



COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
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Honorable George P. Kazen
Chair

February 4, 1997

Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2500, South
Washington, D.C. 20002-8002

Dear Judge Conaboy:

I am writing in response to the published "emergency amendments" on guideline §2L1.1, on behalf of the Committee on Criminal Law. I also have a personal interest in immigration cases, based on handling countless cases of this kind for over seventeen years.

In general, we urge the Commission to proceed cautiously in making upward adjustments higher than those mandated by Congress. Historically, most of these cases usually result in guilty pleas, at least partially because the sentences are relatively modest. If the sentences are significantly enhanced and more of these cases proceeded to trial, serious logistical problems will result. Typically, these cases involve "material witnesses," namely the aliens being smuggled or transported. These witnesses inevitably must be detained. They are generally indigent, illegally in this country, very poorly educated, and require interpreters. The combination of those factors means that they are usually very poor witnesses. Because they have been dealt with by many persons along the transportation chain, usually under clandestine conditions, they often cannot identify defendants and give testimony inconsistent from other material witnesses or from what they have allegedly told Border Patrol agents at the time of their own arrest.

The pre-trial detention of the necessary witnesses is itself a logistical problem of no small proportion. They must be detained in crowded pretrial detention facilities, which are limited and often located far from the court location. Indeed, the Department of Justice recently wrote to me, asking the assistance of the Criminal Law Committee in conveying to all judges the fact that housing pretrial

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Detainees has become a major problem for the Marshals Service--in absolute numbers, in medical needs, and in transportation needs.

It is also true that the defendants being prosecuted for these offenses are generally not the main organizers of smuggling rings but rather low-level underlings. In fact, often the defendant is himself an undocumented alien selected by the "coyote" to drive or guide the group for a discounted fee. Moreover, at a time when the Commission is rethinking quantity-driven guidelines in narcotics cases, it should be slow to make quantity-driven increases in this area. Even more than with narcotics, the number of aliens being transported often has little bearing on the degree of culpability of the defendant.

We would also urge you not to abandon the "not for profit" language of §2L1.1(b)(1). There are many cases of defendant's helping relatives other than a spouse or child. In that connection, however, at some appropriate time it would be useful to clarify that this language does not refer to whether the defendant personally expected to profit but rather whether the transported or harbored aliens were paying someone for this service, as distinguished from directly working with a close friend or relative. Frequently I encounter cases where it is undisputed that a purely commercial venture was afoot, but there is no evidence that the particular defendant driving or guiding the group was directly receiving any money.

In sum, we realize you have no choice with respect to certain changes, but we urge great caution in going beyond the Congressional mandate.

Thank you for your consideration of these suggestions.

Sincerely,



cc: Commissioner Michael S. Gelacak
Commissioner Wayne A. Budd
Commissioner Michael Goldsmith
Honorable Deanell R. Tacha
Mary Frances Harkenrider, ex-officio
Edward F. Reilly, Jr., ex-officio
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