United States Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 7, 2008

Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Response to Request for Comments on Proposed Amendments for 2008

Dear Judge Hinojosa:

On behalf of the Practitioners Advisory Group, we submit the following comments on the Commission's various proposed amendments and requests for comment for the 2008 amendment cycle. We look forward to addressing some of these proposals at the Commission's hearing, on March 13.

1. EMERGENCY DISASTER FRAUD AMENDMENT

The Commission requests comment on issues related to the recent emergency amendment to § 2B1.1 resulting from the Emergency and Disaster Assistance Fraud Penalty Enhancement Act. The PAG believes that the Commission's recent amendment, as directed by the Act, addresses sufficiently the concerns that prompted the legislation. With one possible exception, further amendments should not be considered until the Commission has accumulated a greater body of experience.

There are three issues for comment. The first is whether the Commission should add a minimum offense level to the new specific offense characteristic for this type of offense. As the guideline now stands, any offense involving fraud or theft in emergency or disaster relief will generate a minimum offense level of 9 (base level of 7 plus the new 2-level enhancement pursuant to § 2B1.1(b)(16)). Within the current Manual, the most closely analogous specific offense characteristic containing a minimum offense level is for fraud involving, *inter alia*, misrepresentations that the defendant was acting on behalf of a charitable organization or government agency. For such conduct, there is a minimum offense level of 10. § 2B1.1(b)(8)(A). A similar floor for the new offense is unnecessary. The difference between a minimum of 9 and a minimum of 10 is too small to warrant an amendment. (Under the enhancement for charitable organization or government agency misrepresentations, an offense level of 8 is possible, so the argument for a floor of 10 in those cases is stronger.) Moreover, with an intended or actual loss of anything greater than $5,000, the offense level for emergency or disaster relief fraud will be at least 11. U.S.S.G. §§ 2B1.1(a)(1), (b)(1)(C). An amendment affecting the lowest-level cases, where the intended loss is less than $5,000, is unwarranted.

The second issue is whether the 2-level enhancement should be expanded to fraud or theft involving a benefit paid, etc., in connection with a procurement of property or services related to any emergency or major disaster declaration "as a prime contractor with the United States or as a subcontractor

or supplier on a contract in which there is a prime contract with the United States." Such an amendment might be warranted. We are aware of no principled basis for treating emergency or disaster relief fraud by contractors or subcontractors in connection with a procurement of property or services different than emergency or disaster relief fraud by others. The addition of this language promotes consistency.

The third request for comment is whether aggravating or mitigating circumstances should be added for disaster fraud cases. Although we agree with the testimony at the Commission's February 13, 2008 hearing that fraud by victims of disasters or emergencies should warrant a mitigating adjustment, there is much to be said for leaving the recently amendment guideline as is until some experience can be gathered through, among other things, an analysis of sentences imposed under the Act, in particular whether, why and to what extent courts are deviating from the recommended guideline ranges. There is more reason now than when the guidelines were mandatory for the Commission to wait for data before making adjustments that may further complicate the guidelines or otherwise prove ill-advised.

Finally, the PAG understands at least one organization is proposing that § 2B1.1 incorporate language concerning the appropriateness of a lesser sentence (*i.e.*, downward departure) in cases where the defendant was an actual victim of a natural disaster. The PAG supports judicial recognition of instances where the personal consequences of a disaster influenced, and potentially mitigate, a defendant's offense behavior so as to offset the enhancement required under § 2B1.1(b)(16).

2. HONEST LEADERSHIP AND OPEN GOVERNMENT ACT OF 2007

The PAG has no comment concerning the proposed amendments to § 2C1.1.

3. MISCELLANEOUS FOOD AND DRUG OFFENSES

Human Growth Hormone (hGH)

As a general matter, the PAG supports the previous testimony of Rick Collins, Esquire, of Collins, McDonald & Gann, P.C., particularly with respect to how hGH should be quantified under Guideline 2D1.1. We do not believe that the existing definition of "unit" applicable to trafficking in steroids should be used with distribution offenses involving hGH because hGH offenses present a lesser risk of harm than steroid offenses. As Mr. Collins explained, little scientific evidence supports equal treatment of steroids and hGH for sentencing purposes.

The primary considerations associated with non-medical use of anabolic steroids are not present with non-medical hGH use. For instance, two concerns with anabolic steroids are their psychoactive effects among certain users and the use of excessive amounts beyond what is normally prescribed in lawful medical uses. As Mr. Collins made clear, the medical literature does not support (and Robert Perlstein, M.D. of the FDA does not appear to maintain) that hGH causes enhanced aggression, psychosis, hypomania or other psychological disorders. Nor does the literature suggest that discontinuation of hGH use has any depressive effect on mood. As for abuse of hGH through excessive usage, Mr. Collins testified that while non-medical anabolic steroids users commonly take anywhere from 10-to-100 times the medically prescribed doses, non-medical hGH users typically administer only a fraction of the dosages approved for medical use. Dr. Perlstein appeared to differ on this point, suggesting, as an example, that the typical dosage for a bodybuilder exceeds the typical dose required by adults with severe growth hormone deficiency. Because the evidence on both sides appears somewhat anecdotal, the Commission should

undertake further study concerning how hGH should be treated relative to steroids under the drug quantity table as it bears directly on offense severity.

The Commission also requests comment on whether a maximum base offense level (cap) should apply in § 2D1.1 for hGH distribution offenses. Because hGH presents a lesser harm than anabolic steroids and because questions regarding hGH remain open, the PAG submits that any maximum offense level should be less than the maximum level for anabolic steroids, 20. Moreover, as we submitted previously (*see*, *e.g.*, 2/30/06 PAG Ltr. re: Proposed Emergency Steroids Amendments at 13), any maximum should be structured so that Category VI offenders have a limited incentive to plead guilty, that is, the possibility of an acceptance of responsibility adjustment that might place their recommended guideline range below the statutory maximum (60 months). Further study of the excessive use issue would undoubtedly also inform decisions regarding a maximum offense level for hGH offenses.

PDMA & FDCA Offenses

The PAG agrees with the separate comments of John R. Fleder, Esquire, and John A. Gilbert, Jr., Esquire, of Hyman, Phelps & McNamara P.C. on the issue of whether § 2N2.1 adequately addresses the numerous statutes currently referenced to that guideline. Messrs. Fleder and Gilbert both recommend that before the Commission takes any action, it should study the issues further, perhaps through a working group similar to that convened in 1994. As the Commission notes in its request for comment, § 2N2.1 covers a wide range of regulatory offenses, including felonies with full knowledge and intent requirements as well as misdemeanors that are virtually strict liability offenses. While the FDA comments raise various theoretical concerns, the empirical support for them is certainly not apparent. Nevertheless, the FDA proposes sweeping changes. This complex, heavily regulated area would benefit greatly from a more systematic study of the available data for sentences imposed under § 2N2.1 to identify areas in need of targeted adjustment due to sentences that have deviated too excessively to one extreme or another.

4. ANIMAL FIGHTING PROHIBITION ENFORCEMENT ACT OF 2007

Through the Animal Fighting Prohibition Act of 2007, Congress increased the penalties for violations of 7 U.S.C. § 2156 from a misdemeanor to a felony, with a three-year maximum term of imprisonment, while also adding a new offense involving the distribution and transportation of instrumentalities associated with bird fighting. 7 U.S.C. § 2156(e). In response, the Commission proposes to move the guidelines provisions concerning § 2156 offense from § 2X5.2 (Class A Misdemeanors) to § 2E3.1 (Gambling Offenses).

The PAG agrees that § 2E3.1 addresses offenses analogous to those covered by the Act in that animal fighting is often associated with gambling. Concurrently, we support the proposed base offense level of 8 and oppose the alternate proposed level of 10. Federal authorities pursued fewer than a half dozen animal fighting cases under the Animal Welfare Act of 1976. H.R. 110-27 (2007). Thus very little data is available by which to assess past sentencing practices. For reasons explained above, the prudent course is to take a less forceful approach, followed by monitoring newly-available sentencing data to determine whether, and to what extent, further adjustments may be warranted.

Proposed Application Note 2 to § 2E3.1 suggests an "upward departure" may be warranted in animal fighting offenses involving extraordinary animal cruelty. The PAG does not oppose sentences above the recommended guideline range in such circumstances. However, the provision appears unnecessary in

that it adds—rather than minimizes—complexity to the Manual. For one, "extraordinary cruelty" is not defined, therein encouraging litigation where it may not be needed to reach an appropriate disposition. *See, e.g.*, Rep. Steve King Dissenting View in H.R. 110-27 (perspective on treatment of animals informed by one's background and livelihood). Indeed, consideration of the aggravating circumstance contemplated appears to fall squarely within the ambit of § 3553(a) considerations courts weigh routinely. *See* 18 U.S.C. §§ 3553(a)(1), (2)(A). To the extent the Application Note remains, the PAG submits that in view of *Gall v. United States*, 552 U.S. --, 128 S.Ct. 586 (2007) and the prevailing need to move the Manual toward the current state of federal sentencing law, "departure" language should be avoided. Instead, we propose the following:

> 2. *In the case of an animal fighting offense that involves extraordinary cruelty to an animal, ~~an upward departure~~ a sentence greater than the recommended guideline range may be warranted.*

5. TECHNICAL AMENDMENTS

The PAG has no comment concerning the six proposed technical amendments.

6. CRIMINAL HISTORY

Last year, the criminal history guidelines underwent significant revisions. *See* Amendment 709. Among the changes is that certain prior sentences, such as those imposed on the same day, now count as a single sentence. U.S.S.G. § 4A.1(a)(2). However, where there is an intervening arrest—that is, an arrest for the first offense before the defendant committed the second offense—the prior sentences are always counted separately. *Id.* The Commission now proposes amending § 4A1.2(a) to define "arrest" as including "an attempted service of an arrest warrant where the defendant escapes the arrest or the service of the arrest warrant" and to clarify that "[t]he issuance of a summons or a complaint does not constitute an 'arrest.'"

The PAG opposes this amendment. To our knowledge, successful escape from an arrest or from the attempted service of an arrest warrant is a rare occurrence in the intervening arrest context. Although the situation no doubt will arise from time to time, we question the propriety of using the amendment process to address infrequently occurring situations, especially where the proposed amendment is contrary to the goal of simplifying the guidelines. In this vein, it is important to recognize that: (a) judges are able to vary from the recommended guidelines sentence to account for this unusual factual scenario and (b) the difference between counting the two prior offenses separately or as a single sentence will rarely be more than one criminal history category.

There are few areas where clarity on particular application questions could not be enhanced through amendments like the one proposed. But, taking the long view, as the Commission must, begs the question whether further clarification on issues that do not arise routinely serves the larger goal of a simplified, stable set of guidelines that are easy for practitioners to understand and for judges to administer. We believe that this goal is undermined by amending the Manual frequently and in a manner that adds complexity. Moreover, by making "escape" part of the definition of arrest—rather than a factor the judge may (but need not) consider—the amendment requires litigation and fact-finding where it may not be needed to reach the appropriate sentence in every applicable case.

Although the other half of the proposed amendment favors defendants by clarifying that issuance of a summons or complaint is not an arrest, for the sake of maintaining simplicity in an area where there are few cases affected by the proposed amendment we believe that the entire amendment should be rejected.

7. IMMIGRATION

The PAG has reviewed, and is in agreement with, the reasoned comments of the Federal Public and Community Defenders on this topic. They address fully our perspective and our concerns.

8. COURT SECURITY IMPROVEMENT ACT OF 2007

Appropriate Guideline for Violations of 18 U.S.C. § 1521
(Filing false liens against federal judges and law enforcement officers)

The Commission has requested comment on the appropriate guideline for violations of 18 U.S.C. § 1521 and suggests two existing guidelines for consideration: § 2J1.2 (Obstruction of Justice) and § 2B1.1 (Theft and Fraud). Use of § 2B1.1 is inappropriate for several reasons.

Guideline section 2B1.1 addresses deprivation of property offenses. In adopting 18 U.S.C. § 1521, Congress was concerned not about federal judges or other federal employees actually losing real or personal property through the filing of a false lien but rather situations where false liens are used to intimidate or harass. Report of the House Committee on the Judiciary, H.R. 110-218 at 16; *see* Stmnt. of the Hon. D. Brock Hornby, United States District Judge (D.-Maine) on behalf of the Judicial Conference of the United States to the Senate Committee on the Judiciary (Feb. 14, 2007) at 7-8 ("These liens are usually filed to harass a judge who has presided over a criminal or civil case involving the filer, his family, or his acquaintances").[1] Additionally, § 2B1.1 is loss driven, and determination of loss in false lien cases is problematic (*e.g.*, the cost of having the lien removed, the loss of a potential sale, the value of the property, or some other figure).

Section 2J1.2 is more appropriate because obstruction of justice (or at least an attempt at obstruction) is often at the heart of these forms of intimidation or harassment. Additionally, § 2J1.2 contains several potentially applicable adjustments, including a three-level adjustment if the offense resulted in substantial interference with the administration of justice and a two-level adjustment if the offense involved a substantial number of records or was otherwise extensive in scope. U.S.S.G. § 2J1.2(b)(2), (3).

The Commission might also consider using § 2A6.1 (Threatening or Harassing Communications: Hoaxes) for this offense. The PAG recommends that, if used, a base offense level of six (6) is chosen given that the nature of this offense is far less serious than many other offenses that fall under this guideline. *See, e.g.*, 18 U.S.C. § 871 (Threats Against the President), 18 U.S.C. § 876 (Request for Ransom), 18 U.S.C. § 1992 (False Information Regarding Terrorist Attacks).

It takes some level of sophistication to properly prepare a lien, and false ones are often caught before ever being filed. For example, Chief United States District Judge R. Allan Edgar (E.D.Tenn) reports "one disgruntled litigant had a lien against my home all ready for filing. He got as far as the registrar's

[1] Available at http://judiciary.senate.gov/testimony.cfm?id=2526&wit_id=6071

office, but a court employee prevented him from filing it." *False Claims Used to Harass Judges*, 34 The Third Branch 8 (August 2002).[2] In some jurisdictions, state law requires that liens be rejected absent court order to accept them. Therefore, whichever guideline the Commission adopts, we recommend addition of an application note that provides for a sentence below the recommended guideline range where there was no chance that the lien could have successfully been filed. A similar provision was previously included in § 2F1.1, noting that when "a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it … a downward departure may be warranted." U.S.S.G. § 2F1.1, Comment n.11 (1998 ed.).

The PAG recommends against including an application note mandating an official victim adjustment in every case since § 3A1.2 contains adequate instructions to allow for such determinations on a case-by-case basis.

Appropriate Guidelines for Violation of 18 U.S.C. § 119
(Publishing Restricted Personal Information with Intent to Facilitate Crime of Violence)

The Commission proposes that § 2H3.1 (Interception of Communication: Eavesdropping; Disclosure of Certain Private or Protected Information) or one of the assault guidelines (§ 2A2.1, *et seq.*) apply to violations of 18 U.S.C. § 119. The PAG recommends against including an application note mandating an official victim adjustment in every case since § 3A1.2 contains adequate instructions to allow for such determinations on a case-by-case basis.

Potential Enhancements to Guidelines Applying to Violations of 18 U.S.C. § 115
(Threatening Federal Officials)

Title 18, Section 115 of the United States Code makes it a crime to assault, kidnap, murder, or threaten a federal official, judge or law-enforcement officer and members of their immediate families. Congress has directed the Commission to determine whether an adjustment is warranted when threats made in violation of 18 U.S.C. § 115 are transmitted over the Internet.

Appendix A to the Manual directs that violations of 18 U.S.C. § 115(b)(4), the threat offense, are to be sentenced under § 2A6.1. This section provides a 2-level enhancement if the offense involves more than two threats and a 4-level enhancement for offenses involving substantial disruption of governmental functions. U.S.S.G. §§ 2A6.1(b)(2), (4). Accordingly, the PAG opposes any additional upward adjustments. The realities of modern life make use of the Internet a routine, that is, non-aggravating, occurrence, particularly when compared to other forms of available communication, such as the U.S. Mail. We recognize that the Internet affords the ability to disseminate communications more widely than is possible using traditional communication tools (***e.g.***, "blast" e-mail v. multiple letters) and appreciate that such technology can make it easier to threaten numerous federal officials. However, to the extent that a defendant's activities in a given case might present as aggravating to such a degree as to potentially warrant a sentence above the recommended guideline range (***e.g.***, a large number of e-mails are distributed simultaneously), courts, which must be presumed to be sensitive to these issues, are free to account for the conduct. ***See*** 18 U.S.C. §§ 3553(a)(1), (2)(A). In this regard, and consistent with the reasoning stated above, the PAG suggests amending § 2A1.6 by removing Application Note 3, which provides unneeded

[2] Available at: http://www.uscourts.gov/ttb/aug02ttb/claims.html.

complexity to the Manual.

Congress also directed the Commission to consider whether there should also be an adjustment if the sender of such threats was acting in an individual capacity or part of a larger group. There appears no need to include adjustments under individual guidelines. This consideration is adequately addressed under § 3B1.1 (Aggravating Role).

9. RULES OF PRACTICE AND PROCEDURE

The Commission requests comment regarding whether it should amend its Rules and Procedures to provide a specified time frame governing final action with respect to retroactive application of an amendment pursuant to 28 U.S.C. § 994(u), and, if so, what that time frame should be.

The PAG agrees with the Commission that the decision whether to make an amendment retroactive at the same meeting at which the amendment is promulgated may not be practicable in all situations. Accordingly, Rule 4.1 should be amended so as not to *require* retroactivity decisions on promulgated amendments until the Commission has had the opportunity to undertake a complete retroactivity analysis and until interested parties and the public have had the opportunity to comment.

With respect to a time frame under which Commission staff should undertake a retroactivity analysis and under which the Commission should take final action on retroactivity, the PAG believes that the period of time for such analysis and final action should extend no more than six-and-a-half months from promulgation of the final amendment sent to Congress. More specifically, a reasonable period is from May 1 until no later than November 15 of the same year. Any longer period of time, or an unspecified, "general" time period, will create unnecessary uncertainty in the federal criminal justice system as affected parties await final Commission action regarding retroactivity. Furthermore, the proposed period affords ample time to undertake retroactivity analyses as well as to receive comment or testimony. Finally, prolonging an announcement concerning retroactivity after an amendment's effective date creates unwarranted and arbitrary disparities between those offenders receiving the amendment's prospective benefit and those who may benefit retrospectively. The longer the lag between the effective date of an amendment and a later, final action to apply it retroactively only increases such disparities while expanding the pool of litigants who might seek to obtain the benefit of retroactive application.

CONCLUSION

On behalf of our members, who work with the guidelines on a daily basis, we appreciate the opportunity to offer our input on the proposed amendments and issues for comment. We look forward to discussing some of these topics at the hearing on March 13, and we hope that our perspective is useful as the Commission continues to carry out its responsibilities under the Sentencing Reform Act.

Sincerely,

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