximum at a level that barely accommodates the mandatory minimum sentence for certain drug quantities, this scheme effectively eliminates the range of sentences at certain offense levels from which the court should be able to choose an appropriate sentence. In addition, the court would be effectively precluded from recognizing guideline reductions in cases in which the mandatory minimum trumped the guideline sentence for offenders who played a minor or minimal role in the offense. Thus, the practical effect of the amendment would be to discourage guilty pleas because the mandatory minimum sentence would prevent reduction for role and for acceptance of responsibility for those defendants whose drug quantities are at or just above the mandatory minimum amounts. By contrast, the current offense levels are geared toward existing mandatory minimum sentences to a greater extent and in most cases allow for reduction for such characteristics as role in the offense and acceptance of responsibility. The amendment's stated concern for better sentencing at the high end of the drug quantity table simply transfers problems to the lower and middle levels, where many more defendants are sentenced.

Because the Commission had already decreased the impact of drug quantity on sentencing last year with its 1992 amendment of the relevant conduct guideline, which narrowed the conduct (*i.e.*, quantity of drugs) for which defendants would be responsible at sentencing, we urged it not to make further amendments last year until the effect of the relevant conduct amendment could be determined. We are not aware that the Commission has analyzed the extent to which this amendment cured any of the perceived problems.

(B) Weapons Enhancement Amendment 8 provides two approaches to increase the offense level for crimes involving drugs where weapons were used. Option 1 would add a 4-level enhancement in §2D1.1 for the use of a weapon, and a 2-level enhancement if the offense resulted in serious bodily injury. Option 2 would operate through a special instruction to apply the guidelines for assault with intent to commit murder or aggravated assault if the offense involved such conduct (in addition to the existing enhancement for possession of a dangerous weapon). The Commission also has invited comment on whether the weapons enhancement should be amended to differentiate by dangerousness certain weapons (*e.g.*, assault weapons, machine guns and sawed-off shotguns) and the number of weapons involved.

In view of the Administration's commitment to punish severely defendants who commit violent crimes, the Department

supports this amendment. Option 1 appears to embody a simpler approach to the issue. Similarly, we support greater enhancements for more dangerous weapons and larger numbers of weapons involved.

(C) Mitigating Role Adjustment Ceiling This amendment would provide a ceiling at level 32 or 30 for defendants who receive a mitigating role adjustment, thus making quantity less a measure of the seriousness of the offense than it would be for a defendant with a more important role in the offense. It is designed to limit the impact the quantity of drugs would have in determining the sentence of low-level defendants involved in drug crimes.

The Department supports the goal of this amendment but believes that as published the amendment is flawed. We would support the proposal if the following changes were made:

- ☐ the ceiling were set at level 32 (which covers a 10-year mandatory minimum sentence);
- ☐ the cap applied only to minimal, but not minor, participants (the least culpable group);
- ☐ drug defendants whose relevant conduct consisted only of drugs in their actual possession did not receive a mitigating role reduction and were not subject to the level 32 cap (because of the large amount of controlled substances in their actual possession);
- ☐ defendants who possessed or had ready access to a firearm or other dangerous weapon or engaged in assaultive or violent behavior did not receive a mitigating role adjustment; and
- ☐ language were retained in §3B1.2 stating explicitly that the downward adjustment for a minimal participant should be used infrequently.

DEPARTURES (Amendments 7 and 14)

Amendment 7 requests comment on whether the guidelines should provide that departures may be based on cultural characteristics of defendants or the collateral consequences (e.g., impeachment or a bar to holding public office) a public official and other defendants might encounter as a result of a conviction.

The Department believes that collateral consequences should not be the basis for a downward departure. The fact that one defendant may suffer collateral consequences as the result of

conviction does not alter either the nature of the crime or the nature of the offender. Indeed, this would run counter to the intent of the guidelines, which are designed to achieve, in part, the same sentences for similar offenses committed by similar offenders. Taking collateral consequences into account would appear to discriminate among defendants on the basis of prohibited factors such as education and occupation. In addition, the parties may not be able to determine the potential collateral consequences during the plea bargaining process or after a criminal trial; and even if identified, they may never come to pass. For example, in negotiating a plea in a criminal fraud case, is the prosecutor required to consider the potential outcome of possible civil litigation? There are numerous situations when consideration of collateral consequences would be highly inappropriate, including lower sentences for deportable aliens, antitrust defendants in bid rigging cases who may be debarred, and others who face the loss of some benefit as a result of committing a crime.

Similarly, we believe that cultural characteristics should not be the basis for a downward departure. To recognize such characteristics would appear to discriminate on the basis of race, sex, national origin, creed or religion, and socioeconomic status -- prohibited factors for departure under 28 U.S.C. §994(d). Criminal laws are enacted to reflect societal norms. The fact that a defendant's cultural heritage made the unlawful conduct more acceptable in his or her community should have no bearing on the sentence imposed. This argument could well be used in the future to justify downward departures for violent crimes by gang members, organized crime figures, and racially motivated individuals who assert they would have been subjected to shame or worse in the community had they not committed the offense.

Amendment 14 would revise §5K2.0, Grounds for Departure, by specifically permitting departures for offender characteristics or other circumstances not ordinarily relevant to that determination. The proposal provides that if the characteristic or circumstances, or combination of characteristics or circumstances, is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, then the factors may be considered.

This year the Department requested that the Sentencing Commission provide guidance regarding offender characteristics not ordinarily relevant for departure. However, the Commission has broadened the Department's proposal significantly by adding the language "or combination of characteristics or circumstances". This sweeping language may result in departures based on prohibited factors in 28 U.S.C. §994(d), which Congress intended would not be considered.

The Department has opposed this "combination of characteristics" approach in the past and continues to do so on the grounds that it would lead to an erosion of the guidelines and, thus, undermine the goal of consistency in sentencing.

MONEY LAUNDERING (Amendment 11)

The Department is opposed to the proposed changes to the money laundering guidelines.

ACQUITTED CONDUCT AS RELEVANT CONDUCT (Amendment 18)

The Department cannot support the published proposal advanced by the Practitioner's Advisory Group to change the definition of relevant conduct in guideline §1B1.3 to restrict the use of acquitted conduct in determining the guideline offense level. The amendment would provide that acquitted conduct may no longer be considered in determining the guideline range but can only be the basis for an upward departure.

This change would constitute a dramatic and illogical departure from the constitutional standards courts have historically applied in both pre-guidelines and guidelines cases and would reverse a long line of decisions in which ten courts of appeals have held that the Constitution does not preclude the use of acquitted conduct for sentencing purposes. These rulings are consistent with Supreme Court decisions allowing acquitted conduct to be introduced in evidence at a defendant's subsequent trial, *Dowling v. United States*, 493 U.S. 342 (1990), and allowing civil forfeiture notwithstanding acquittal on the same charges underlying the forfeiture. *United States v. 89 Firearms*, 465 U.S. 354 (1984). The broader rules of evidence admissible at sentencing, as compared to trial, also militate against a bar to using acquitted conduct for sentencing purposes. There is surely no unfairness in sentencing a defendant based on additional evidence, e.g., obtained from a search whose fruits could not be admitted at trial, that clearly shows that the defendant engaged in the conduct at issue.

There are, moreover, additional reasons why changing the present rules with respect to acquitted conduct would be unwise. First, the change would lead to a large increase in litigation. Frequently, the effect of an acquittal is unclear because the basis of the jury's verdict cannot be definitively established. For example, suppose a defendant and a confederate are charged with selling drugs and the defendant with using a firearm during and in relation to that crime (18 U.S.C. §924(c)). The defendant is convicted of the drug charge but acquitted of the firearms offense. Should that mean that the defendant can assert the acquittal to successfully resist the government's attempt to apply the enhancement in guideline §2D1.1 for possessing the

firearm? Not necessarily. The proof at trial may have been weak as to whether the firearm belonged to the defendant or to the confederate, also present in the room. The doubt may have been sufficient to cause the acquittal, but, if that was the basis therefor, not to preclude an enhancement under the guidelines. In other cases, the verdicts may simply be inconsistent, for example, a case in which the defendant is convicted of aggravated bank robbery (18 U.S.C. §2113(d)) for placing life in jeopardy by using a firearm, but acquitted under 18 U.S.C. §924(c) for using the firearm to commit the robbery. Based on anecdotal information from the United States Attorneys, it is our belief that the number of inconsistent verdicts, particularly in drug and fraud prosecutions, is growing. In each of these situations, if the Commission were to bar the use of acquitted conduct in determining the guideline range, difficult litigation would arise over the effect of the acquittal -- an increased burden on the already highly complex sentencing process that we think is unjustified and that many courts, we suspect, would not welcome.

Second, a limitation on the use of acquitted conduct would likely lead to unwarranted charging and sentencing disparity, contrary to the goal of the Sentencing Reform Act, and would encourage more trials and sentencing hearings. Under the proposal, the court would remain obligated to consider conduct not charged in the indictment but within the ambit of relevant conduct yet could not consider that same conduct if it had been charged and resulted in acquittal. Often, the decision whether to bring a charge that later results in acquittal will be a close one, on which reasonable prosecutors would reach conflicting judgments. If the rule on acquitted conduct were changed as proposed, these reasonable but opposing charging decisions by prosecutors would produce markedly different sentences. Moreover, the change would create a temptation for prosecutors to decline to bring charges that they fear could result in acquittal and wait to bring supporting facts to the court's attention at sentencing. Likewise, defendants, who are encouraged under the current definition of relevant conduct to enter pleas when charged with several counts with similar offenses will, if the proposed amendment is adopted, have a strong incentive to go to trial to try to defeat one or more of the multiple counts, thereby increasing the number of trials in the hard-pressed justice system. For all of these reasons, the superficially appealing but unsound proposal to limit the use of acquitted conduct should be rejected.

ACCEPTANCE OF RESPONSIBILITY (Amendment 32)

This amendment, published by the Commission at the request of a district judge, would provide an additional one-level decrease for a defendant who goes to trial but avoids actions that unreasonably delay or burden the proceedings or place an

undue burden on the government. We believe this additional point designed to assist the expeditious administration of justice will have just the opposite effect -- it will encourage defendants to go to trial. The Department believes there is no justification for this amendment.

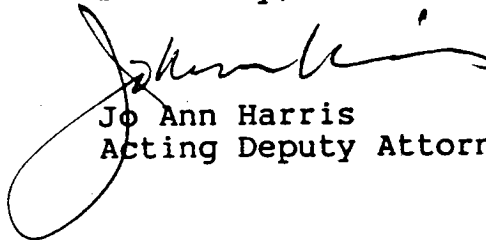
Under the current guidelines, many defendants who go to trial receive credit for acceptance of responsibility; the proposed point for not contesting frivolous issues will give them the same three points they would now receive for pleading early. They will be in the same guideline range and will have the right to appeal. The proposed additional point actually lowers the risk of going to trial. In some cases, defendants will actually receive more points for going to trial under this proposal.

The proposal also raises several difficult issues that would require litigation, such as what would constitute an undue burden or "frivolous" motion. Can the defendant receive the reduction for assisting in the administration of justice and then raise ineffective assistance of counsel on appeal? Would this amendment penalize defendants for exercising their constitutional rights? Litigation in the Ninth Circuit is now focused on the similar constitutional issue of granting a point for acceptance of responsibility for timely notification of intent to plead guilty. The proposal is also inconsistent with the principle that clients are not sanctioned for the inappropriate trial tactics of their attorneys.

TAX OFFENSES (Amendment 12(C))

The Department is opposed to any amendment of the tax tables this year. Because changes to the tax tables made during the last amendment cycle took effect as recently as November 1993, it is imperative that these amendments be allowed to work before further changes are made.

Sincerely,



Jo Ann Harris
Acting Deputy Attorney General