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CRIMINAL DEFENSE
IN FEDERAL AND STATE COURTS
TRIAL - APPEAL - POST-CONVICTION RELIEF

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January 19, 2017

Kathleen C. Grilli
General Counsel
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

Re: Proposed Amendment to Resolve Circuit Conflict

Dear Ms. Grilli:

I have represented a client, Christopher Ferguson, both in the Southern District of Florida and the Eleventh Circuit Court of appeals, in a failed attempt to remove a seven level enhancement to his sentence for a Hobbs Act robbery based on what we see as a misapplication of U.S.S.G. § 2B3.1(b)(2)(A). The issue is the discharge of a firearm, not by the defendant, but in this case, by a security guard. Indeed, the defendant was the person shot, not the shooter, but to add insult to injury, the defendant was scored a seven level increase for the security guard having shot him.

There is a split in the circuits on this issue. It should be resolved by the Sentencing Commission. Clearly it was not intended that if a third person - especially a third person who is not an aider or abettor - discharges a firearm, that the defendant receive a sentencing enhancement for that discharge.

The cases which support Ferguson's position are from the Seventh and Sixth Circuits, *United States v. Gordon*, 64 F.3d 281 (7th Cir. 1995) and *United States v. Hill*, 381 F.3d 560 (6th Cir. 2004). The Eleventh Circuit case in conflict is *United States v. McQueen*, 670 F.3d 1168 (11th Cir. 2012). The Eleventh Circuit is supported by cases

from the Fifth and Eighth Circuits, *United States v. Roberts*, 203 F.3d 867 (5th Cir. 2000), and *United States v. Triplett*, 104 F.3d 1074 (8th Cir. 1997).

Clearly the conflict is significant enough and the impact is significant enough that the Sentencing Commission should address it.

Sincerely,

A handwritten signature in black ink, appearing to read "W. M. Kent". The signature is written in a cursive style with a prominent horizontal line at the end.

William Mallory Kent