

United States District Court
Southern District of Texas
Houston Division
515 Rusk Avenue
Houston, TX 77002-2601

Nancy J. Atlas
United States District Judge

Tel.: 713-250-5990
Fax: 713-250-5994

March 27, 2001

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

Attn: Timothy B. McGrath

Re: Comments in Support of Proposed Amendments to United States Sentencing
Guidelines § 2L1.2

Dear Commissioners and Mr. McGrath:

This letter is submitted in response to the United States Sentencing Commission's invitation for comment on potential amendments to Guideline § 2L1.2 for unlawfully entering or remaining in the United States. I generally support the concepts in both Options I and II, but have several proposals for modifications or clarifications.

Option I

Graduation of Enhancement Levels for Length of Incarceration.-- Proposed Guideline § 2L1.2, subsection (b)(1)(A)(i)(I), properly provides for graduation of the enhancement for a previous conviction for an aggravated felony based on the period of imprisonment actually served by the defendant for the aggravated felony. In most cases, the sentence actually served for a prior felony is an adequately reliable indicator of the severity of the crime committed. The court that presided over the aggravated felony case was in the best position to assess the facts of the crime and other pertinent circumstances in order to impose an appropriate sentence. Generally, the post-sentencing factors that affect the length of sentences actually served reflect the severity of the crimes committed. Moreover, graduation of the enhancement on the basis of time actually served for the aggravated felony is an objective, easily applied standard. Sentencing courts will not be required virtually to retry the earlier case, and the amendment obviates the need for argument about the details of that earlier conviction.

Further, the amendment's separate treatment in subsection (b)(1)(A)(i)(II) for aggravated felonies that "involved death, serious bodily injury, the discharge or other use of a firearm or dangerous weapon, or a serious drug trafficking offense" is generally appropriate. The 16 level

increase for these crimes expresses the public and Congressional wisdom that patently serious crimes should retain strict treatment under the Guidelines.

I offer, however, one small modification to the language in subsection (b)(1)(A)(i)(II). The term “use” should be eliminated from the proposed amended Guideline. The proposed phrase “involved . . . other use of a firearm or dangerous weapon” is vague and difficult to apply to prior convictions in a sentencing context. Under *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501 (1995), the term “use” requires the “active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.” *Bailey*, 516 U.S. at 143, 116 S. Ct. at 505. Sentencing courts, in order to determine factually and legally whether a prior felony “involved . . . other use of a firearm or dangerous weapon,” would be required to search transcripts or offense reports from the earlier felony file. The enhancement’s application in this regard will be rife with factual disputes and logistical difficulties. There would be a concomitant loss of objectively verifiable bases for sentences in otherwise straightforward cases. Disputes concerning whether a firearm was “used” is likely also to result in substantial delays in sentencing. I therefore submit that the Commission should eliminate the term “use” in this subsection.

I note in support of my proposal to eliminate reference to “use of a firearm” in subsection (b)(1)(A)(i)(II) that sentencing courts would retain the ability to take proven firearm use into account. First, the “use” of a weapon as part of the aggravated felony conviction is an obvious factor that the earlier sentencing judge inevitably considered in imposing the sentence and that the post-sentence decision-makers considered in granting parole, if any. Thus, the active use of the firearm will be reflected in the length of the sentence actually served. Second, as a practical matter, if the defendant’s use of a weapon in connection with the prior aggravated felony was significant, the criminal charges brought against the defendant and his prior conviction would reflect that fact. Third, the federal sentencing court would have under the proposed amendments the ability to depart upward under proposed Application Note 4(A) (*see below*), if that court learns that use of a firearm was not adequately taken into account in the Guideline calculations.¹ Thus, absent the “discharge” of the weapon, the 16 level enhancement of Guideline § 2L1.2(b)(1)(A)(i)(II) should not apply simply because the prior aggravated felony “involved . . . use of a . . . weapon.”

Very Old Aggravated Felonies.— The Commission also seeks feedback on the concept under proposed Guideline § 2L1.2(b)(1) of “not counting” aggravated felonies that were committed beyond a certain number of years prior to the instant offense. I believe that some statute of limitations is appropriate. I would tie, however, the bar of use of the earlier aggravated felony to the time period when the defendant *completed his incarceration*, not when the prior aggravated felony conviction occurred. Specifically, I propose that when a defendant completed incarceration for the aggravated felony more than ten years before commission of the offense of conviction, the enhancement for the prior felony should be capped at 6 offense levels. This is a compromise. Both the length of time since incarceration and the size of the enhancement are selected to hold the defendant accountable for earlier conduct while giving some credit for non-aggravated felony behavior during a substantial period since incarceration. Further, in the isolated case where the Guidelines fail to account

¹ I do not oppose the reference in Application Note 4(A) to “use of a firearm or a dangerous weapon.”

sufficiently for a very old felony, the sentencing court may depart upward on an encouraged ground in Application Note 4(A) (in Option II).²

Option II

I also basically endorse the departure provisions in Option II set out in Application Note 4.

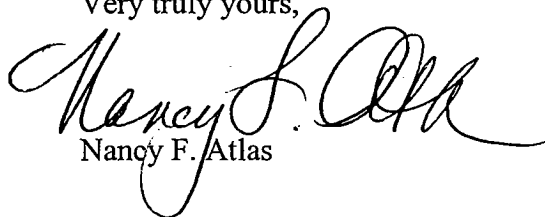
Upward Departures.-- It is very important to provide the sentencing judge with flexibility to depart upward when a defendant's prior criminal conduct is not sufficiently reflected in the offense level computed under proposed subsection (b)(1). This flexibility is appropriately included in the draft Guideline Application Note 4(A), which makes enhancement for a prior aggravated felony conviction an encouraged upward departure ground where the seriousness of the defendant's prior aggravated felony is understated.

Downward Departures.-- I endorse the downward departure concept contained in Application Note 4(B) covering "cases in which the defendant was not advised, at the time the defendant was previously deported or removed, of the criminal consequences of reentry after deportation or removal." Clarification is necessary, however. The Commission should explain whether a defendant has been adequately "advised" when the only explanation that defendant received prior to removal was contained in a lengthy form the defendant signed before deportation. I submit that a written explanation is insufficient if the warning was not given in the defendant's native language, the defendant was illiterate, or if the defendant was not given a copy of the warnings to take with him or her when removed from the United States.

Conclusion

Both proposed Options are thoughtful and necessary additions to the Guidelines. Together, these amendments substantially improve the existing Guideline § 2L1.2 by making the penalties for illegal reentry relate more sensibly to the severity of the crime and the defendant's criminal history. I urge the adoption of both Options with the (i) addition of a cap on the enhancement for prior aggravated felonies if the sentence of imprisonment was completed more than ten years before the offense of conviction and clarification as indicated above, (ii) deletion of the word "use" in Guideline § 2L1.2(b)(1)(A)(i)(II), and (iii) with clarification in Application Note 4(B) as to what is sufficient to "advise" a defendant before deportation of the criminal consequences of reentry.

Very truly yours,


Nancy F. Atlas

NFA/cm

² I am not opposed to incorporation of the standards in Guideline § 4A1.2 for computing criminal history, but think that it is unnecessarily complex.

cc: Honorable Edward C. Prado
United States District Court
John H. Wood, Jr. United States
Courthouse
655 East Durango Boulevard
San Antonio, TX 78206-1198

Honorable William K. Sessions III
United States District Court
Post Office Box 928
Burlington, VT 05402-0928



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

March 30, 2001

Lynn N. Hughes
Judge
515 Rusk Avenue
Houston, Texas 77002

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

Re: Proposed Amendments to Sentencing Guidelines § 2L1.2

Dear Commissioners:

I agree with the thoughtful analysis of my colleague, Nancy F. Atlas.

In general, you need to think through changes to reduce current confusion and future changes. Like the tax code, anything as complex as the guidelines cannot be called effective—for the defendants, prosecutors, courts, or the public we serve.

Simplify. Simplify.

Yours very truly,

A handwritten signature in black ink, appearing to read "L. Hughes", is written over a horizontal line.

Lynn N. Hughes