



COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
Gerald R. Ford Federal Building
110 Michigan Street, N.W., Room 602
Grand Rapids, MI 49503

Honorable Lance M. Africk
Honorable Paul J. Barbadoro
Honorable Judith C. Herrera
Honorable Sterling Johnson, Jr.
Honorable Cindy K. Jorgenson
Honorable Irene M. Kelley
Honorable Theodore A. McKee
Honorable Franklin L. Noel
Honorable Charles R. Norgle, Sr.
Honorable William J. Riley
Honorable Margaret Casey Rodgers
Honorable Reggie B. Walton

TELEPHONE
(616) 456-2021

FACSIMILE
(616) 456-2538

Honorable Robert Holmes Bell, Chair

February 24, 2011

Honorable Patti B. Saris, Chair
United States Sentencing Commission
Once Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs

Re: Comments on Proposed Amendments to Sentencing Guidelines

Dear Judge Saris,

The Criminal Law Committee of the Judicial Conference is pleased to respond to the U.S. Sentencing Commission's request for comment regarding the proposed amendments to the Sentencing Guidelines. As explained in more detail below, the Committee recommends that in re-promulgating the temporary emergency amendments authorized by the Fair Sentencing Act of 2010,¹ the penalty structure in the Drug Quantity Table for crack cocaine should be set so that the statutory mandatory minimum penalties correspond to base offense levels 24 and 30. Finally, the Committee recommends that in amending the Sentencing Guidelines for supervised release that the Commission require the court to order a term of supervised release only when required by statute and to include no minimum guideline term of supervised release for any felony or misdemeanor.

¹Pub.L.111-220 (August 3, 2010).

Crack Cocaine Sentencing

Cocaine sentencing policy has been a concern of this Committee and the Judicial Conference for many years. In 2006, the Judicial Conference expressed concern that the 100 to 1 ratio between crack and powder cocaine could have a corrosive effect on public confidence in the courts and adopted this Committee's recommendation to (1) oppose the existing difference between crack and powder cocaine sentences and (2) support the reduction of that difference.² In 2007, when the Commission was considering an amendment to lower the sentences for certain crack cocaine offenses, this Committee wrote in favor of the amendment and its retroactive application. The Committee recognized at that time that the two-level reduction was a first step in addressing the long-standing problems caused by the 100 to 1 ratio.

The Fair Sentencing Act was a compromise bill that lowered the previous 100 to 1 ratio of crack to powder cocaine sentences to approximately 18 to 1, eliminated the mandatory minimum for simple possession of crack cocaine, and directed the Sentencing Commission to amend the Sentencing Guidelines on the basis of certain aggravating and mitigating factors. In October 2010, the Commission issued temporary emergency amendments authorized by the Act. The temporary amendments set the base offense levels for the quantity that triggers the 5-year mandatory minimum at level 26, and the 10-year mandatory minimum at level 32. This decision appears to be consistent with the Commission's longstanding position to set the lower limit of the guideline ranges as close to the statutory mandatory minimum as possible,³ despite the fact that the 2007 amendments tied the mandatory minimums to base offense levels 24 and 30.

As the Sentencing Commission prepares to re-promulgate the temporary emergency amendments authorized by the Fair Sentencing Act, the Committee recommends that the penalty structure in the Drug Quantity Table for crack cocaine be set so that the statutory mandatory minimum penalties correspond to base offense levels 24 and 30. This treatment would keep the mandatory minimums within the guideline ranges, but would allow judges to consider a within-guideline sentence if relief from the mandatory minimum was authorized.

Supervised Release

The Committee also recommends that in amending the Sentencing Guidelines for supervised release that the Commission require the court to order a term of supervised release only when required by statute, as set forth in Option 1B of the proposed amendment to USSG §5D1.1, and to include no minimum guideline term of supervised release for any felony or misdemeanor, as set forth in Option 2B of the proposed amendment to USSG §5D1.2.

²JCUS-SEP 06, p.18.

³See, USSG §2D1.1, comment. (backg'd).

As noted in the Commission's 2010 report, *Federal Offenders Sentenced to Supervised Release*, supervised release is imposed in almost every case, including in more than 99 percent of the cases in which there is no statutory requirement to impose such a term. While supervised release is an essential component of a sentence when the defendant poses a risk of recidivism and is in need of assistance to safely reenter the community, a term may not be required in every case. Supervised release should be ordered when it is necessary to provide an added measure of deterrence, protection to the public, or provide the defendant with needed rehabilitative services. The Committee agrees with the Sentencing Commission that the sentencing guidelines manual should be revised to focus limited supervision resources on offenders who need supervision. The Committee believes that the best way to achieve this is to allow judges, with the help of probation officers and attorneys, to assess each defendant's risk and needs to determine whether a term of supervised release is warranted. Avoiding terms of supervised release on the lowest risk offenders will enable probation officers to spend more of their time and resources on offenders who pose the greatest risks.

The Committee realizes that illegal aliens account for 44.7 percent of offenders who received terms of supervised release in fiscal year 2009. Since most of these offenders are deported and are likely not able to return to the United States legally, the value of including a term of supervised release is questionable for those offenders who pose a low risk to commit further crimes. Clearly, offenders who illegally reenter the country would still be subject to a new prosecution. However, of those sentenced in fiscal year 2009 under the §2L1.2 guideline, 65 percent were found to be in Criminal History Category III through VI. These offenders may be among those who pose the greatest risk of committing major violations of supervised release. What is not known is whether terms of supervised release in some of these cases deters offenders from reentering or whether the option of imposing a consecutive sentence on a violation of supervised release may deter future illegal reentry. Deterrence is a factor to be considered when imposing supervised release, as set forth in 18 U.S.C. §§ 3583(c) and 3553(a)(2)(B).

Accordingly, the Committee recommends that the Sentencing Commission's proposed Application Note 3(D) to USSG §5D1.1 be amended to allow the court to more readily use a term of supervised release as a form of deterrence for deportable aliens. In particular, the Committee recommends that the note state that when supervised release is not required by statute, the court may impose a term of supervised release for certain deportable aliens if it is determined it would provide an added measure of deterrence and protection to the public that might not be afforded solely by a new prosecution.

Illegal Reentry

The final proposal that the Criminal Law Committee would like to comment on is the proposed amendment to USSG §2L1.2, which would limit the use of prior convictions to those that received criminal history points under Chapter Four of the guidelines manual. The Committee supports this amendment as it provides consistency between the use of prior

convictions for the purpose of determining the offense level and the criminal history category, and avoids using stale factors in determining the appropriate sentence under the guidelines.

Conclusion

The Criminal Law Committee fully understands that the decision whether to make these amendments rests with the Sentencing Commission. In light of this fact, the Committee is very appreciative of the Commission's request that we present our views. If the Committee can provide any further information, please feel free to contact me at (616) 456-2021.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Holmes Bell", with a long horizontal flourish extending to the right.

Robert Holmes Bell