



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, DC 20530-0001

January 2, 2001

Honorable Diana E. Murphy
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Murphy:

Under the Sentencing Reform Act of 1984, the Criminal Division is required to submit at least annually to the United States Sentencing Commission a report commenting on the operation of the sentencing guidelines, suggesting changes that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. § 994(o). We are pleased to submit this report, pursuant to this provision. It is our view that the sentencing guidelines are operating relatively well on the whole.

Specific Commission Priorities

We agree with the priorities established by the Commission for this amendment cycle and appreciate having had the opportunity to discuss the development of these priorities with the Commission earlier in this amendment cycle. These priorities include: economic crimes; nuclear, chemical, and biological weapons; money laundering; the Protection of Children from Sexual Predators Act of 1998; the Methamphetamine Anti-Proliferation Act of 2000, which addresses a variety of substances, including methamphetamine, amphetamine, and "Ecstasy"; the Victims of Trafficking and Violence Protection Act of 2000; other crime legislation enacted during the second session of the 106th Congress, including legislation addressing the drug "GHB" and scholarship fraud; counterfeiting of bearer obligations of the United States; firearms; the safety valve; obscenity; stalking; criminal history; immigration; the payment to, or receipt by, federal employees of unauthorized compensation; offenses implicating the privacy interests of taxpayers; and circuit conflicts.

Chief among our concerns are the economic crime amendments, which were addressed at the Commission's excellent symposium held recently; nuclear, chemical, and biological weapons; money laundering; the safety valve; statutory directives and other crime legislation; and circuit conflicts. Several of these merit specific discussion. As to the economic crime amendments, we believe it is important for the Commission to develop a new loss table that provides increased penalties for offenders at most levels, particularly at the middle and upper ranges. In many cases penalties are inadequate to serve the purposes of sentencing for white collar offenders, including just punishment, deterrence, and incapacitation. While the Commission has recently addressed specific types of economic offenses, including identity theft and cellular cloning, there are many other offenses that have been largely untouched by these amendments, including health care and procurement fraud. Moreover, the fact that the Internet has created vast opportunities for large-scale fraud deserves the attention of the Commission. A new loss table should address all areas of white collar crime in order to bring about greater deterrence, while maintaining proportionality and fairness in sentencing.

With respect to nuclear, chemical, and biological weapons, we have submitted a guideline amendment proposal to the Commission addressing such offenses as possession and threats involving these weapons and have worked productively with the staff in this area. Our proposal would fill gaps in the current guidelines, for example, the absence of a guideline to address offenses covered by 18 U.S.C. § 175 (relating to biological weapons), § 229 (relating to chemical weapons), and certain violations of § 831 (concerning prohibited transactions involving nuclear materials). In addition, the proposal we submitted would address other offenses that are now inadequately handled by the guidelines, including offenses relating to weapons of mass destruction, 18 U.S.C. § 2332a, when committed with biological, chemical, or radiological materials. While we have not proposed a specific amendment for importation and exportation offenses involving such weapons, we believe the Commission should raise penalties for these offenses as well. As you know, the National Defense Authorization Act for Fiscal Year 1997 urged the Sentencing Commission to provide increased penalties for offenses relating to importation, exportation, and attempted importation or exportation of nuclear, biological, or chemical weapons or related materials or technologies under specified provisions of law.

Money laundering is another area where we urge the Commission to act expeditiously. The Department has attempted to cooperate fully with Commission staff in developing a revised guideline that would be fair, workable and effective. Attorneys from our Asset Forfeiture and Money Laundering Section have spent many hours meeting with Commission staff and have shared their concerns and perspectives directly with the Commission at a recent meeting. The development of guidelines amendments for money laundering has taken many years and has been the subject of intense interest among the bench and bar. We urge the Commission to complete its work on this project during this amendment cycle.

Ongoing Commission Priorities

We recognize that the Commission's agenda is quite demanding and that it faces many difficult guideline amendment decisions in the coming months. Nevertheless, we believe the Commission can address certain additional areas of the sentencing guidelines as part of its long-term goals. Among these areas should be the further refinement of criminal history so that those with particularly serious criminal backgrounds are appropriately distinguished from those with less serious backgrounds who may merit more lenient treatment. The nature and severity of past offenses are significant in this regard, as is the issue of whether they involved an act of violence.

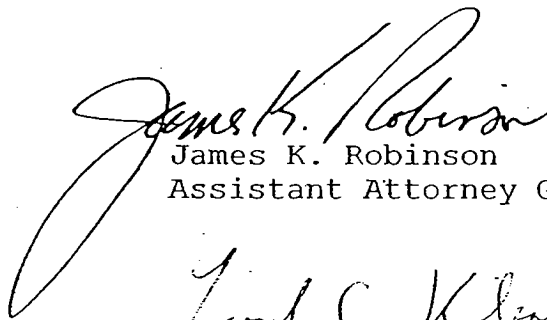
Another area for ongoing consideration is refinement of the guideline for acceptance of responsibility. The guideline should contain an incentive for early guilty pleas that permit the government to avoid preparing for trial and the court to allocate its resources efficiently. The current guideline allows for reduction in sentence by one level (in addition to the two for acceptance of responsibility generally) either for timely notification of authorities of an intention to enter a guilty plea or for timely provision of complete information to the government concerning the offender's involvement in the offense, §3E1.1(b). Subsection (b)(2) of the guideline specifically includes the goal of permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, but achieving this goal is difficult because of the alternative basis for reduction provided by subsection (b)(1). Thus, an offender who makes a timely disclosure but, nevertheless, waits until the eve of trial to plead guilty may receive this third level of reduction in the offense level. Tightening the guideline to create an incentive for timely pleas that save government resources is an important area for the Commission's consideration.

We also urge the Commission in its endeavors generally to take into account a provision of the Sentencing Reform Act of 1984 that, in our view, has received only passing attention in the past. The provision in question addresses the purposes of the Commission and provides that one purpose is to establish sentencing policies and practices for the Federal criminal justice system, that, among other things, "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process" 28 U.S.C. § 991(b)(1)(C). The Commission's recent report by an expert on sexual predators is an example of how the Commission can make use of social science research in its development of the sentencing guidelines. There are many other opportunities for such enlightenment that would serve the Commission well in the future. Moreover, the Commission can also gain knowledge from the experience of state sentencing commissions and should seek information from such commissions more often. These commissions often address the same types of issues for purposes of state sentencing law that are of interest federally, and the research, policy analysis, and experience of these state commissions can serve federal interests as well.

Conclusion

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to continuing to work with the Commission in a cooperative spirit as it addresses the many items on its agenda.

Sincerely,



James K. Robinson
Assistant Attorney General



Laird C. Kirkpatrick
/ Commissioner Ex-officio



U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, DC 20530-0001

January 12, 2001

Honorable Diana E. Murphy
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Murphy:

The Department of Justice submits the following comments regarding the proposed amendments to the federal sentencing guidelines published for comment in the Federal Register in November, 2000. These comments concern: Amendment 2 (counterfeiting), Amendment 5 (aggravated assault), Amendment 6 (fraudulent misrepresentations), and Amendment 7 (mitigating role).

AMENDMENT 2. Counterfeiting Offenses

Amendment 2 would amend the counterfeiting guideline, §2B5.1, in several respects. It would increase the base offense level from level 9 to 10; delete the minimum offense level of 15 for manufacturing offenses and replace it with a two-level enhancement; and delete commentary that suggests that the manufacturing adjustment does not apply if the defendant "merely photocopies." We agree with the increased base offense level and commentary change. However, we object to the deletion of the minimum offense level of 15 for manufacturing offenses. Deleting the floor will provide a windfall to many counterfeiters in the form of reduced punishment at a time when technology has made the offense increasingly easier to commit. We strongly believe this is the wrong message to send and that the floor of 15 should be retained.

AMENDMENT 5. Circuit Conflict Concerning Aggravated Assault

The proposed amendment includes two options to amend §2A.2 to address a circuit conflict regarding whether the four-level enhancement for the use of a dangerous weapon during an aggravated assault is impermissible double counting in a case in which the object used as a weapon was not inherently dangerous, such as a chair. We agree with the goal of both options to

resolve the circuit conflict in a manner that clarifies that the weapon enhancement in subsection (b) (2) of the guideline applies even though the reason for the application of the aggravated assault guideline is the presence of the weapon. However, both options may inadvertently raise additional issues for litigation. We would favor a simple statement that the weapon enhancement in subsection (b) (2) applies in a case involving a weapon even where the applicability of the aggravated assault guideline itself is predicated upon the involvement of the weapon. We do not believe there is a need for a more in-depth explanation in the commentary to §2A2.2 of the rationale for applying the weapon enhancement. As between the two options, we believe that Option 1 is more straightforward and consistent with the structure of other guidelines and that, while Option 2 attempts to address several concerns, it may raise similar problems to those in Option 1.

Including an explanation of the Commission's rationale for the applicability of the weapon enhancement is problematic in several respects. First, both options state in proposed Application Note 2 that the base offense level itself incorporates the presence of the dangerous weapon. However, since the aggravated assault guideline also applies in situations in which there is no weapon, the proposed language in Note 2 may lead to litigation that the aggravated assault guideline should not apply in such cases. In addition, Note 2 may raise a negative inference that other enhancements in the aggravated assault guideline are not applicable in the absence of a specific statement regarding their treatment in both the base offense level and specific offense characteristics. Eliminating the rationale for resolution of the circuit conflict would cure these problems. However, if the rationale is not deleted, the note should be clarified to indicate that the presence of a weapon is one of the aggravating factors taken into account in the base offense level.

In a related vein, both Options 1 and 2 state at the end of proposed Application Note 2 that in a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and the weapon enhancement. The underlined words may lead courts to believe that it is acceptable to avoid application of the weapon enhancement in a case in which the government has not shown an intent to cause bodily injury. However, there are other instances in which both the base offense level and the weapon enhancement should apply. Thus, we prefer the simple statement recommended above to the effect that the weapon enhancement in subsection (b) (2) applies in a case involving a weapon even where the applicability of the aggravated

assault guideline itself is predicated upon the involvement of the weapon.

AMENDMENT 6. Circuit Conflict Concerning Certain Fraudulent Misrepresentations

Amendment 6 addresses a circuit conflict regarding the applicability of an enhancement to the fraud guideline concerning actions on behalf of a charitable, educational, religious, or political organization, or government agency, §2F1.1(b)(4)(A). Specifically, the amendment addresses the question whether the enhancement applies where the defendant did not misrepresent his or her authority to act on behalf of the organization but rather only misrepresented that he or she was conducting an activity on behalf of the organization. We agree with the proposed resolution of this circuit conflict to assure the applicability of the enhancement in question to a defendant working for a charity, for example, who raises funds ostensibly for the charity and then diverts them to personal use. This situation presents increased culpability not captured by the amount of the fraud alone. However, the proposed language should be modified to delete the word "solely" from proposed Application Note 5(B) in the phrase "acting 'solely' to obtain a benefit for the organization or agency" A defendant who represents that he or she was acting to obtain a benefit for the organization or agency, whether or not solely for this purpose, but who diverts the proceeds to personal use is equally culpable. For example, a defendant working for a fund-raising organization under contract with a charity may indicate that some of the funds are to be paid to the former, but his or her culpability is not lessened when funds are diverted to personal use simply because the contributor is aware that some of the funds are intended for the benefit of the fund-raising organization.

We are also concerned with a change in Application Note 5 concerning persons presently covered by the enhancement. It now applies to persons who misrepresent that they are "acting on behalf of" a charitable or other specified organization. The amendment would make the enhancement applicable to a person who misrepresents that he was an "employee or authorized agent" of a such an organization. This additional change, while likely intended to be non-substantive, is unnecessary and may produce litigation by defendants claiming that a narrowed effect was intended.

Finally, we do not believe that the proscription against application of the Chapter 3 enhancement for abuse of a position of trust or use of a special skill is necessary, as proposed in

Application Note 5. The harm addressed in §2F1.1(b)(4)(A) concerns fraudulent conduct that leads the victim to believe that funds solicited will go to a charitable or similar organization or a government entity. The fact that the defendant is able to conduct such a fraud because he or she works for the charity is a separate harm addressed by Chapter 3 and should not be subsumed in the misrepresentation relating to the use to be made of the funds. If Application Note 5 were adopted as proposed, a person who uses his or her position of trust to conduct a fraud relating to a charitable organization would receive no greater sentence than one who uses his or her position in connection with a non-charity (except to the extent the level 10 floor currently in 2F1.1(b)(4) affects an otherwise low sentence). Therefore, we would recommend deleting the proposed commentary at the end of Application Note 5 regarding the application of §3B1.3. If, nevertheless, the Commission is intent upon retaining this commentary, it should be limited to the situation in which the defendant was an employee or agent of a covered organization or agency who represented that he or she was acting for its benefit. As currently drafted, the limitation placed on the application of §3B1.3 could also apply where the defendant falsely represented that he or she was an employee of a covered organization or government agency and used a special skill to commit the fraud. The published explanation preceding the proposed amendment language indicates that the limitation on the applicability of §3B1.3 was intended to apply only in the case of an employee of a covered organization or agency.

AMENDMENT 7. Circuit Conflict Concerning Certain Drug Defendants and Mitigating Role

Amendment 7 makes a number of changes to the mitigating role guideline, §3B1.2. While several of these changes are improvements, such as setting forth in the guideline that there must be more than one "participant" in order for the mitigating role adjustment to apply, there are two objectionable features. First, the proposal deletes Application Note 2 from §3B1.2, which states in part that the minimal role adjustment is intended to be used infrequently. Second, the proposed amendment resolves a circuit conflict in a manner we believe is inappropriate in most situations--by indicating that a defendant convicted of drug trafficking whose role was limited to transporting or storing drugs and who is accountable only for the quantity of drugs the defendant personally transported or stored is not precluded from receiving a mitigating role adjustment.

Deletion of Application Note 2 is a significant change that goes well beyond resolving the circuit conflict that is the

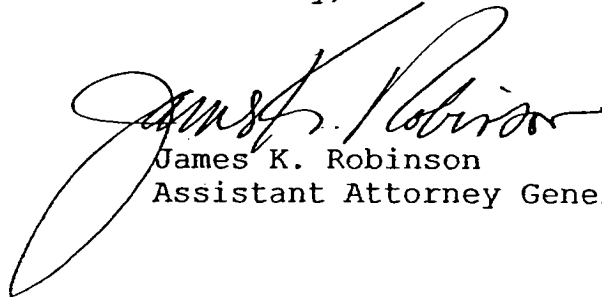
ostensible reason for amending the mitigating role guideline. Deletion of this note would send a strong signal that the four-level reduction for minimal participation should be applied more frequently. First, the note now expressly states that the downward adjustment for a minimal participant is intended to be used infrequently. It also provides examples of the appropriate use of this reduction relating to an off loader of part of a drug shipment or a courier for a single smuggling transaction. Given the scant guidance provided by §3B1.2 as to eligibility for treatment as a minimal participant, the proposed deletion of the infrequency language is particularly significant.

The coupling of the deletion of Application Note 2 with the proposed resolution of the circuit conflict is particularly troubling. It is an invitation to grant a role reduction to drug couriers. While there may be unusual circumstances in which a reduction for mitigating role in the offense may be appropriate for a defendant convicted of drug trafficking whose role was limited to transporting or storing drugs and who is accountable only for the quantity of drugs the he or she personally transported or stored, we believe these circumstances are rare indeed. In our view, the quantity transported or stored by a defendant who commits an offense with other participants often does not reflect the true extent of relevant conduct in cases involving multiple participants. The courier's relevant conduct can easily fail to take into account the true quantity of drugs involved in the offense when other participants have not been apprehended.

Moreover, even in a case in which a defendant actually transports or stores the full amount involved in jointly undertaken activity, his or her responsibility for the total quantity is generally inconsistent with a role reduction. Since the other participants have entrusted the defendant to transport or store the entire quantity of drugs involved in the offense, the defendant's role is ordinarily too significant for treatment as a minor or minimal participant. Only in an unusual case--for example, where the quantity is very small, or there is some other indication that the defendant's level of involvement in the offense is low despite his or her being entrusted with the total drug quantity--should a reduction in the offense level for mitigating role be permitted. Thus, the commentary should be amended to indicate that a role reduction should be precluded in the situation described in the proposed amendment except in rare cases.

We look forward to continuing to work with the Commission on the development of the amendments discussed above.

Sincerely,



James K. Robinson
Assistant Attorney General