



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS

ANDREW S. HANEN  
U.S. DISTRICT JUDGE

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October 23, 2015

Office of Public Affairs  
U.S. Sentencing Commission  
One Columbus Circle, NE, Suite 2-500  
Washington, DC 20002-8002

*Via-Regular Mail &  
Via-Electronic Mail*

Re: *Proposed Amendments due to Johnson v. United States*

Dear Sir/Madam:

Please consider this letter as a comment on the proposed changes to the Sentencing Guidelines now being considered. This letter addresses two of the proposed changes that apply to some of the most violent criminals our population faces. Both are changes to the definitional sections contained in the Application Notes, and both are fraught with the danger of misinterpretation.

**A. The Deletion of Sexual Abuse of a Minor and Statutory Rape as Crimes of Violence**

In the proposed new definition, the Commission is deleting “sexual abuse of a minor” and “statutory rape” from its definition of a crime of violence. While one could argue that these crimes are subsumed under the reference to the definition section in § 4B1.2(a) and its further reference in Application Note 2(E) to the two definitions contained in 18 U.S.C. § 2246, there is no reason to deliberately create such an ambiguity. The only possible rationale for this wording change is expediency. It has nothing to do with the recent Supreme Court case of *Johnson v. United States*, 135 S. Ct. 2551 (2015). Understandably, the Commission wants to make the Guidelines easy to use. Certainly, if the definition found in § 4B1.2(a) matched the definition used in § 2L1.2 it would be easier for courts to use. This is not an unworthy goal, but whatever is gained in expediency is not worth endangering the well-being of the children of this country. There are multiple reasons to reject these proposals, but let me highlight two.

First, the “statutory rape” and “sexual abuse of a minor” provisions are the only two provisions under which many sexual offenses perpetrated against minors fall. To delete these is to do a great injustice to our society and encourages (or at least fails to discourage) those who commit heinous crimes against children. This is especially true in the cases which fall under § 2L1.2—where courts are required to analyze not only federal law but the law of each of the fifty states. These laws vary greatly and do not necessarily contain the same elements or protect children in the same fashion. My court has had many cases where the underlying offense is a crime against a child which would not necessarily fall under the umbrella of a forcible sex offense as proposed (especially when courts are compelled to use the categorical approach) but which were clearly crimes involving sexual abuse of a minor. To understand my concern, one need only remember how narrowly most circuits interpreted “forcible sex offenses” prior to the 2008 Guideline changes in that § 2L1.2 definition. Latching onto the term “forcible,” many circuits held rape was not a crime of violence. Given this history, the Commission should not even consider the change. Additionally, in many cases covering a vast array of conduct which all would agree would otherwise constitute sexual abuse of a minor, the defendant pleads guilty as part of a plea agreement to statutory rape because it is an offense upon which both the prosecution and defense can agree (since many times the only proof needed is the conduct and the age differential). It saves the child from having to testify, and the label is more appealing to many defendants as being less disparaging. The Commission’s proposal will have the effect of lowering the penalties against seriously bad behavior perpetrated against children. It is hard to believe that the Commission intends to lessen the penalties against child abusers. If that is the intent, I think the Commission should seriously rethink its priorities.

If that is not the Commission’s intent, then it brings me to the second problem with this proposed amendment. By deleting these offenses from the definition section while at the same time including other similarly-situated enumerated offenses in the new definition found in § 4B1.2(a), it leads to the inescapable conclusion that the Commission meant for these crimes not to be considered as crimes of violence, thus precluding the argument that might otherwise be made that these offenses somehow fall under “forcible sexual offenses.” The case law concerning the interpretation of statutory deletions using the concept of “*expressio unius est exclusio alterius*” (or, stated in English, the expression of one concept is to exclude others) is found in every jurisdiction. See, e.g., *Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013), for a recent example. Carrying over the enumerated crimes of murder, voluntary manslaughter, kidnapping, and aggravated assault from § 2L1.2 into the new definition found in § 4B1.2 but not doing the same for sexual abuse of a minor and statutory rape will lead to only one logical outcome: statutory rape and sexual abuse of a child are not crimes of violence because the Commission intended to drop these acts from the crime of violence definition.

There is an easy fix for this omission. The proposed definition of a “forcible sex offense” could be re-written as follows:

§ 4B1.2, Application Note 2(E)

A “forcible sex offense” is any offense requiring a sexual act or sexual contact to which consent to the actor’s conduct (i) is not given, (ii) is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced, or (iii) is statutory rape or sexual abuse of a minor. The terms “sexual act” and “sexual contact” have the meaning given in 18 U.S.C. § 2246.

If the law underlying Chapter 4 does not support this change for career offenders, then the Commission should not change the § 2L1.2 definition at all.

**B. The Definition of Murder**

The second area I suggest the Commission rethink is the use of the term “malice aforethought” in the definition of murder. I do not have the time or resources to analyze the law in all fifty states, but I do know that under the Model Penal Code and the penal code here in Texas “malice aforethought” is not a concept currently in use. Therefore, for those jurisdictions that are situated like Texas or that utilize statutes with language similar to the Model Penal Code, a murder under those laws would never be a murder under the Sentencing Guidelines. Is this the result that the drafters intended? I do not know how many jurisdictions would be excluded using this definition, but I think if it excludes even one it is a mistake. I strongly suggest that the Commission drop the “malice aforethought” language.

I realize that the manner in which the proposed amendment utilizes “malice aforethought” may be interpreted as a different way of expressing “purposefully [or intentionally], knowingly, or recklessly . . .” given their inclusion in the parenthetical that follows that phrase, but that will not be how it will be interpreted. In all likelihood, given the way it is phrased, to qualify as murder there will have to be proof of an applicable *mens rea* (purposefully, knowingly, or recklessly) and then additional proof of “malice aforethought.” BLACK’S LAW DICTIONARY defines “malice aforethought” as “[a] predetermination to commit an act without legal justification or excuse.” The second definition states it is the “intentional doing of an unlawful act . . .” If it is the intention of the Commission that the use of “malice aforethought” means “intentional,” then why confuse it with concepts of legal justification or excuse which no doubt may vary greatly from state to state? Just say:

“Murder is (1) the intentional, purposeful, knowing, or reckless (under circumstances manifesting extreme indifference to human life) . . . unlawful killing of a human being (including but not limited to an act done with malice aforethought or premeditation).”

This is an easier definition for courts to use. More importantly, it is less likely to be misinterpreted. It matches not only the generic, contemporary definition but also the more traditional definition of murder, and it conforms with the Model Penal Code. Further, it does not suggest that a court needs to investigate the facts and/or statutes underlying a conviction to try to determine how, if at all, that jurisdiction utilizes “malice aforethought.”

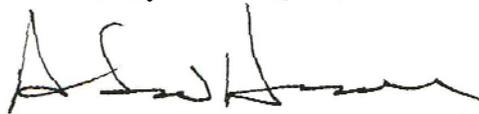
Secondly, with respect to murder, most state statutes include in their murder definition, either by exact wording or by interpretation, the concept of homicides that are committed in the course of a criminal attempt to commit a felony or in an effort to escape. These concepts could easily be included if the Commission would add the following:

causing the death of another human being in the course of committing, attempting to commit, or immediate flight from the commission or attempt to commit another felony . . . .

The Commission’s proposed definition omits both the “attempting to commit another felony” language and the “immediate flight” language. The attempt language found in § 2L1.2, Application Note 5 of the Guidelines will not save this omission. I think both the “attempt” and “flight” language should be included if the Commission’s goal is to encapsulate the current, contemporary understanding of murder as it is found in most jurisdictions.

Of the two, I am most concerned about the Commission’s willingness to adopt any measure which is either intended to be, or can be interpreted later to be, a measure to drop the penalties for rape or sexual abuse of a child. If the proposed amendments pass as currently drafted, it will certainly be the perception that the Sentencing Commission has lowered the penalties one faces for having sexually abused children. I hope that this is not the intent of these amendments, but, regardless of the intent, it certainly will be the result.

Yours truly,



Andrew S. Hanen  
United States District Judge

ASH:am

cc: Judge Patti B. Saris  
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*Via-Regular Mail*

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