

028 - 95

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
UNITED STATES PROBATION OFFICE

JOHN R. LONG
CHIEF U.S. PROBATION OFFICER

Second Floor
130 North Royal Street
Alexandria 22314
703-557-2357

March 6, 1995

Suite 1
320-B Charles Dimmock Parkway
Colonial Heights 23834
804-526-1806

Suite 100
10500 Battleview Parkway
Manassas 22110
703-330-7110

Room 300, Post Office Bldg.
101 25th Street
Newport News 23607
804-245-0803

Suite 200, U.S. Courthouse
600 Granby Street
Norfolk 23510
804-441-6673

P.O. Box 597
Richmond 23205
804-771-2317

REPLY TO : Manassas

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Comment

Dear Sir:

In response to the 1995 proposed amendments to the sentencing guidelines, please accept the following comments.

Issue for Comment (Issue) #1:

HIV exposure: HIV related assault could be sanctioned through 2A2.2, Aggravated Assault, and/or 2A3.1 - 3.4.

Infectious bodily fluids should be defined expressly as a dangerous weapon.

HIV-infected bodily fluid should be included in the definition of "permanent or life-threatening bodily injury".

Other infections, e.g., hepatitis, should be included in "bodily injury" or "serious bodily injury" depending on the strain.

Issue #2:

Minor Assault: Add a cross-reference to 2A2.2, Aggravated Assault, for victim under 16 with substantial bodily injury.

Issue #3:

Involuntary Manslaughter: Raise the levels to 16 and 14, respectively, thereby insuring that a person convicted of this offense goes to jail. A person who takes a life, even "involuntarily", should face a harsh penalty. We have heard

from families for years the absurdity of a drug dealer facing mandatory time while someone who takes a life could, conceivably, walk away with community confinement.

Proposed Amendment (Amend.) #4

Kidnapping: Prefer option 1, which is more in line with 1B1.2.

Issue #5:

Aggravated Sexual Abuse: Prefer no enhancement for more than one assailant. 2A3.1 is adequate with its fairly comprehensive SOCs. Other aggravating factors can be handled through departures.

Amend. #6:

Death of the Victim: Prefer option 2, which will be more efficient.

Amend. #7:

Adequacy of Criminal History Category: Not sure if the additional application notes are necessary in light of existing 4A1.3, but the addition to 4A1.3, itself, is appropriate.

Issue: The offense levels in 2A are adequate as are.

Amend. #8:

Counterfeit Bearer Obligations: Prefer option 1, which seems to ensure uniform application and is more conforming to other guidelines, e.g., 2D1.1.

Issue: Enhancement should be modeled after that in 2D1.1.

Amend. #9:

2D1.1: Prefer option 1, as 2D1.1 already contains a cross-reference if death occurs.

Issue: No additional SOCs are needed. DOJ cannot realistically expect the Commission to add a point for every conceivable (or inconceivable) sentencing factor. This is why departures were built in, as a "failsafe."

Issue #10A:

Contraband in Prison: 2P1.2 is adequate as is.

Issue #10B:

844/841 in federal prison: 844 should reference to 2P1.2; 841 should go to 2D1.2 if the defendant distributed or PWID.

Issue #11:

Protected locations: Current enhancement is adequate.

Issue: 2D1.2 is fine as is; this BOL would be used infrequently. Let the Court depart downward if this becomes a sentencing factor.

Amend. #12:

2D1.2: This amendment is appropriate in order to conform the guideline to statute, and also to eliminate the problem with LSD vis a vis 2D1.1.

Amend. #13:

Flask/Equipment: As is, this amendment is problematic. There seems to be only a hair's breadth of difference between the two. If there is to be a distinction between intent and belief, make it a clean and clear distinction. As is, this will be a nightmare to deal with in the field.

Amend. #14:

Vulnerable Victim/Civil Rights: Prefer option 2. Option one tries to squeeze too much into 3A1.1 and 2H1.1.

Amend. #15:

Firearms: Agree.

Issue: No, there should not be an enhanced OL.

Amend. #16:

Firearms: Prefer option 2; BOL of 12 appears appropriate for transferring firearm to a juvenile.

Issue #17:

Firearms: The focus should be on the most dangerous firearms.

Issue #18:

2K2.4: Prefer the second approach with the departure provision.

Issue #19:

Firearms: The OLs and definitions are adequate as are.

Amend. #20:

Prefer option 2; if a "two bit burglar" happens to take a gun or marijuana as part of a house burglary, he should not automatically face a higher OL. Give the Court the discretion depending on the circumstances of the offense.

Amend. #21:

Firearms/Explosives: Agree.

Issue #22A:

Alien Smuggling: Yes, the OLs should be increased under 2L1.1, and can be accomplished by SOC's or by cross-reference to the more serious offense, e.g., aggravated assault, manslaughter.

Issue #22B:

Reentry: Current levels are appropriate. No, three misdemeanors do not equal a felony - a person who possesses marijuana on three occasions should not face the same penalty as a person who distributes cocaine.

Amend. #22C:

Immigration: No! This change is too convoluted. Why not add a SOC of 2 points for injury caused by the defendant and cross-reference if death or sexual assault occurs? Also, there may be a problem re the injury. What if a harbored alien breaks his leg fleeing INS? Will we hold the defendant accountable for this ("if any person sustained bodily injury")?

Amend. #22D:

Immigration: No, the top of the guideline range is sufficient.

Issue #23A, Amend. #23B:

Immigration: This proposed amendment is acceptable, except for SOC's (b)(2) - (b)(4). These are overkill! Again, DOJ is trying to build in every obscure scenario into the guidelines, when the departure avenues are built in in anticipation of such cases.

Issue #24:

Terrorism: These cases would be so rare, it seems unnecessary to create another guideline. Chapter Five is adequate to cover any such cases.

Issue #25A:

Juvenile: These cases can best be handled through Chapter Five departures.

Amend. #25B:

Juvenile: This amendment is not appropriate! Prefer to give the Court the discretion to depart, particularly since the age difference may be only four years in these cases, e.g., 21 year old employing 17 year old who may be just as sophisticated or dangerous as his employer.

Issue #26A:

Street gangs: A street gang enhancement could be built into 3B1.1, Aggravating Role.

Amend. #26B:

Street gangs: Prefer to see an enhancement built into 3B1.1.

Issue #27A:

Elderly Victims: The guidelines provide adequate sanctions for crimes involving elderly victims. 2F1.1, 3A1.1, and other guidelines provide for elderly status. And, as always, the Court is given latitude to depart in particularly aggravating cases.

Amend. #27B:

Elderly Victims: This change is appropriate.

Issue #27C:

Elderly Victims: Current victim-related adjustments are adequate. Rebuttable presumption of age will carry its own set of difficulties, e.g., What if the defendant and the victim are the same or close to the same age?

Issue #28:

Career Offender: No action is necessary; 5G1.1 addresses this adequately.

Amend. #29:

Safety Valve: 5C1.2 is okay as is, but may need some clarification down the road; e.g., If a defendant receives an enhancement per 3C1.2, can he still qualify for 5C1.2? (this was a hotline question last fall); If a police officer shoots a codefendant, is the defendant held accountable for this injury, and, thus, precluded from 5C1.2?

Amend. #30:

Restitution: Agree.

Amend. #31A:

Supervised Release: Agree.

Amend. #31B:

Supervised Release: Agree, but clarify if this exception applies to 3565(b) only and not 3583 - this will undoubtedly be raised in the field.

Amend. #32:

App. A/ Guideline Titles: Agree.

Amend. #33:

2D1.1: Prefer option A, which appears to most closely conform to legislative intent. This is still a lot of time to serve!

Amend. #34:

2D1.1: Definitely agree where the defendant qualifies for a minimal role; not so sure where the defendant is a minor participant. Minor participants, in some cases, still handle a lot of drugs.

Issue: No! This is too convoluted and would be much too cumbersome in the field.

Amend. #35A:

Role: Agree, but the language may be problematic. It could be argued that less must be done to qualify for a 4 point enhancement, which is driven by number of participants, than for a 3 point enhancement, which is driven by number of participants supervised.

Amend. #35B:

Role: Thank goodness we finally get rid of 3B1.4 and the 3 point intermediate enhancement at 3B1.2! Notes 1(A)(1) and 1(B)(1) are confusing and notes (1)(D) and the examples don't provide much relief. Please make these more clear. Note 4 is also a difficult read. Regarding the last paragraph of the notes, please stay away from hypotheticals. This amendment is somewhat confusing - please simplify.

Amend. #36:

2D1.1: 2D1.1 and 2D1.11 are fine as are. The Court can depart or cross-reference as needed. However, the rebuttable presumption regarding firearms is appropriate. Regarding 3B1.1, prefer option 2.

Issue: This is much too convoluted! Again, why try to build in every possible set of circumstances, when a more generic enhancement, combined with a departure if warranted, serves the purpose more efficiently.

Amend. #37:

2D1.1: Agree, this seems like a more realistic approach.

Issue #38:

Powder/crack: Yes, the ratio should be reduced, but not sure by how much.

Amend. #39:

2D1.1: No, this skews reality. Someone who sells 1 kilo a week for a year is a 52 kilo dealer, not a 4 kilo dealer (if 30 day standard is used).

Amend. #40:

2D1.1/purity: The table is adequate as is. The Commission may want to include threshold levels in the commentary as an issue for departure, e.g., anything below 15% or above 85% purity.

Amend. #41:

2D1.1/pills: This amendment appears to create more equity in assessing offense level.

Amend. #42:

Re hash/hashish oil: Agree.
Re marijuana and moisture content: Agree.
Re khat, LAAM, d/l-meth: Agree.
Re weapon: Agree with rebuttable presumption.
Re negotiated amount: Agree unless actual weight is higher or defendant was not capable of producing.
Re reasonable foreseeability: Agree.
Re 50% lab capacity: Agree.
Re PWID and personal use: Prefer the second approach with the rebuttable presumption that all amounts are for sale. Otherwise, not only will defendants be encouraged to be loose with the truth, but prosecutors may also feel open to manipulate facts, particularly if a larger scale dealer pleads guilty and cooperates.

Re protected location: What is "no increased risk"?
Re 2D1.8: Agree.

Amend. #43:

2D1.1: Prefer neither option. Prefer the simplicity of the present 2D1.1. Why complicate the matter?

Amend. #44:

Consolidation of 2S1.1, 2S1.2: Agree, this would make life easier in the field.

Issue: Yes, this table seems more reflective of real money laundering offenses. Prefer the approach that applies the highest base offense level. Also agree that if a government agent manipulates transactions in order to increase guidelines, a downward departure may be warranted.

Issue #45:

Supervised Release: No. A term of supervised release after a defendant has served a year in prison is appropriate. Also, the Court has the option to terminate supervision after one year. Further, if restitution is to be made a mandatory condition of supervision, the field will need the time on supervision to enforce this condition, particularly where payments are necessarily small because of payment capacity.

Amend. #46:

5G: Prefer option 2. This option is much more practical and will be much more attractive to the Courts. "Partially concurrent" would be difficult to implement between the Courts and BOP.

Thank you for the opportunity to comment on these issues and proposed amendments. It means a lot to us in "the trenches" that our input was requested.

Sincerely,


Carla G. Coopwood
Senior U.S. Probation Officer

CGC/lwk

cc: John R. Long, CUSPO
Alexandria, Virginia