

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

19613 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PA 19106

JUDGE EDWARD R. BECKER
CHAIRMAN

8-897-8642 (FTS)
213-897-8642 (COMM.)

I. Comments Relative to The Structure of the Sentencing Guidelines

§ 2G2.2: Transporting, Distributing, Receiving, Possessing with Intent to Sell, or Advertising to Receive Material Involving the Sexual Exploitation of a Minor

§ 2K2.6: Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition by Convicted Drug or Violent Felon

§ 2L1.1: Smuggling, Transporting, or Harboring an Unlawful Alien

The organization of the Guidelines Manual designates distinct functions to the chapters. Chapter Two provides guidelines tailored to specific types of offenses, focusing on the offense behavior of the case to be sentenced. Chapter Three addresses universal adjustments common to all offenses. Criminal History determinations are presented in Chapter Four. However, in each of the three proposed amendments listed above, there are specific offense characteristics addressing prior criminal conduct within the Chapter Two guideline. In order to retain the integrity of the structure of the guidelines, it would appear that such prior criminal conduct considerations would be more properly addressed in Chapter Four. Although I am doubtless missing something, in which case you will correct me, save for the Career Offender Guidelines, also contained in Chapter Four, I know of no instance where prior criminal history affects offense level. I fear that the proposals will cause confusion, as well as skew the guidelines structure.

In sum, in developing the procedures to determine a defendant's criminal history score, the Commission decided that points are assigned based upon the sentence imposed rather than the substance of the offense of conviction. The proposed specific offense characteristics in the three referenced amendments incorporate sanctions for the nature of a prior offense(s) or criminal conduct. If the Commission is now seeking to incorporate sanctions for the nature and essence of prior criminal behavior, perhaps a more comprehensive approach can be developed within Chapter Four, rather than piecemeal in certain Chapter Two guidelines.

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II. Offenses Involving Unlawful Aliens

While we are concerned about the specific offense characteristic in § 2L1.1 regarding prior criminal conduct, we support the other proposed changes on the particular guidelines. As the Committee has pointed out in the past, the districts bordering Mexico process large dockets with numerous cases involving this guideline. There has been a need to distinguish defendants that smuggle large numbers of aliens and those who endanger the lives of the aliens. To date, the courts have had to depart to distinguish the criminal conduct of such offenders. The proposed modifications to § 2L1.1 in specific offense characteristics (b)(1) and (b)(2) as well as the additions to the application notes, by making the offense level dependent on the number of unlawful aliens transported, and by encouraging departure where safety is endangered, correct this deficiency.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#35, Page 42 -- §2L1.1(b)(2)

We object to using the number of aliens smuggled to increase the B.O.L. We believe that the key law-enforcement issue is, "was the person the organizer?".

With regard to §2L1.1(b)(2)--documents, we contend that the existence of documents which can easily be duplicated into large numbers, is not the issue. The issue should be how many were used. This is not analogous to counterfeiting where all of the money is negotiable on its face. Documents require filling in names, pictures, and additional individualized preparation.