

March 13, 1997

Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
South Lobby
Washington, DC 20002-8002

Dear Mr. Courlander:

Enclosed, please find our comments with regard to the amendments proposed by the United States Sentencing Commission.

Sincerely,



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Our names are Mary Lou Soller and Alan J. Chaset and we serve as the Chairpersons of the American Bar Association Criminal Justice Sections's Committee on the United States Sentencing Guidelines. The members of that committee include professionals with diverse views and who are involved in all aspects of the federal criminal justice system - including judges, prosecutors, public and private defense practitioners, academics and criminal justice specialists. We are corresponding today, however, in our individual capacities as private defense attorneys and not as representatives of either the committee, the section or the association.

On January 2, 1997, the Commission published notice of proposed temporary emergency guideline amendments. Additionally, that notice contained several "non-emergency" proposals to amend and consolidate various other sections of the guidelines. Subsequently, on February 25, 1997, the Commission published another notice containing proposals for other emergency and non-emergency amendments to the guidelines and including some conforming changes to the previously published proposals. While we have already forwarded a brief response to the initial set of emergency proposals in our representative capacity, we are using this occasion to address some of the issues raised within the remainder of those notices and ask that you accept these comments on our own behalf.

As a starting point, we wish to commend the Commission (and more specifically its staff) for the significant amount of effort obviously reflected by the broad range of issues implicated by the various and numerous proposals. To the agency's credit, it was able to craft potential changes to advance its commitment to simplify and consolidate the guidelines while, at the same time, drafting responses to the many legislative directives requiring some more immediate action. And it was also able to deal with other aspects of the guidelines that needed adjustment, able to address several disparate decisions between the circuit courts, and able to attempt to placate the various constituent groups, entities and organizations that seek amendments to the Manual.

Because we are cognizant of the quantum of effort required just to produce the several hundred pages of proposals and because we understand the work that would now be required to polish and refine these matters to permit their adoption and to facilitate their implementation, we appreciate all the more the signal apparently being provided by the Commission as to what can and probably will be handled during this amendment cycle and what needs to be deferred for the present. Rather than being critical of the Commission for raising false hopes, we fully understand that message in general and recognize the impact of the two current commissioner vacancies in particular. Furthermore, considering previously stated remarks in regard to the Commission's Rules of Practice and Procedure, we believe that such deferral would be consistent with the suggestion of a more deliberate system of proposal, comment, review and more focused reproposal.

Having said the above, we believe that the Commission must in turn appreciate that, as a consequence, it has been somewhat more difficult to enlist volunteer members of our and other such committees to spend the time necessary to fully and properly consider and then formally address each of the proposals on the long amendment agenda. For instance, while some of our

volunteers were ready to volunteer their individual opinions on single issues, there was insufficient comment and discussion provided as to most others. As a result, no clear consensus position could be achieved for each of the items on the lists and thus no fairly representative statement could be crafted. We will, however, be providing herein some brief comments of our own on several of the proposals and we do offer our commitment to continue to work with the Commission and its staff on the remainder.

With that as background and even though we are speaking as individual practitioners, please understand that our principal policy directive on sentencing guideline matters is still to be found in the ABA Standards for Criminal Justice, Chapter on "Sentencing," third edition. More specifically, Standard 18 - 2.4 instructs that: "Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized." And Standard 18 - 4.3(c) instructs that: "Proposed amendments to existing sentencing provisions should be drafted and evaluated in light of data regarding with experience under the provisions in effect, and projections of future sentencing patterns under the proposed amendments."

I. January 2, 1997 - Non-Emergency Amendments

A. Amendment 5: While cognizant of the fact that the proposal here effectively amounts to making permanent a previously promulgated emergency amendment, we remain uncomfortable with U.S.S.G. §3A1.4 in its current and amended forms because we see it as violative of the basic structure of the guidelines. We believe that the existing provisions in Chapter Two and Chapter Four, coupled with the ability to depart for relevant offense and offender characteristics, should be sufficient to address these clearly more serious crimes of terrorism. Further, in the absence of data and/or other evidence speaking to the inadequacy of the current provisions and mechanisms, we cannot support the establishment of a mandatory minimum of 210 months for all such crimes committed by all offenders (including those with no criminal history points).

B. Amendment 6: We too are troubled by the confusion surrounding the definition of "instant offense" and its relation to relevant conduct and we also believe that explanatory language is needed. Unfortunately, the current proposal does not fully address and solve that confusion and that need. While we believe that more work is needed on this otherwise worthwhile proposal, we are also troubled by what is labeled as a conforming change to U.S.S.G. §3C1.1. Despite the label, we view the amendment as applied here as more a broadening of the coverage of this obstruction provision as opposed to an explanatory definition.

C. Amendment 8: We support incorporating the holding in United States v. Hill into U.S.S.G. §1B1.3.

D. Amendment 9: While we have previously and consistently stated our opposition to having acquitted conduct being considered for sentencing purposes and while we favor Option

1B among the proposals now being provided, we are cognizant of the fact that the Commission may not presently be in a position to consider all the implications of United States v. Watts and all the issues surrounding the use of acquitted conduct in the guideline equation.

E. Amendment 10: While we are supportive of that part of this proposal that simplifies the operation of Chapter Two cross references by limiting the what goes into/ what is to be considered in the determination of "greater offense level," we believe that more research needs to be undertaken and presented demonstrating the need to amend U.S.S.G. §2X1.1 as proposed.

F. Amendment 11: We are opposed to the proposed amendment to U.S.S.G. §1B1.10 limiting the impact of retroactive guideline changes to only reductions in the term of imprisonment. For many judges, the sentencing decision is a gestalt reflecting the use of the various sanctioning alternatives available under the statutes and the guidelines. Often, the appropriate sentence for the unique combination of offense and offender characteristics is a similarly unique combination of a particular point on the otherwise applicable range of months, a certain fine including the costs of imprisonment and/or supervision, a period of supervision to follow with particularized conditions of supervision, etc. When one of those factors is changed or eliminated in some way, the entire package has thus been changed. The only way to then achieve the desired balance is to similarly adjust each of the other pieces of the sentencing puzzle.

G. Amendments 12 & 18: The need to address the multiple problems associated with fraud and theft and tax guidelines in general and the interrelated loss issue in particular is most apparent as is the appropriateness of taking those matters off the table for this amendment cycle. While we have not as yet developed a specific position on the changes as currently proposed, we are encouraged by the lead taken in this area by the Practitioner's Advisory Group and are impressed with the drafts already authored by James Felman, Barry Boss and John Cline. As the effort on this front moves forward, we anticipate making substantial use of the product being prepared by these individuals and expect to recommend substantial parts of same for your consideration.

H. Amendment 14: Since we believe that the decisions from the 6th and 11th circuits represent the more appropriate response to the application of the "express threat of death" enhancement in U.S.S.G. §2B3.1, we oppose the proposed changes within the guideline and the application note.

I. Amendment 15: While we remain uncomfortable with language that equates injury as conduct and while there might be a better way to frame the point the Commission is trying to make, we prefer Option 1 as the identified narrower approach to the matter.

J. Amendment 16: While having no difficulty with the first and third parts of this proposal, we are opposed to the functional increase in the offense level for the covered bearer instrument offenses that will occur by moving the offenses from U.S.S.G. §2F1.1 to §2B5.1.

There has been no showing/demonstration that the current arrangement is not adequate to address the crime.

K. Amendment 17: We support the clarification of the meaning of "underlying offense" being proposed here.

L. Amendments 21 & 22: We share the belief that the current guidelines relating to role in the offense merit further study and refinement and we have long felt that these provisions could be integrated in some way with the drug guidelines to lessen the impact of drug quantity on the overall guideline assessment. While we see the need for change, we have some difficulties with each of the options being proposed for dealing with aggravating role and mitigating role adjustments. Because these sections are so significant, we trust that the Commission will place the issue high on the priority list for the next amendment cycle and we pledge to work with staff to share our specific thoughts and suggestions.

M. Amendment 23: While we prefer the clear and convincing standard adopted in the District of Columbia circuit, we believe that the decision in United States v. Dunnigan provides all the guidance necessary here. Further, we oppose the last of the four changes being proposed for the application note to U.S.S.G. §3C1.1; there has been no demonstrated need or other data provided justifying the expansion to a broader set of cases.

N. Amendments 24, 25 & 26: Of the three proposals addressing various aspects of the Acceptance of Responsibility concept in U.S.S.G. §3E1.1, we note our support of only those revisions that remove the restriction that currently prohibits the application of the additional one level decrease for offense level 15 or lower.

O. Amendment 28: As a general proposition, we believe that the Commission should not necessarily dictate a determination/resolution each time a disagreement between the circuit courts is identified as regards the implementation or application of a guideline provision. However, we appreciate the difficulties and unfairness that arise because of disparate interpretations and we are cognizant of the twenty-plus-page document prepared by the Commission's General Counsel listing such conflicts already addressed by Commission amendment.

If, however, the Commission decides to address any of the fifteen conflict issues listed within this proposed amendment during this cycle, please permit us to offer our position on several of those items. As to 4), we believe that a federal prison camp is clearly a non-secure facility and thus is functionally similar to the other listed facilities in U.S.S.G. §2P1.1(b)(3). As to 5), we believe that the two level enhancement at U.S.S.G. §2F1.1(b)(3)(A) requires that the defendant affirmatively misrepresent his/her authority to act on behalf of a charitable or governmental organization. As to 12), we believe that the use of the career offender provisions should be restricted to only those who otherwise statutorily qualify and thus cannot be used for departure purposes. As to 13), we believe that it may be reasonable in some circumstances for multiple criminal incidents occurring over a period of time to constitute a single act of aberrant

behavior thus warranting departure. And as to 14), we believe that it may be reasonable in some circumstances for the collateral consequences of defendant's conviction to serve as the basis of a downward departure.

P. Amendments 33, 34 & 35: We appreciate the desire of the Commission to recognize and implement the holding in Koon v. United States. While we support some of the more technical changes in amendment 34, we believe that amendments 33 and 35 are an inappropriate and unnecessary response to that decision and we see no need to merely repeat the language from the introduction in U.S.S.G. §5K2.0. If the Commission does intend to recraft the entire introduction in an upcoming amendment cycle, that would be the time to handle this matter.

Q. Amendment 37: As to the numerous consolidations and refinements proposed within this item, we have reviewed the detailed comments in this regard prepared by the Federal Public Defenders. While not necessarily adopting the position stated therein on each of the proposed consolidations, we find the effort thorough and complete and commend the discussion to the Commission.

II. February 25, 1997- Emergency/Non-Emergency Amendments

Aside from amendments 2, 12 and 13 that are necessarily implicated by either our previous comments our remarks contained above, we have not had an opportunity to review and discuss these proposals. Any comments in that regard from either us individually or more formally from the committee that we chair will be provided by the March 28, 1997 response date.

Finally, attached hereto are some additional comments prepared by one of the members of the committee. While this document was originated as a response to our request for reactions to the amendments being proposed during this cycle, its content is more general in nature and speaks to the structure of the present system and the author's perceived need for dramatic change. Since we are providing the above discussion in our individual capacities, we thought it appropriate to similarly forward this thoughtful piece from Professor Russell Coombs.

Thank you for this opportunity to provide our input.