



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

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Honorable William M. Catoe, Jr.
Honorable William F. Downes
Honorable Richard A. Enslen
Honorable David F. Hamilton
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Honorable James B. Loken
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Honorable William W. Wilkins, Chair

February 5, 2003

Honorable Diana Murphy
Chair, United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002

Dear Diana:

The Judicial Conference Committee on Criminal Law respectfully submits the following comments to the proposed guideline amendments published in the November 27 and December 18, 2002, *Federal Register*.

1. Proposed Amendment to §2L1.2, Unlawfully Entering or Remaining in the United States.

The Commission has proposed two options for amending this guideline to address felony drug trafficking offenses that receive a sentence other than imprisonment.

The Committee expresses no view whether Option One or Option Two should be adopted. The Committee believes, however, that if Option Two is adopted by the Commission, the change should not be made retroactive. It has been the experience of members of the Committee that news of guideline amendments rapidly circulates among the inmate populations and that courts are often flooded with requests, frequently ill-advised and not supported by actual amendments, to revise defendants' sentences. Given the large number of defendants sentenced under § 2L1.2, especially by the border courts, the Committee is concerned that a flood of collateral litigation would arise from a retroactive amendment to this guideline.

2. Proposed Amendment regarding Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment.

The Commission has proposed several options for amending §5G1.3. As the Commission's synopsis recognizes, there is a circuit conflict whether to construe the word "should" in Application Note 6 to §5G1.3 as meaning "shall" (the majority view), or as a non-mandatory directive (the minority view). At least two circuits have concluded that the application note is ambiguous in this context and have urged the Commission to clarify its intent. United States v. Gondek, 65 F.3d 1, 4 (1st Cir. 1995); United States v. Smith, 282 F.3d 1045, 1048 (8th Cir. 2002).

Proposed Options One A and Two A resolve the ambiguity by amending §5G1.3(a). These options require that in cases in which the instant offense was committed while the defendant is on federal or state probation, parole, or supervised release and such supervision is revoked, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment. They also restate this requirement by replacing the word "should" with "shall" in a new Application Note 1. Options One B and Two B leave current Application Note 6 unchanged.

The Committee expresses no view as to whether consecutive sentences should be mandatory, or encouraged but not required, in cases to which Application Note 6 applies. But the Committee is concerned that simply leaving the present language unchanged, as stated in Options One B and Two B, would not resolve the conflict in the circuits because many courts have found the word "should" to be ambiguous in this context. Regardless of how the Commission resolves this issue of whether consecutive sentences shall be mandatory, or encouraged but not required, the Committee suggests that Application Note 6 be amended to express the Commission's intent more clearly.

3. Offenses Involving Assault Against Federal Judges.

The Commission has asked whether an enhancement should be provided in the assault guidelines for offenses against federal judges and other officials described in 18 U.S.C. §§ 111 or 115. At its January 8, 2003 meeting, the Commission voted to seek comments about whether such an enhancement would be appropriate for other Chapter Two guidelines that apply to these offenses and whether, and to what extent, the three-level adjustment now provided in §3A1.2 for offenses against official victims should be increased.

The Committee believes that an enhancement is appropriate for offenses against federal judges and other officials, either as a specific enhancement under the Chapter Two guidelines that apply to these offenses or by raising the Official Victim adjustment in §3A1.2. The Commission may wish to consider whether a separate, additional enhancement is appropriate when the offense is motivated by the official victim's role in the administration of justice.

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The members of the Committee appreciate the opportunity to comment on these proposed guideline amendments and will be pleased to provide any other information requested by the Commission.

With warm personal regards, I am

Sincerely,

A handwritten signature in cursive script that reads "Billy".

William W. Wilkins



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Honorable William W. Wilkins, Chair

February 10, 2003

Honorable Diana Murphy
Chair, United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002

Dear Diana:

The Judicial Conference Committee on Criminal Law respectfully submits the following comments to the proposed guideline amendments published in the January 17, 2003 *Federal Register*.

The Commission has sought comment on whether the loss tables for fraud, theft, and property destruction offenses should be separate. The Committee has studied these issues and provides the following observations for the Commission's consideration.

In May 2001, the Commission proposed the Economic Crime Package, which became effective November 1, 2001. The Economic Crime Package was the result of a 6-year study of economic crime sentences by the Commission and other interested groups, including probation officers, defense counsel, the Department of Justice, and the Criminal Law Committee, and was adopted after extensive Commission hearings and a major symposium. The Economic Crime Package built upon and improved a draft proposal that, with our Committee members' participation, was successfully field tested in 1998 and found to be superior to the previous guidelines in organization, workability, and resolution of circuit conflicts. The Economic Crime Package was the first comprehensive rewrite of guidelines dealing with a major category of crime.

The Economic Crime Package consolidated the theft, property, and fraud guidelines, revised the loss table for the consolidated guidelines and a similar tax offense table, and provided a revised definition of loss for the consolidated guideline. The loss table revision resulted in

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substantial increases in penalties for moderate and high loss offenders while slightly reducing offense levels for low loss offenders.

The Committee strongly believes that it would be ill-advised to now precipitously reverse course by pulling apart the consolidated guideline into separate theft, fraud, and property guidelines, or to revise and separate the definition of loss. The considerations that favored the adoption of the Economic Crime Package are still valid. One key consideration, as we understood it, was to avoid disparate sentencing outcomes for conceptually similar offenses that sometimes were occurring depending on whether sentencing occurred under the theft or the fraud guideline. For example, a bank officer's fraudulent personal loan scheme should be punished the same, whether the offense was charged as a bank fraud under 18 U.S.C. § 1341 or as an embezzlement under 18 U.S.C. § 656. Similarly, a consolidated guideline would appear to better ensure consistent sentencing treatment of the various hybrid theft/fraud and new technology offenses, such as identity theft and cellular telephone cloning.

Since these guideline amendments are only applicable to offenses committed after November 1, 2001, there is little available data on the effect that these changes have had on sentencing and virtually no appellate case law. Moreover, prosecutors, defense counsel, probation officers, and judges are only now becoming familiar with these new guidelines. Revision of these guidelines by the Commission would result in enormous confusion and a waste of governmental and private resources as counsel, probation officers, and judges have to learn new guidelines after only recently beginning to digest the November 2001 amendments.

The Committee strongly believes that the Commission should wait until sufficient empirical data and case law guidance are available concerning the Economic Crime Package before considering any major revisions. At a minimum, the Commission should publish specific proposals on how the loss tables would be separated and provide specific examples on how the proposed guidelines would operate.

The members of the Committee appreciate the opportunity to comment on the proposal to separate the loss tables and will be pleased to provide any other information requested by the Commission.

With warm personal regards, I am

Sincerely,



William W. Wilkins