



U. S. Department of Justice

Criminal Division

#970002722

Washington, D.C. 20530

February 4, 1997

Honorable Richard P. Conaboy
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Conaboy:

The Department of Justice submits the following comments regarding the emergency sentencing guideline amendments recently proposed by the Sentencing Commission in the areas of List I chemicals, alien smuggling, document fraud, and involuntary servitude.

LIST I CHEMICALS (AMENDMENT 1)

Amendment 1 amends guideline section 2D1.11 to increase the penalties for List I chemicals involved in certain violations of the laws regulating chemicals used in the manufacture of controlled substances. The amendment generally raises the offense level by two levels for the most serious chemical violations, such as possessing a listed chemical with intent to manufacture a controlled substance or with knowledge or reasonable cause to believe it would be so used. The increase is mandated by section 302 of the Comprehensive Methamphetamine Control Act of 1996.

The proposed two-level increase in offense levels satisfies the Congressional directive with one exception. At offense level 12 in the proposed Chemical Quantity Table (the lowest level in the table under section 2D1.11), the amendment would result in no increase in offense level for many quantities of the listed chemicals previously subject to this offense level. No mention is made of this exception in the explanation of the amendment. As reflected in the proposed amendment, for example, less than 2.7 kilograms of anthranilic acid would result in offense level 12. The same result would exist under the current guideline, which provides level 12 for less than 3.6 kilograms of the substance.

It is true that the proposal provides a two-level increase from level 12 to 14 for the upper end of the range of List I

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chemical quantities previously sentenced at level 12 -- e.g., 2.7 to 3.6 kilograms of anthranilic acid.¹ Apparently, the chemical quantities previously assigned to offense level 12 for anthranilic acid and other List I chemicals were split between levels 12 and 14 in the proposal so that only the upper end of the range was increased to the higher offense level. However, this approach does not comport with the Congressional mandate to increase the offense levels by at least two for List I chemicals for the offenses covered by guideline section 2D1.11. No exception was provided for small quantities, and if such an exception is needed, it should be sought from Congress.

Since Congress provided that a two-level increase is the minimum appropriate, we recommend that the Commission study the effect of the proposed two-level increase during the next year to determine whether offense levels are sufficient for the affected offenses. The gap between a controlled substance offense and the relevant chemical offenses may continue to be too great.

ALIEN SMUGGLING (AMENDMENT 2)

Amendment 2 amends guideline section 2L1.1 on smuggling, transporting, or harboring an unlawful alien. It responds to section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. We generally agree with the proposed amendment and have the following comments on specific issues it raises.

We strongly agree with the proposed narrowing of subsection (b)(1), which replaces the current three-level reduction for offenses committed other than for profit with a two- or three-level reduction if the offense involves the smuggling, transporting, or harboring only of the defendant's spouse or child. The current reduction is subject to overuse and does not correctly identify the least serious class of alien smugglers since an offender can transport or smuggle numerous aliens or otherwise engage in serious conduct even if not for profit. Moreover, what constitutes profit can be difficult to assess in some cases. The proposed amendment of subsection (b)(1) more appropriately identifies those smugglers who engage in the least serious offenses.

The proposed amendment of subsection (b)(1) presents a choice of either a two- or three-level reduction. We believe that the greater reduction would be appropriate if the Commission were to select more than a three-level increase in the base offense level. In addition, we urge the Commission to retain the

¹ Curiously, 3.6 or more kilograms of anthranilic acid (which should be increased from level 14 to 16) seem to be absent altogether from the proposed table.

limitation on the reduction currently found in subsection (b)(1) -- namely, that it should apply only if the base offense level is determined under subsection (a)(2) for ordinary smuggling and related offenses. By contrast, a base offense level determined under subsection (a)(1) indicates that the defendant's violation involved an alien who was previously deported after a conviction for an aggravated felony. The reduced sentence should not be available for smuggling, transporting, or harboring such an alien, even if such a person is a close relation of the defendant's.

Subsection (b)(3) concerns the proposed enhancement for prior convictions for an immigration and naturalization offense, as mandated by the new immigration law. The amendment presents two options. We urge the Commission to select Option 2, which we believe more closely reflects the statutory directive. The directive requires an enhancement if the defendant had one or two prior felony convictions arising out of a separate and prior prosecution for conduct similar to that involved in the current offense. Option 1 limits the application of the enhancement to a case in which the defendant engaged in the new conduct subsequent to a conviction for the prior conduct. We see no reason for this limitation and do not believe that the statutory directive contemplated it. As long as the conviction occurred before the current sentencing and related to a separate transaction, there is an appropriate basis for enhancing the current sentence to reflect the defendant's recidivist tendencies.

Subsection (b)(4) concerns the possession or use of a weapon in connection with alien smuggling. The Commission has included two options. One is that the defendant must have discharged or used the weapon, while the second is that another person may have done so. However, commentary language in proposed Application Note 7 provides that if it is another person, the defendant must be aware of the presence of the firearm.

We disagree with creating what amounts to a special relevant conduct rule for firearms use in connection with alien smuggling and related offenses. The normal relevant conduct rules should operate since a special rule would unnecessarily complicate the guidelines and cause a great deal of litigation. Moreover, we see no policy basis for a narrower approach to addressing the conduct of others for this offense as compared to other offenses in which firearms are used. If the normal rules apply, the defendant's potential responsibility for another person's firearms use would be the same for this offense as for robbery. That is, section 1B1.3(a)(1)(B) of the guidelines would operate to make the defendant liable in the case of jointly undertaken criminal activity for "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity" Similarly, the defendant would be

responsible for acts and omissions that he or she aided, abetted, counseled, or commanded, as provided in section 1B1.3(a)(1)(A).

The proposed amendments also address recklessly creating a substantial risk of death or serious bodily injury to another person. This enhancement is extremely important because of the dangerous situations sometimes created in alien smuggling and related violations. Option 2 is preferable to Option 1 since Option 2 seems to provide a cumulative, rather than an alternative, enhancement to the risk created by a weapon. A cumulative enhancement is needed unless the risk of death or serious bodily injury arises only because of the weapon. As Option 1 is drafted, an offender who brandished a weapon at one individual but also created a separate risk by transporting others in the trunk of a car would receive the same sentence as one who only brandished a weapon.

We also have several concerns with respect to proposed changes in the commentary to guideline section 2L1.1. Application Note 5, as amended, provides that if the offense involved more than 400 aliens, an upward departure may be warranted. This note previously allowed for upward departure in the case of substantially more than 100 aliens. The proposed amendment represents too great a gap between the enhancement for 100 aliens and the number required for an upward departure. For example, a court should be able to consider the possibility of an upward departure when 300 aliens are involved. We strongly recommend retaining the current language involving "substantially more than 100 aliens" for purposes of this departure.

Another problem with Application Note 5 is that it eliminates a useful basis for upward departure previously authorized -- inhumane treatment of aliens. It is not uncommon for defendants to subject smuggled aliens to demeaning living conditions. District courts should maintain their ability to enhance the sentence of a defendant who treats a smuggled alien in an inhumane manner, even if no substantial risk of death or serious bodily injury results.

With respect to Application Note 9 concerning the enhancement for risk of death or serious bodily injury, we suggest deleting "may include" and inserting "includes" in the second sentence so that it reads as follows: "Such conduct includes, but is not limited to, transporting persons in the trunk or engine compartment of a motor vehicle" If the defendant engaged in any of the types of conduct specified, the enhancement should apply. However, because of the word "may" in the proposed language, a court may conclude that it need not apply the enhancement in the situations listed.

Proposed Application Note 10 includes a definition of an "immigration and naturalization offense" as any offense covered

by Chapter 2, Part L. We suggest that this definition be modified to add any related offense under state or local law.

We also recommend the inclusion of language regarding another basis for departure from the guidelines: the defendant's knowing involvement in smuggling, transporting, or harboring an unlawful alien who engages in, or intends to engage in, unlawful activity upon arrival in this country. Certain smugglers are known to assist in the smuggling of narcotics traffickers into the United States. However, such smugglers generally have not engaged in conduct that would result in conviction for conspiring to traffic in narcotics. An alien smuggling or related offense in such circumstances should result in a Commission-sanctioned upward departure.

NATURALIZATION OR CITIZENSHIP DOCUMENT FRAUD (AMENDMENT 3)

Amendment 3 amends sections 2L2.1 and 2L2.2 of the guidelines regarding trafficking in, or fraudulently acquiring, documents relating to naturalization, citizenship, or legal resident status, or a United States passport. This amendment implements section 211 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

Subsection (b)(1) of section 2L2.1 includes two options for a reduced sentence. The first retains the current reduction for offenses committed other than for profit but adds a limitation that the defendant must not have been convicted of an immigration and naturalization offense prior to the commission of the new offense. The second option limits the reduction to cases involving documents only related to the defendant's spouse or child. We prefer Option 2 since the reduced sentence would not be appropriate in all cases of not-for-profit offenses. For example, committing document fraud to assist numerous aliens who enter unlawfully, even if not for profit, should not result in a reduced sentence.

Sections 2L2.1(b)(4) and 2L2.2(b)(2) provide two options for an enhancement if the defendant had one or two prior convictions for an immigration and naturalization offense. We prefer Option 2 for the reasons set forth in our discussion of Amendment 2 above on the same issue in the alien smuggling guideline.

Proposed Application Note 5 to section 2L2.1 and Note 3 to section 2L2.2 define "immigration and naturalization offense." The amendment we suggested above in the alien smuggling guideline should also apply to the definitions in these guidelines.

We also urge the Commission to include upward departure language in section 2L2.1 for offenses involving substantially more than 100 documents. Without such language a court may

conclude that the quantity of documents has been adequately considered by the Commission and that upward departure is not warranted even for hundreds of documents.

PEONAGE, INVOLUNTARY SERVITUDE, AND SLAVE TRADE (AMENDMENT 4)

Amendment 4 revises section 2H4.1 substantially and responds to a directive in section 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Two key aspects of the directive are: 1) the reduction or elimination of any unwarranted disparity between the sentences for servitude offenses and the sentences for kidnapping and alien smuggling; and (2) the assurance of guidelines that are stringent enough to deter servitude offenses and adequately reflect their heinous nature.

In our view involuntary servitude and related offenses are very similar to kidnapping and should result in offense levels that are similar. Of course, some minor variation is necessary to reflect certain differences, such as the long period of time during which a servitude offense is likely to endure.

Several base offense levels are proposed, beginning with 18 and ending with 24. We strongly support level 24, which is the base offense level for kidnapping. See §2A4.1. If the Commission adopts base offense level 24, the lower offense levels for serious or life-threatening bodily injury in proposed subsection (b)(1) would be appropriate.

Assuming base offense level 24 is selected, the lower option (2 levels) for use of a dangerous weapon in proposed subsection (b)(2) would be consistent with the kidnapping guideline and adequate for peonage offenses.

Under proposed subsection (b)(3), which deals with the length of servitude, the high options provided are most appropriate since they most accurately reflect the seriousness of the conduct. For example, an increase of five levels is needed to reflect the seriousness of an involuntary servitude offense that lasts more than one year. In this regard, involuntary servitude and related offenses are distinguishable from kidnapping, which typically has a shorter duration, and the proposal reflects this distinction by including longer time periods than in the kidnapping guideline. The highest adjustment for length of time in that guideline is two levels if the victim is not released before 30 days have elapsed. Thus, it is appropriate to start with a three-level enhancement under the proposed amendment of the servitude guideline for cases in which the victim is held for more than thirty days and to increase in accordance with the high options presented for longer periods.

Proposed subsection (b)(4) concerns other offenses committed during the commission of, or in connection with, the servitude, peonage, or slave trade offense. As proposed, it only provides a two-level increase above the offense level otherwise determined under the amended guideline or above the offense level from the offense guideline applicable to that other offense. The kidnapping guideline provides a four-level increase. The two-level increase proposed for the servitude guideline is inadequate and would result in unwarranted disparity with the kidnapping guideline.

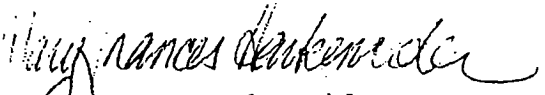
We note that the proposal fails to provide an enhancement for cases in which the victim is a minor. The kidnapping guideline includes a three-level enhancement where the victim was a minor and, in exchange for money or other consideration, the victim was placed in the care or custody of another person who had no legal right to such care or custody of the victim. §2A4.1(b)(6). A similar enhancement should be included in the servitude guideline since an offense involving the enslavement of a minor is particularly serious.

We also recommend several revisions to the proposed commentary to section 2H4.1. The term "dangerous weapon" in proposed Application Note 3 should be defined in terms that are appropriate to slavery and related cases. Since the essence of such a case is forced incarceration, implements used to enslave should be included in any sentence calculated under these guidelines. Thus, any device capable of causing injury to prevent or deter escape, such as razor wire or guard dogs, should be incorporated into this definition.

The proposed amendment includes upward departure language for cases involving the holding more than 10 victims. In addition, there is an issue for comment concerning the portion of the statutory directive requiring the Commission to ensure that the guidelines reflect the general appropriateness of enhanced sentences for cases involving a large number of victims. We believe that upward departure language is not sufficient to meet the directive. Nor are the current multiple count rules, which provide no increase in the sentence if there are more than six counts. See §3D1.4. A guideline increase is needed to address large number of victims, but such increase should be devised in such a way as not to defeat the operation of the multiple count rules where there are six or fewer victims.

We would be pleased to provide assistance in the further development of the guidelines discussed.

Sincerely,


Mary Frances Harkenrider
Counsel to the Assistant
Attorney General