

FEDERAL PUBLIC DEFENDER
Western District of Washington

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February 26, 2001

Honorable Diana E. Murphy
Chair, United States Sentencing Commission
1 Columbus Circle NE, Suite 2-500 South Lobby
Washington, DC 20002-8002

Dear Judge Murphy:

I have received a copy of Robert S. Mueller's letter, written on behalf of the Department of Justice, requesting the Commission to defer action on a number of recently published guideline amendments. In support of his request, Mr. Mueller offers that the Department's new administration would like the opportunity to examine the proposals. The process preceding publication of the proposals was thorough and thoughtful. The Department of Justice participated fully in that process and enjoys a continuing presence on the Sentencing Commission. During the ongoing public comment period, the Department and its new leadership will have additional and ample opportunity to provide input concerning the proposals. Thus, there seems to be no need for the delay requested by the Department of Justice through Mr. Mueller.

I am especially concerned that the Department asks to defer discussion and implementation of the proposal that addresses the illegal reentry guideline. Improvement of this guideline is long overdue. Reduced to its essence, the concern with the proposed amendment to this guideline, as expressed in Mr. Mueller's letter, is that the proposal will result in lower sentences in some cases for the offense of illegal reentry following a conviction on an aggravated felony. Mr. Mueller is correct and, of course, that is the point of the amendment.

The amendment would change the way illegal reentry offenses are sentenced by providing graduated sentencing enhancements based on the seriousness of the prior "aggravated felony" conviction. Presently under the guideline a felony conviction for the distribution of a gram of marijuana is scored the same as a previous conviction for murder. While the new leadership in the Department might have a different sentencing philosophy than its predecessor, the most zealous proponent of tough sentencing laws could not reasonably embrace the unfairness of this current scheme.

The 16-level enhancement for all aggravated felonies, regardless of seriousness, makes this guideline an object of universal criticism. Its rote application produces unfair

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results, a fact that is manifest in the number of downward departures granted under the guideline. By far and away, downward departures for illegal reentry on a percentage basis outnumber downward departures for any other offense type. The amendment addresses the unfairness of the current guideline through the graduated sentencing enhancement approach.

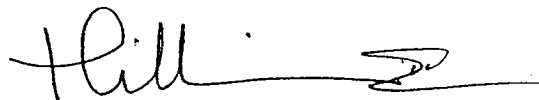
The amendment would mitigate another significant problem. As Mr. Mueller's letter implies, the government in some districts agrees to downward departures in these cases if the defendant agrees to "fast track" the prosecution. Unfortunately, in many districts the government opts against recommending such departures. Government policies vary widely throughout the country. As a result, sentences imposed against similarly situated defendants for this offense vary widely. This government-sponsored disparity would be cured through the amendment.

The amendment would address another serious defect in the current guideline. In thousands of cases, its application results in inappropriately severe sentences. Virtually all of these sentences are imposed against people of color, usually citizens of countries in Latin America. The present guideline offends our constitutional principle of equal justice.

In his letter, Mr. Mueller expresses concern about delay in establishing the actual time served on a particular conviction. There is no reason to fear the amendment will result in delay. The amount of time served on a prior offense is relevant only to the aggravated felony conviction. The presentence reporter will be able to focus on that conviction and obtain needed information well within the 2-3 months generally allowed for preparation of presentence reports.

The reasons and principles that drove publication of the proposed change in the illegal reentry guideline are enormously important. Discussion and, hopefully, implementation should occur in the usual course and without the delay requested by the Department. I appreciate your time and consideration in reviewing these comments.

Very truly yours,



Thomas W. Hillier, II
Federal Public Defender

TWH/kac
cc: All Commissioners

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