



U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

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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 proposed sentencing guideline amendments published for comment in the Federal Register January 2, 1997. The detailed comments that follow relate to the proposed guideline amendments that we understand the Commission is most likely to consider. However, there are a number of other amendments on which we will comment at Commission meetings if the Commission decides to consider them, such as the ones relating to acquitted conduct and role in the offense. We strongly oppose these particular amendments and urge the Commission not to adopt them.

Before addressing the issues the Commission has indicated it is likely to consider, we wish to reiterate the need to amend the fraud, tax, and related guidelines to produce more appropriate sentences and to simplify the guidelines' operation. Specifically, the fraud table should be adjusted to include more than minimal planning and to produce higher sentences for serious offenses. In addition, several new enhancements are needed, as outlined in our proposal last December. We urge the Commission to address the fraud area and would be happy to work with you in finalizing a guideline this amendment cycle. If, however, the Commission decides to delay action on this amendment, we believe the Commission should give it its utmost attention in the next amendment cycle.

AMENDMENT 7 -- STATUTORY INDEX

Amendment 7 amends the Statutory Index and guideline §1B1.2 to clarify that the Statutory Index specifies the offense guideline most applicable to the offense of conviction, subject

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to certain exceptions. The effect would be to give the Statutory Index more binding effect than it may now have. Although we agree that the Statutory Index should be given binding effect, we are not convinced that the proposed amendments will prevent the litigation they are aimed at discouraging.

AMENDMENT 10 -- CROSS REFERENCES AND ATTEMPTS AND CONSPIRACIES

Amendment 10 would revise the operation of cross-references that specifically direct the use of a different guideline if it results in a higher offense level. It would also amend the guideline on attempts, solicitations, and conspiracies (where such offenses are not covered by a specific offense guideline), §2X1.1, to eliminate the three-level reduction that now applies where the defendant has not completed all the acts he or she believed necessary for the successful completion of the substantive offense. The amendment would allow downward departures of up to three levels if the defendant were arrested well before such completion. We recommend that the Commission adopt the proposed amendment of §2X1.1. It will simplify the operation of the guidelines and recognize the seriousness of many attempts and conspiracies.

AMENDMENT 11 -- REDUCTION IN TERM OF IMPRISONMENT BECAUSE OF RETROACTIVE GUIDELINE APPLICATION

Amendment 11 responds to recent litigation regarding the reduction of a term of imprisonment under policy statement §1B1.10 because of an amended guideline range. The amendment clarifies that this guideline provision authorizes a court to reduce a prison sentence but not other components of the sentence, such as supervised release. It also provides that the reduced term of imprisonment may not be less than the term of imprisonment the defendant has already served. We support this amendment since the statutory authority for this guideline provision, 18 U.S.C. §3582(c), authorizes a court to reduce a prison term and provides no authority retroactively to reduce other components of the sentence.

While we urge the Commission to adopt an amendment along the lines proposed, we find proposed Application Note 3 problematic. It states that the determination whether to grant a reduction in imprisonment and the amount of reduction are "within the sound discretion of the court, subject to the limitations in subsection (b)" of §1B1.10. We are concerned that this language may result in arguments that the court can depart below the amended guideline range in the retroactive consideration of the amended guideline. The amendment should make clear that a court may not sentence below the amended guideline range.

AMENDMENT 14 -- THREAT OF DEATH

Amendment 14 would amend the robbery guideline by deleting the word "express" from "express threat of death" in the specific offense characteristic imposing a two-level enhancement in cases involving such threats, §2B3.1(b)(2). The commentary would also be amended to clarify that a defendant need not have expressly stated his intent to kill the victim in order for the enhancement to apply.

We favor the proposed amendment. However, the proposed commentary amendment to Application Note 6 would delete examples of death threats previously included. These consist of a number in which the defendant has explicitly stated or written the death threat and one in which there is a combination of words and a gesture: "Give me the money or else (where the defendant draws his hand across his throat in a slashing motion)." We recommend that the Commission retain the proposed examples in the commentary. These examples will continue to be useful to the courts in construing the amended guideline, and their deletion would likely engender arguments that the conduct they describe is not meant to be covered. Retaining the examples would require some adjustment of the commentary preceding them and may also require the addition of further examples illustrating the effect of the amendment.

AMENDMENT 15 -- AGGRAVATED SEXUAL ABUSE AND SEXUAL ABUSE AS SERIOUS BODILY INJURY

Amendment 15 addresses the recent statutory change to the carjacking statute, 18 U.S.C. §2119, which was amended to include aggravated sexual abuse and sexual abuse within the definition of "serious bodily injury." Two options are presented: one narrowly addressing the robbery guideline, and the other amending the definition of "serious bodily injury" generally for the guidelines. We prefer the broader approach, which is embodied in Option 2, since guidelines for offenses other than robbery should recognize that aggravated sexual abuse and sexual abuse involve serious bodily injury. For example, the guidelines applicable to assault with intent to commit murder and aggravated assault, §§2A2.1 and 2A2.2, both include enhancements for serious bodily injury to the victim and should reflect injury in the form of aggravated sexual abuse and sexual abuse.

The proposed amendment may have an unintended consequence that should be addressed. It may give rise to arguments that where sexual abuse or aggravated sexual abuse occurs in connection with a robbery (or other offense if the broader option is chosen), the injury can never be greater than serious. Whichever option is chosen, the Commission should clarify that cases of aggravated sexual abuse or sexual abuse that result in permanent or life-threatening injury are not excluded from the

greater enhancement for such injury just because these offenses themselves constitute serious bodily injury. For example, if a victim suffers permanent or life-threatening injury as a result of a robbery-related rape (such as through contracting the HIV virus), the injury should not be considered merely serious because it occurred in connection with an aggravated sexual abuse. The Commission should clarify the potential applicability of the greater enhancement for permanent or life-threatening injury in this and other situations where such injury occurs.

While we favor Option 2, we are concerned about the proposed narrowing of the portion of the definition of "serious bodily injury" involving impairment of a function of a bodily member, organ, or mental faculty. The proposed change is to require that such impairment be "protracted." While there may be a need to differentiate "serious bodily injury" from "bodily injury," the proposed standard is likely to engender litigation on the meaning of the term "protracted." We are not convinced that there is a need to amend this aspect of the definition of "serious bodily injury."

We also recommend that additional conforming amendments be made if Option 2 is approved. For example, the kidnapping guideline, §2A4.1, includes a two-level increase for serious bodily injury and a three-level increase if the victim was sexually exploited. The amended definition of "serious bodily injury" including sexual abuse and aggravated sexual abuse should not apply to this guideline.

AMENDMENT 16 -- ALTERED BEARER OBLIGATIONS OF THE UNITED STATES

Amendment 16 would treat offenses involving altered bearer obligations of the United States in the same manner as cases involving counterfeit bearer obligations. It would accomplish this result by moving the former offenses from guideline §2F1.1 to §2B5.1. The amendment would also add a two-level enhancement for offenses committed outside the United States -- a feature which is the result of a directive in the Antiterrorism and Effective Death Penalty Act.

We generally favor the amendment. However, we question the need for the addition of proposed Application Note 3, which excludes from the calculation items "that clearly were not intended for circulation" because, for example, of defects but includes "partially completed items that would have been completed but for the discovery of the offense" Determining which items are defective and which are only partially completed calls for a level of distinction that would be impossible on the basis of found items in many cases. Nevertheless, the presence of this application note would encourage litigation. Had the defective items been better produced, the offender would likely have circulated them along with the well-produced items. The

fact that a counterfeiter has produced some defective items should not reduce his or her sentence; the defective items reflect his or her intent as much as the good ones do.

AMENDMENT 17 -- UNDERLYING OFFENSE FOR RICO AND OTHER GUIDELINES

Amendment 17 amends the guidelines pertaining to use of a communication facility in committing drug offenses, §2D1.6; unlawful conduct relating to racketeer influenced and corrupt organizations (RICO), §2E1.1; interstate or foreign travel or transportation in aid of a racketeering enterprise, §2E1.2; and violent crimes in aid of racketeering activity, §2E1.3. Each of these guidelines refers to the offense level applicable to the underlying offense or to the underlying racketeering activity, or similar language. The Commission proposes to specify that the underlying offense is determined on the basis of the conduct of which the defendant was convicted. This language would eliminate relevant conduct as a basis for determining the offense level in many instances and create arguments in others that relevant conduct is not meant to apply to this determination. We strongly oppose these amendments and recommend that, if the Commission acts on this issue, it do so in a manner opposite to that proposed. That is, the Commission should clarify that the underlying offense is to be determined on the basis of relevant conduct.

First, we do not agree that there is a circuit conflict with respect to the two cases cited, United States v. McCall, 915 F.2d 811 (2d Cir. 1990), and United States v. Carrozza, 4 F.3d 70 (1st Cir. 1993). The court in McCall did not discuss the effect of the relevant conduct guideline, §1B1.3, in determining how to apply the guideline applicable to the offense of conviction for violent crimes in aid of racketeering activity. It seemed to assume the result it reached -- that the offense of conviction determines the applicable guideline referred to in guideline §2E1.3. That is, the court never entered into an analysis of whether the direction in §1B1.2 to use the guideline most applicable to the offense of conviction operates beyond selecting the guideline applicable to violent crimes in aid of racketeering, §2E1.3, and to the derivative guideline for the underlying offense. Similarly, the court never discussed the effect of relevant conduct on determining the guideline for the underlying offense. In addition, the court in McCall was apparently concerned about the impact of the defendant's guilty plea and his possible lack of understanding of the operation of the guidelines.

Next, we believe that the proposed amendment would result in seriously incorrect sentences for some of the most dangerous offenders we prosecute. The proposed amendment is a departure from the fundamental policy determination of the guidelines not to use a pure charge offense approach to sentencing. The

Commission has resolved the tension between a charge offense and real offense system generally through the relevant conduct guideline. In most cases the guidelines base sentences on real offense conduct that is reasonably related to the offense of conviction. Thus, for example, uncharged but related drug transactions are part of relevant conduct. The Commission also uses cross-references to achieve this mixed charge-offense and real-offense approach. Thus, murder committed in connection with a robbery results in application of the murder guideline even though the offense of conviction is robbery. This result is consistent with the view that real offense conduct counts toward the sentence where it is connected to the offense of conviction and is not an uncommon or unforeseen result.

While the above description of the guidelines pertains to many guidelines, the Commission proposes to take a narrower approach to one of the most serious federal crimes prosecuted -- that pertaining to racketeer influenced and corrupt organizations. Particularly with respect to racketeering offenses, the relevant conduct approach is important. Crime bosses establish their structure of organized crime, in part, to insulate themselves from the criminal acts that they direct and control. The relevant conduct approach cuts through this insulating structure and punishes the bosses for the acts they command and encourage, even when there are more limited specific counts of conviction that can be proved beyond a reasonable doubt. Precisely because RICO involves criminal enterprises, it is important to focus on the enterprise's illegal conduct, and not simply on any one individual's offense of conviction.

Despite the nature of organized crime, the Commission proposes to treat RICO offenses as if they were mere conspiracies to commit a particular unlawful act. This approach ignores the fact that a RICO offense is not an underlying individual racketeering act, but rather the behavior of conducting the affairs of an enterprise through a pattern of racketeering activity. The heart of the RICO statute, 18 U.S.C. §1962, is a defendant's ongoing participation in an enterprise that affects commerce. A defendant violates the RICO statute only if, among other things, he also engages in a "pattern of racketeering activity" (two racketeering acts) or the "collection of an unlawful debt" that has a specified relationship to the charged enterprise. Generally speaking, the gravamen of the offense is to conduct the affairs of an enterprise through a pattern of racketeering activity. This offense should not be likened to a one-time conspiracy to commit an unlawful act.

Another problem with the proposed amendment is that it ignores the fact that Congress views various forms of illegal conduct as related when committed in an organized crime context. By including particular crimes as RICO predicates, Congress has indicated the nature of offenses it believes are typical of

racketeering enterprises. These include: murder, kidnapping robbery, extortion, controlled substances trafficking, bribery, retaliation against witnesses, and other serious offenses. See 18 U.S.C. §1961. The RICO predicates are related in that they represent the types of criminal activity a racketeering enterprise uses as a means to conduct its affairs. Since Congress regards numerous offenses as related in an organized crime context, the Commission should do so as well. As it does with other related offenses, the Commission should allow the relevant conduct rules to operate with respect to racketeering offenses so that a racketeering defendant's measure of criminal conduct is not limited to his offense of conviction.

We have similar concerns about the proposals relating to the two other racketeering guidelines proposed for amendment, interstate or foreign travel or transportation in aid of a racketeering enterprise, §2E1.2; and violent crimes in aid of racketeering activity, §2E1.3. The offenses to which these guidelines pertain are used to prosecute racketeering cases, and any narrowing of the underlying conduct could result in insufficient sentences for serious offenders.

With respect to the proposed amendment of guideline §2D1.6, we believe this proposal will create confusion at best. The proposed new Application Note 1 may be viewed as inconsistent with Note 2. Note 1 states that the offense level must be determined on the basis of the offense of conviction, while Note 2 allows relevant conduct to enter into this determination. Some courts may be able to read these two notes together and understand that the added application note is intended to direct them to the drug distribution guideline, to which relevant conduct, including conduct not contained in a count of conviction, applies in establishing the offense level. However, other courts may find that the new application note limits relevant conduct to the quantity embodied in the offense of conviction and that this new note serves as an exception to guideline §1B1.3. In any case, a great deal of litigation can be expected. The commentary to guideline §2D1.6 should not be amended as proposed. Relevant conduct should control the determination of the offense level.

AMENDMENT 23 -- OBSTRUCTING JUSTICE

Amendment 23 attempts to address recent litigation surrounding the last sentence of Application Note 1 following guideline §3C1.1 on obstruction of justice: "In applying this provision in respect to alleged false testimony or statements by the defendant, such testimony or statements should be evaluated in a light most favorable to the defendant." The Commission's stated concern is that the above language may suggest a heightened standard of proof when a court applies the obstruction enhancement to perjury. While we favor the concept of this

amendment, we find it problematic in its execution in several respects.

The proposed amendment purports to eliminate the suggestion of a heightened standard of proof by deleting part of the above quoted language -- namely, the instruction regarding how the court should evaluate the testimony or statements. However, the proposal substitutes new language admonishing the court to be cognizant that inaccurate testimony or statements may result from confusion, mistake, or faulty memory and may not necessarily reflect a willful attempt to obstruct justice.

While it would be helpful to delete the offending language, the proposed substitute language will raise new questions. The Commission does not ordinarily instruct the courts as to how to consider evidence, and such instruction is not appropriate here. Moreover, some will regard the new language as the practical equivalent of the old, and the problem the Commission is attempting to cure may persist. It would be preferable to delete the offending sentence and to include no substitute language.

The proposed amendment is also problematic in another respect. It deletes Application Note 3(i), which contains a reference to offenses in title 18, United States Code, to which the obstruction enhancement applies. The reason given for the deletion is that the statutes referred to "include a hodgepodge of provisions" and that some have marginal, if any, relevance to the obstruction enhancement. This aspect of the proposal is unnecessary tinkering. The deleted provisions include some that have clear relevance to obstruction, such as influencing or injuring a juror and obstruction of a criminal investigation. The deletion of this language is simply not neutral and will spawn many unnecessary arguments. As a result, the main effect of the deletion will be to increase litigation surrounding conduct that was clearly covered as obstructive conduct in the past. The specifically listed sections of title 18, United States Code, should be retained in Application Note 3.

AMENDMENT 28 -- CIRCUIT CONFLICTS

Amendment 28 includes issues for comment on a number of matters. We agree that the Commission should address significant circuit conflicts when they exist and would be pleased to consider these conflicts further in discussions with the Commission.

We have several specific comments about the proposed amendments to resolve circuit conflicts.

Item 6

Item 6 concerns the issue whether the "victim of the offense" for purposes of the guideline on hate crimes and vulnerable victims, §3A1.1, refers only to the victim of the offense of conviction or to the victim of any relevant conduct. As indicated above, we favor the broader view. For example, a defendant may be convicted of several counts of mail fraud in which part of his relevant conduct, but not his offense of conviction, included a scheme to defraud several vulnerable victims. By contrast, in a similar mail fraud scheme evidentiary considerations may result in counts of conviction that involve one or more vulnerable victims but not other counts that would be included within relevant conduct.

The reasons the guidelines include relevant conduct for purposes of determining the extent of a fraud apply equally to the manner in which that fraud is conducted generally. Real offense sentencing enhances the ability of the guideline system to reduce unwarranted sentencing disparity. Without the use of relevant conduct principles, two offenders who commit identical conduct could receive very different sentences, depending upon the specific charges pursued. Thus, the Commission should resolve this issue so that the vulnerable victim guideline operates in accordance with relevant conduct principles.

Item 13

Item 13 addresses the issue of whether multiple criminal incidents over time may constitute a single act of aberrant behavior warranting departure from the applicable sentencing guideline range. We urge the Commission to specify that such acts are not a basis for departure. A single act of aberrant behavior may constitute a basis for departure because a defendant who acts out of character and engages in illegal conduct on one occasion is deserving of less punishment and is less in need of incapacitation than one who engages in multiple unlawful acts over time. However, to extend the reasoning of this departure basis to multiple unlawful acts occurring over time defies logic and undermines the guideline system. We urge the Commission to disallow this basis for departure when based on multiple unlawful acts occurring over time.

Item 14

Amendment 14 concerns the issue whether collateral consequences of a defendant's conviction can be a basis for a downward departure. The Commission should address this issue since departures based on collateral consequences of conviction may be seized upon by judges as a means of avoiding guideline sentences in white collar cases. In addition to the cases cited by the Commission, a recent tax case, United States v. Olbres,

99 F.3d 28, 32-37 (1st Cir. 1996), shows how the courts have had to deal with this issue. In Olbres the defendants appealed from the denial of a downward departure based on the fact that their business would fail and their 12 employees would be adversely affected if the defendants were imprisoned. The First Circuit rejected a categorical approach to these cases and remanded to the trial court to determine whether the case fell outside the heartland of these offenses. The court gave some indication that a disadvantage to innocent persons is not enough to take a case out of the heartland.

The Commission should disallow collateral consequences of conviction as a basis for downward departure so that the guidelines can operate as intended. Every individual suffers collateral consequences of conviction, whether such consequences be in the form of lost employment or lost business. Collateral consequences are a heartland effect of imprisonment and should not be the basis for a lower sentence. We urge the Commission to disallow this basis for departure.

AMENDMENT 30 -- SUPERVISED RELEASE AND SAFETY VALVE

Amendment 30 amends the supervised release guideline, §5D1.2, to provide that a defendant eligible for the "safety valve" exemption from mandatory minimum sentences is also exempt from a statutorily determined minimum term of supervised release. While we do not object to the substance of this amendment, we would recommend that its form be changed somewhat. The current proposal sets forth the change in an Application Note but includes contrary language in subsection (b) of the guideline itself: "The term of supervised release imposed shall in no event be less than any statutorily required term of supervised release." (Emphasis added.) To improve clarity in this area, we recommend that subsection (b) begin with the words "Except as provided in §5C1.2". With this addition, the commentary and the guideline itself will be consistent.

AMENDMENT 31 -- RESTITUTION

Amendment 31 includes an issue for comment concerning "community restitution" for a defendant convicted of certain controlled substances offenses in which there is no identifiable victim. The issue for comment arises because of section 205(c) of the Antiterrorism and Effective Death Penalty Act of 1996, which permits a court to order restitution based on the amount of public harm in such cases. This provision directs the Sentencing Commission to promulgate guidelines in this area and further provides that no restitution may be ordered until the Commission promulgates guidelines.

We urge the Commission to move forward with a guideline this amendment cycle in accordance with section 205(c) of the Act so

that the statutory provision can take effect in November. Delaying the issuance of a guideline for another year would mean a two-and-a-half year gap between the enactment of the statutory directive and its practical effect.

Since the concept of community restitution is a new one, we believe that a fairly general guideline that complies with the statutory provision would be appropriate. The guideline could be refined in the future after the courts gain experience with this form of restitution. For the present, the amount of public harm caused by the offense could be based on the offense level. Moreover, since the statute provides that the amount of community restitution may not exceed the fine ordered in the case, the guideline could refer to the ranges from the fine table for purposes of community restitution. The Commission should act quickly so that the statutory provision authorizing community restitution becomes a reality.

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

Sincerely,



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Attorney General