

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

200 WEST 8TH STREET

AUSTIN TEXAS 78701

JAMES R. NOWLIN
CHIEF JUDGETELEPHONE:
(512) 916-5675

April 4, 2001

Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Proposed Amendment to USSC § 2L1.2

Dear Commissioners:

I agree with your efforts to modify § 2L1.2. Under the existing guideline a defendant charged with illegal reentry who had previously been convicted of an aggravated felony received an automatic 16-level enhancement regardless of the severity of the felony and when it occurred. In many cases the guidelines produced a sentence much harsher than necessary. The main reason for such disparity is due to the wide scope of what constitutes an aggravated felony and/or the staleness of the aggravated felony. In some cases the underlying aggravated felony occurred more than 20 years before. After reviewing the proposed amendment and consulting with Federal Public Defender Bill Ibboston and Assistant United States Attorney Mark Marshal, I suggest the following:

First, the proposed amendment bases the gradual increases in enhancement levels on time served for the prior aggravated felony. While this addresses the different severity levels among aggravated felonies, presuming less severe aggravated felonies get less time, it does not fully address the situation. With good time credits and parole possibilities time served may artificially lower the enhancement level. Instead, I suggest using sentence time imposed as the measuring unit. Actual sentence time imposed offers a better picture of the punishment handed out for the underlying crime. Other benefits of using time imposed include the ease in calculating which enhancement level is appropriate and increasing the proportionality among defendants with similar offenses. Using time imposed also accounts for those instances when a defendant is released early not because of his good behavior or cooperation but because of prison overcrowding.

Alternatively, the suggestion of Abe Clout, a former assistant United States Attorney and now a defense attorney in New York City, tying the enhancement steps with the Criminal History category is a possible solution. In tying the steps with the Criminal History the severity of the aggravated felony and the time since it occurred are taken into account. This system also offers the benefit of using information that is already available in the presentence report.

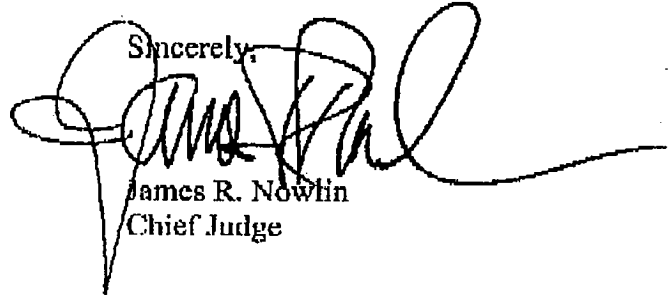
Second, the proposed amendment does not account for the staleness of the underlying

aggravated felony. In some cases the aggravated felony occurred more than 15 or 20 years before. There should be some allowances for those who have stayed clean for more than 15 or 20 years. The guidelines actually make such an allowance in figuring the criminal history level. Convictions older than 15 years are not counted. The same should apply to this section.

Finally, the proposed amendment does not account for the felony of possession of a controlled substance. The amendment defines a controlled substance offense as an offense under federal or state law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance or the possession of a controlled substance with the intent to manufacture, import, export, distribute or dispense. In the county in which this Court sits the state prosecutors usually only charge defendants with possession of a controlled substance. Under the current definition these drug offenses will not count for sentence level enhancements. I suggest adding language to include convictions for state law felonies of drug possession.

Thank you for the opportunity to respond to the proposed amendments. Please contact me if you need further information.

Sincerely,

A handwritten signature in black ink, appearing to read 'James R. Nowlin', with a long horizontal flourish extending to the right.

James R. Nowlin
Chief Judge

JRN/on