U.S.S.C. BAC2210-40

COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

UNITED STATES SENTENCING COMMISSION

Concerning

2012 PROPOSED PRIORITIES

IN RESPONSE TO THE COMMISSION'S
INVITATION TO SUBMIT WRITTEN COMMENTS TO THE PUBLIC NOTICE
PUBLISHED AT 76 FED. REG. 45007 (JULY 27, 2011)

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August 26, 2011

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Via U.S. Mail and Electronic Mail
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Attn: Public Affairs – Priorities Comment

Re: Comments on Proposed Priorities for 2012 Amendment Cycle, U.S.S.C. BAC2210-40: 76 Fed. Reg. 45007 (July 27, 2011).

Dear Commissioners:

The Washington Legal Foundation (WLF) hereby submits these comments to the U.S. Sentencing Commission in response to the notice of proposed priorities for the 2012 amendment cycle. Specifically, WLF urges the Commission to address the disproportionate sentencing guidelines for fraud offenses. A comprehensive review of these Guidelines and their implementation is necessary to avoid unjust and excessive punishments for those who commit the non-violent offense of fraud, especially those who are first time offenders. Among the priorities for the upcoming amendment cycle, the commission should include such a review of the fraud guidelines.

I. Interests of WLF

The Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center based in Washington, D.C., with supporters in all fifty states. WLF regularly appears before federal and state courts and administrative agencies to promote economic liberty, free enterprise, and a limited and accountable government. WLF has a longstanding interest in the work of the Sentencing Commission and its determination of the appropriate sentences that should be established for various categories of offenses.

Since the Commission's formation over twenty-five years ago, WLF has regularly submitted written comments and testified before the Commission on various substantive issues. WLF has supported strict sentences for certain violent *malum in se* crimes, but more lenient sentences for others, particularly *malum prohibitum* violations such as regulatory infractions and corporate fraud.

WLF has frequently litigated cases raising corporate criminal liability issues, particularly the growing and disturbing trend by the Justice Department to prosecute corporate employees and officers under the so-called "responsible corporate officer" doctrine, which impermissibly allows the *mens rea* requirement to be diluted or ignored altogether. *See, e.g., Hansen v. United*

States, 262 F.3d 1217 (11th Cir. 2001), *cert. denied*, 535 U.S. 1111 (2002); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000); *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996); *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993), *cert. denied*, 513 U.S. 1128 (1995). WLF has also consistently urged the Commission and its advisory committees to operate in a transparent manner when formulating Commission policy and has taken the Commission to task (and to court) for failing to do so. *See Wash. Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996); *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1993).

Recently, WLF submitted written comments on March 22, 2010 in response to proposed amendments to Chapter Eight Organizational Guidelines. WLF objected to the expansion of possible conditions for probation under Section 8D1.4, and urged the Commission to have greater flexibility in the guidelines with respect to reducing an organization's culpability score.

In addition, WLF's Legal Studies Division has published numerous studies, reports, and analyses on corporate criminal liability and related issues. *See, e.g.,* Mark Osler, *Federal Sentencing for Fraud, DOJ, and the Role of Natural Law*, (WLF Legal Opinion Letter, October 2010); J. Brady Dugan, Catherine E. Creely, *Sentencing Guideline Amendments: What Impact on Regulated Enterprises?* (WLF Legal Backgrounder, June 2010); Dick Thornburgh, Eric Grannon, et al., *SPECIAL REPORT: FEDERAL EROSION OF CIVIL BUSINESS LIBERTIES* (WLF Report, March 2010); Joe D. Whitley, et al., *The Case For Reevaluating DOJ Policies On Prosecuting White Collar Crime* (WLF Working Paper, May 2002); George J. Terwilliger, III, *Corporate Criminal Liability: A Handbook For Protection Against Statutory Violations* (WLF Monograph,1998); William C. Hendricks, III and J. Sedwick Sollers, III, *Corporate Vicarious Criminal Liability* (WLF Contemporary Legal Note, April 1993); Alan Yuspeh, *Developing Compliance Programs Under The U.S. Corporate Sentencing Guidelines* (WLF Contemporary Legal Note, July 1992); Irvin B. Nathan and Arthur N. Levine, *Understanding And Complying With The U.S. Corporate Sentencing Guidelines* (WLF Contemporary Legal Note, May 1992); Joseph R. Creighton, *New Corporate Sentencing Guidelines Are Vulnerable To Constitutional And Statutory Non- Compliance Challenges* (WLF Legal Backgrounder, March 6, 1992).

II. Loss Table Inadequately and Arbitrarily Sets Disproportionate Sentences

It would be difficult for a reasonable person to argue that fraud resulting in the loss of $1000 is comparable to a loss of $1,000,000 or $100,000,000. Certainly, much greater economic harm is done with the latter than the former. However, due to amendments made to the fraud guidelines for sentencing under Chapter Two, Part B, Section 1, monetary loss is the primary means for determining a sentence under the Guidelines. When a corporate officer is convicted of such a crime, resulting in the loss of tens or hundreds of millions of dollars, a lengthy sentence is understandable. But the Guidelines impose sentences for such violations that may far exceed the proportional response necessary, when instead they should depend on factors such as the loss relative to the defendant's actual or intended gain from the offense, the motivation for the crime,

his role as a principal or merely as a participant, and the scope and duration of the offense. Risk of recidivism should also factor into a sentence determination.

When the loss table for calculating enhancements to the base level offense (either a 6 or a 7) divides monetary loss into sixteen different levels, there is clearly a problem with such arbitrary distinctions. On what basis does the Commission find it appropriate to distinguish between certain monetary losses of $120,000 versus $400,000, or $20,000,000 versus $50,000,000? On what basis are these numbers derived, and why is the increase based on an arbitrary two level increase for each category of loss? Of course, there is no empirical support or even congressional mandate for these distinctions. If the Commission is intent on having monetary loss be a factor in sentencing determinations – and it should play a role – then it should justify any cutoff between the various levels of enhancement and should seek to tailor each level to an empirical rationale for the line drawn.

For instance, a certain amount of an illegal substance is considered substantial enough to indicate intent to distribute rather than mere possession. Similarly, certain dollar amounts of loss could correspond to different mental states and intents. But even still, there is clearly a difference between a person who masterminds and operates a Ponzi scheme with malicious intent to defraud others resulting in the loss of millions of dollars and a corporate officer who, out of an error of judgment and mistaken sense of duty to their job and company, conceals accounting fraud by others.[1]

In the initial 1987 Guidelines, which at the time were considered mandatory for district court judges, the amount of loss, at most, would lead to an increase of five times the term of imprisonment as the lowest level of monetary loss. Those guidelines sought "short but definite" sentences for white collar defendants.[2] Since then, the spread has gradually increased such that the difference between the basic offense and the maximum amount of loss - $400,000,000 or more – is 30 levels. There is no rhyme or reason for such a change other than political considerations.

Moreover, actually calculating the loss itself is a concern. While a simple fraud case may be easy to calculate, "the issue becomes clouded in more typical white-collar cases involving a publicly traded company."[3] Determining the value of loss when multiple securities change hands throughout a certain period of time and are subject to market fluctuation is inherently difficult. The Commission should recognize this fact and seek to clarify how monetary loss is to be calculated, whether it is actual loss, intended loss, or something in between. With different

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[1] Derick R. Vollrath, *Note, Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1001-3 (2010) (discussing the Bernie Madoff Ponzi scheme in comparison to Richard Adelson's concealment of fraud as president of Impath; both would have resulted in similar sentences under the rigid Guidelines).

[2] Stephen Breyer, *The Federal Sentencing Gudelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 22 (1988).

[3] *Supra* note 1, at 1019.

judges calculating different amounts of loss, it is difficult to have a substantially similar sentencing regime – the entire rationale for the Guidelines.

III. Judicial Disregard of Guidelines is Embarrassing to the Commission

The Commission should take heed of what several federal judges have said about the economic fraud sentencing guidelines. It is embarrassing for federal judges to roundly pan these Guidelines for either being unhelpful or barbaric. Judge Block wrote in *United States v. Parris* that "we now have an advisory guidelines regime where, as reflected by this case, any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment." 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008). Rather than embrace this Commission's Guidelines, Judge Block rejected them and did the hard work necessary to determine what similar sentences in high-loss cases called for in a case like the one before him. A five year sentence was imposed – not life in prison.

Judge Block is not alone in ignoring the guidelines. In *United States v. Watt*, Judge Gertner sentenced a 25-year-old first-time offender to two years imprisonment and $171 million in restitution for massive identity fraud. The statutory maximum would have imposed a five year sentence. Judge Gertner expressed dismay with the Guidelines, writing that they were "of no help; if not for the statutory maximum, the Guidelines for an offense level 43 and [no] criminal history… would have called for a sentence of life imprisonment," even though Watt had zero gain from the offense, no criminal history, and a distinct unlikelihood of repeat offense. 707 F. Supp. 2d 149, 151 (D. Mass 2010).

In *United States v. Adelson*, Judge Rakoff sentenced Impath president Richard Adelson to three-and-a-half years imprisonment and restitution of $50 million. 441 F.Supp.2d 506, 514-15 (S.D.N.Y. 2006). Given that Adelson did not begin the fraud and only concealed it, and was a first time offender and unlikely to recidivate, Judge Rakoff also ignored the Commission's Guidelines because the monetary loss table resulted in a score of 46, which is above that required for life in prison. If federal judges across the country are recognizing that these Guidelines are so far off the mark with regard to certain types of cases, then there is clearly a problem with them. The Guidelines were created to provide certainty and uniformity of sentencing across the federal judiciary, not to confuse and alienate federal judges. Yet, that is exactly what has happened.

IV. "Piling On" of Sentence Enhancements and Failure to Consider Certain Mitigating Factors Leads to Similar Sentence Recommendations for Very Different Offenders

Another problem with the guidelines is the myriad of sentence enhancements that are piled on to the base level offense and monetary loss increase. Among these, for instance, is an increase of 6 levels for a crime that involves 250 or more victims, which is easily reached for an

officer of a public corporation.[4] For a securities fraud, an increase of 4 levels is tacked on merely for being an officer or director.[5] If the means used to perpetrate the crime was sophisticated, an additional 2 levels are tacked on.[6] What this ultimately means is that, as Judge Block noted in *Parris*, corporate executives who commit high-loss fraud, lengthy terms for multiple or even a single count can reach the maximum – life imprisonment. In many cases this is an absurd result.

Is someone like Richard Adelson the same as Bernie Madoff or someone who commits a violent crime, is a repeat offender, and very likely to commit an offense again? Under the Guidelines and this piling on of sentencing enhancements, the answer is yes – or even worse. The Commission cannot justify barbaric sentences simply on the basis of congressional pressure to increase criminal penalties for white collar crime. The Commission can do better and must revise the Guidelines to avoid this piling on effect.

Additionally, judges should be able to consider other factors that may mitigate a sentence for a white collar criminal. For instance, they should "be able to depart from the guidelines more freely in white-collar cases based on characteristics such as a history of good works."[7] With the overwhelming amount of focus on monetary loss, determining a defendant's moral culpability is more difficult with such an imprecise and rigid formula.[8] If judges are already ignoring the Guidelines and evaluating criteria outside of those permitted under the Guidelines, it is clearly time for the Commission to consider adjusting the Guidelines so that a single sentencing regime is used by all federal judges.

V. Both the Commission and the Department of Justice Recognize that Two Sentencing Regimes is Untenable and Requires Review of Certain Guidelines

WLF urges the Commission to conduct the comprehensive review that was considered likely to occur in a February 2011 hearing.[9] Even the Department of Justice has noted that there are problems with the current guidelines. In its annual report to the Commission, the Criminal Division of the Department of Justice stated that there are "certain offense types for which the guidelines have lost the respect of a large number of judges… including certain frauds involving high loss amounts."[10] The Department recommended that change take place, but did not specify those changes.

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[4] U.S.S.G. § 2B1.1(b)(2)(C).
[5] *Id*. at (17)(A).
[6] *Id*. at (9)(C).
[7] Mark Osler, *Federal Sentencing for Fraud, DOJ, and the Role of Natural Law*, (WLF Legal Opinion Letter, Vol. 19 No. 25) (Oct. 2010).
[8] Vollrath, *supra* note. 1, at 1036.
[9] *Public Hearing Agenda Transcript*, United States Sentencing Commission (February 16, 2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110216/Agenda.htm.
[10] Letter to William K. Sessions, Chair of the Sentencing Commission, from Jonathan Wroblewski, Director, Office of Policy and Legislation (June 28, 2010).

Now is the opportunity for the Commission to take the necessary first steps by including a review of the fraud guidelines in its priorities for the 2012 amendment cycle. There can no longer be "two distinct and very different sentencing regimes…[one] that remains closely tied to the sentencing guidelines… [and a] second regime that has largely lost its moorings to the sentencing guidelines."[11] It is the Commission's duty and responsibility to construct Guidelines that make sense, are rooted in logic and data, and can be used efficiently and effectively by federal judges. The current fraud guidelines fall substantially short of this imperative.

VI. Conclusion

The need for a review of the fraud offenses guidelines is apparent from the comments made by judges while ignoring them, in addition to the inherent unfairness of a system of arbitrary and imprecise categories of monetary loss as the driving factor for sentencing. WLF urges the Commission to conduct such a review as part of its priorities for the upcoming amendment cycle, and appreciates the opportunity to provide comments on the proposed priorities.

Respectfully submitted,

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[11] *Id*.