



COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
300 East Washington Street, Suite 222
Greenville, South Carolina 29601

Honorable Donetta W. Ambrose
Honorable William M. Catoe, Jr.
Honorable William F. Downes
Honorable David F. Hamilton
Honorable Sim Lake
Honorable James B. Loken
Honorable John S. Martin
Honorable A. David Mazzone
Honorable William T. Moore, Jr.
Honorable Wm. Fremming Nielsen
Honorable Gerald E. Rosen
Honorable Emmet G. Sullivan

TELEPHONE
(864) 233-7081

FACSIMILE
(864) 242-0489

Honorable William W. Wilkins, Jr., Chair

March 8, 2001

To: The Chair and Members of the Sentencing Commission:

The Judicial Conference Committee on Criminal Law respectfully submits the attached comments on certain proposed guideline amendments that the Commission may soon consider.

The Committee understands that when the Commission considers these proposed amendments it may also consider whether any of them should be made retroactive. Although one member of the Committee believes that the proposed immigration amendment (Proposed Amendment No. 18) should be made retroactive, the other members of the Committee either oppose making any amendments retroactive or, at a minimum, believe that before the Committee comments on retroactivity it should first have the benefit of the Commission's assessment of the impact of making a particular amendment retroactive and the practicability of doing so.

The members of the Sentencing Guideline Subcommittee appreciate the opportunity of meeting with the Commission on March 20, 2001, and will be prepared to answer any questions

about these comments and to discuss any other matters of interest with the Commission.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Jim Lake".

Chair
Sentencing Guideline Subcommittee

Attachments

cc: Members of the Committee on Criminal Law
Honorable J. Phil Gilbert
John Hughes, Chief, FCSD

Proposed Amendment No. 5 -- Sexual Predators

The Committee is concerned with the Application Note 2., the "Sexual Predator Determination," in Option Two at page 34. (Unless otherwise noted, all page references are to the Commission's January 24, 2001, compilation of Proposed Amendments.) This note, which requires the sentencing court to decide if the defendant "is likely to continue to engage in prohibited sexual conduct with minors in the future . . .," is broad and subjective, and making such a determination could be especially difficult in cases where no expert psychosexual evaluation of the defendant has been prepared.

The Committee notes that Option Two, Background, at page 34, recommends that the maximum term of supervised release be imposed for all offenders sentenced under guideline § 4B1.6; and that Option 4 at page 41, dealing with § 5D1.2, "Term of Supervised Release," would mandate the maximum term for all offenders sentenced for the "sex offenses" identified in Application Note 1. at page 41. Although the Committee agrees that for most offenders covered by these guidelines the maximum term of supervised release will be justified, the Committee is concerned with requiring that the maximum term of supervised release be imposed in every case given the limited resources available to probation officers. If the Commission feels that language of this nature is desirable, the Committee recommends, as an alternative, language such as, "In the majority of cases the Commission believes that the maximum term of supervised release should be imposed."

Proposed Amendment No. 12 -- Economic Crime Package

Loss Definition

The Committee supports the adoption of its proposed loss definition (Option Two at p. 124). This option addresses each of the issues noted in the Commission Proposal (Option One at p. 118). The Committee's proposed definition is complete, workable, and easy to apply. It builds upon and improves the draft that was successfully field tested and found to be superior to the current application notes in organization, workability, and resolution of circuit conflicts. (For the two minor issues not addressed in the Committee Proposal, noted in footnotes 10 and 11 on page 27 of Andy Purdy's December 21, 2000, memorandum submitting the amendments for discussion during the January 2001 Commission meeting, the Committee supports the approach taken in the Commission Proposal.)

In many instances the Commission Proposal presents alternative options. The Committee believes that certain of the Commission's alternative options are less desirable than the alternative options incorporated in the Committee's proposed loss definition.

The Basic Definition of "Loss"

Section 2.(A) Option 1 of the Commission Proposal (pp. 118-19) sets out a basic definition of "loss" that mirrors the definition in the Committee Proposal. "Loss" should be the greater of the actual or intended loss.

"Actual loss" should be the pecuniary harm that resulted from the conduct attributable to the defendant under § 1.B1.3 (Relevant Conduct) and that was reasonably foreseeable to the defendant.

Option 1 contains two examples of reasonably foreseeable pecuniary harms that are absent from the Committee Proposal. The Committee does not believe it desirable to include these examples as part of the basic definition of "loss." Although examples can be helpful to courts, when only one or two examples are provided they may be over-construed so that the focus becomes the example rather than the language of the guideline itself. The computer crime example provides a helpful illustration, but the Committee found it preferable in its own proposal to include that example in the background commentary. The second long example in the Commission Proposal is so complex that it is likely to produce more confusion than clarification.

Section 2.A Option 2 of the Commission Proposal (p. 119) would include in "loss" all pecuniary harms that "resulted or will result" from the defendant's criminal conduct. This definition would include in "loss" every adverse financial consequence of a defendant's crime, no matter how causally remote. Such an expansive causation standard would be unworkable because it would require courts to consider even

the most unlikely events and would be unjust because it would hold defendants responsible even for harms they could not have foreseen. The Committee adheres to its position that the touchstones of a proper "loss" definition are:

- (1) whether the harm resulted from the defendant's crime, and
- (2) whether it was reasonably foreseeable to him.

Time of Measurement

A rule for determining when "loss" should be measured is essential. To the extent possible, such a rule should be equally applicable to all cases and should provide that all the components of "loss" be measured and valued on the same date. The Committee recommends that "loss" be measured at the time of detection. (Option Two § 2.D at p. 126)

The Commission's § 2.B Option 1 at p. 120 proposes that "loss" generally be measured at the time of sentencing. This rule could not be applied to many common theft and fraud cases. For example, in a car theft the vehicle may have been recovered and returned to the owner with no damage by the time of sentencing. In a check kiting, by the sentencing date the bank may have recovered all or some portion of the overdraft in existence at the date of discovery through voluntary repayment or by proceeding against the defendant's other assets. In neither case would it be accurate to say that the loss was zero, or even that it had been diminished

for sentencing purposes by post-detection recoveries or repayments. The Commission Proposals would partially alleviate this problem if Option 2 under "Exclusion from Loss" were adopted. This option states in § 2.(C)(iii)(II) at p. 120 that the "value of any 'economic benefit' transferred to the victim by the defendant ordinarily shall be measured at the time the offense was detected." However, the result of adopting these two options would be rules in different sections of the loss definition that measure different components of "loss" on different dates. The Committee believes its proposal provides a more coherent, consistent rule for measuring loss.

Interest

The Committee's loss definition recommends excluding interest of any kind from "loss." (Option Two § 2.B(i) at p. 125)

The Committee opposes including "bargained-for" interest in "loss." (§ 2.(C)(i) [Option 2] at p. 120) There is no readily apparent rationale for including bargained-for "interest" in loss, while excluding from loss imputed interest and other benefits promised by the defendant to the victims, merely because the defendant used some word other than "interest" -- "profits," "dividends," or "return on investment" -- to describe the promised benefits.

The Committee is also concerned about the use of the phrase "other opportunity costs" in § 2.(C)(i) [Option 1] at p. 120. In general, terms of art from fields outside the law should only be incorporated into the law with extreme caution. It is unclear to the Committee what "opportunity costs" means, and no definition is provided. The Committee believes that including this term in the guideline would invite confusion and inconsistent judicial interpretations.

Other Exclusions from Loss

The Committee Proposal does not credit a defendant for items of de minimis value transferred by a defendant to a victim (§ 2.(C)(i)(a) at p. 125). This rule is also incorporated in the Commission Proposal (§ 2.C(iii)(IV)(1) (first option) at p. 121). The Committee opposes expanding the de minimis exclusion to include benefits that have "little or no value to the victim" because they are "substantially different from what the victim intended to receive." (§ 2.(C)(iii)(IV)(1) (second option) at p. 121) The essence of fraud is that victims receive something different from what they expected. If a defendant were to receive no credit against loss unless the benefit he gave the victim was exactly what the victim expected, this provision would effectively nullify the crediting rules. This option would also complicate the sentencing process by requiring

probation officers and judges to determine the victim's subjective expectations.

"Ponzi Schemes" and Other Investment Frauds

The Committee supports the "loss to the losing victims" approach of measuring loss in multi-victim investment frauds adopted in United States v. Orton, 73 F.3d 331 (11th Cir. 1996), which is incorporated in the Commission Proposal (§ 2.(C)(iii)(V) [Option 1] at p. 121). The Committee opposes the approach in § 2.(C)(iii)(V) [Option 2], which includes as part of the loss economic benefits transferred to victims by defendants when such benefits were "designed to lure additional 'investments' in the scheme."

Gain

The Committee believes that "gain" should be considered as an "alternative measure of loss when loss cannot otherwise reasonably be determined, but the defendant's gain can reasonably be determined." (Option Two § 2.(F) at p. 127)

The Committee urges the Commission to view with caution proposals that treat "gain" as having independent significance. The loss tables are established on the assumption that they measure relative amounts of economic harm inflicted on victims of crime. As long as "gain" is merely an occasionally useful way of estimating "loss,"

treating a "gain" of \$X the same as a "loss" of \$X makes sense because the defendant's gain is some victim's loss. Some of the pecuniary gain options in the Commission Proposal assume, however, that there are cases in which the defendant receives a "gain," but does not cause a corresponding amount of economic harm, either because he causes no economic harm at all or because the amount of the gain is greater than the amount of the loss. (§ 2.(E) [Options 2 and 3] at p. 122) If such cases exist, then in such cases it seems doubtful that gain should have the same effect on punishment as loss. In any case in which the "loss" is truly zero, or in which a defendant's gain exceeds the economic loss to all identifiable victims, gain is no longer a true measurement of economic harm. The Committee is unsure of the justification for sentencing the defendant to the same punishment he would have received if he had caused a harm equal to his gain.

Departure Considerations

The Committee prefers its own description of the general considerations for departures, which refers not only to the seriousness of the offense, but also to the culpability of the defendant. In addition, the Committee does not believe that interest or the other items listed in § 2.(G) (i) (III) at p. 123 should be departure considerations.

The Insider Trading Amendment (§ 2.B1.4 at page 110)

This provision would result in higher sentences than would the current guideline for some offenses. Because the current insider trading base offense level of 8 includes more than minimal planning, the Committee believes the base offense level for insider trading should be lowered to 6 if a new sentencing table is adopted that incorporates more than minimal planning. This change would better preserve the status quo and avoid a double enhancement for more than minimal planning in some areas.

Loss Tables

Although the Committee prefers its own table (Option Three at p. 115), any of the published proposed loss tables is an improvement over the current table. The differences among the three proposed tables are not significant, and the Committee defers to the Commission's judgment as to the most preferable table.

Proposed Amendment (Part F) to § 2T1.1

In response to Issue for Comment No. 1 at p. 157, the Committee supports the Commission's proposal as explained in new Application Note 7 at p. 156.

Proposed Amendment No. 13 -- Aggravating and Mitigating Factors in Fraud and Theft Cases

The Committee favors the concept of flexibility embodied by these amendments, but does not believe that either amendment currently merits adoption. Most of the factors in the two options are addressed as encouraged departures in either the current guidelines or in the Committee's proposed loss definition. The Committee suggests that the loss definition reform be implemented and that the Commission gain experience with it before determining whether other factors should be codified in this manner.

Proposed Amendment No. 14 -- Sentencing Table Amendment and
Alternative to Sentencing Table Amendment

While the Committee favors greater sentencing alternatives for the least serious offenders (as reflected in the Committee's proposed loss table, which lowers offense levels for low-loss offenses), the Committee lacks sufficient information to determine the effect of this proposed change given the simultaneously anticipated new loss table for economic offenses. The Committee is also uncertain whether the proposed changes to Zones B and C are advisable for non-economic crimes. The Committee would prefer to gain experience with the anticipated new loss definition and loss table before endorsing either option.

Proposed Amendment No. 18 -- Immigration

Although it is not clear how Option 2 fits with Option 1, the Committee endorses Option 1's approach as an improvement over the current guideline. The graduated adjustment approach will result in more proportional sentences than the departure approach. The Committee specifically opposes Option 2.(B)'s proposed downward departure in cases in which the defendant was not advised of the consequences of the prior deportation. The Committee believes that this provision would unduly overburden courts in litigating issues that arose in the deportation procedure.

Additional Issue for Comment No. 1. Items of cultural heritage

The Committee does not believe that this type of conduct occurs often enough to warrant either an alternative loss calculation or a suggested upward departure. The Committee prefers that such conduct remain unmentioned grounds for departure.

Additional Issue for Comment No. 4. Inchoate fraud and theft

The Committee's proposed loss definition eliminates the current references to § 2.X1.1 in the theft and fraud guidelines as confusing and unnecessary.

