

**STATEMENT OF THE HONORABLE KATHLEEN CARDONE**  
**WESTERN DISTRICT OF TEXAS, EL PASO DIVISION**  
**NOVEMBER 5, 2015**  
**WASHINGTON, D.C.**

Let me begin by thanking you for this opportunity to appear today to give testimony. I am very honored to be able to share with you some of my thoughts regarding the Proposed Amendments to the Federal Sentencing Guidelines. As you have requested, I will do my best to provide the Commission with information and feedback regarding the definition of “crimes of violence” and the related changes to the career offender guidelines which were published on August 7, 2015. However, for purposes of this submission, I have decided to focus on one specific portion of those proposed amendments, the definition of “kidnapping.”

As I have stated previously in my appearances before this Commission, when I began working with the Guidelines, I found them to be extremely useful in setting a framework for sentencing. I appreciated their thoroughness in addressing each separate offense and in incorporating the surrounding circumstances. However, as I pointed out to you in my last appearance before you in October 2014, that framework for sentencing is not without its challenges, particularly as it relates to issues surrounding the Guideline definition of “crime of violence” and the residual clause.

I would remind you that I am the Judge whose three cases involving a crime of violence enhancement for kidnapping were discussed at that October 2014 meeting. It is because of that dubious distinction and my struggles in the past with the definition of “kidnapping” and “crimes of violence,” that I would like to focus my commentary on that portion of the Proposed Amendments. It seems that kidnapping is my “Waterloo.”

It is my understanding that the proposed amendment and issues for comment include a proposed amendment to §4B1.2 (Definitions of Terms Used in Section 4B1.1). These Amendments seek to delete the residual clause and revise the list of enumerated offenses in the “crime of violence” definition.

Under the Proposed Amendments, all of the enumerated offenses have been moved to the Guidelines, and the definitions of these enumerated offenses are provided in the Commentary. Thus, under §4B1.2, “Crime of Violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that - (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, burglary of a dwelling, burglary, arson or extortion, or involves use of explosives. Then, in the Commentary, there is a “new” Note 2 which reads under (C) : “Kidnapping” is an offense that includes at least (I) an act of restraining, removing, or confining another; (ii) an unlawful means of accomplishing that act; and (iii) at least one or more of the following aggravating factors: (I) the offense was committed for a *nefarious* purpose; (II) the offense substantially interfered with the victim’s liberty; or (III) the offense exposed the victim to a substantial risk of bodily injury, sexual assault, or involuntary servitude.

I have emphasized the term *nefarious* in the preceding paragraph because it is this terminology that causes me concern in the Proposed Amendment. The term is unusual, even arcane. It appears nowhere in the United States Code. It appears in the statutes of the fifty states only a handful of times, and none of them related to kidnapping. But, it has made its way into the case law on this subject: The source of the term “nefarious purpose” in the context of kidnapping appears to be Wayne R. LaFave in his influential treatise on Criminal Law. The Model Penal Code does not itself employ the term nefarious, though it is mentioned in its commentary: “The usual way of differentiating among offenses in this field is to specify nefarious purposes with which the actor must undertake removal or confinement of his victim.” Indeed, case law shows that federal courts have looked to the LaFave treatise, the Model Penal Code, and its commentary in discerning the generic, contemporary meaning of the currently undefined crime of kidnapping, to determine whether a prior state kidnapping conviction would constitute a crime of violence under the Sentencing Guidelines. Thus, I am hypothesizing the term nefarious has made its way into the Proposed Amendment.

While enumerating kidnapping as a crime of violence in the proposed Guidelines and providing this definition of kidnapping in the Commentary go a long way to clearing up confusion in the mind of the sentencing judge and fixing some of the problems in the case law, I believe the definition could be made even clearer by avoiding the use of the term “nefarious purpose.”

The concern I have with the use of nefarious is that it is vague and ambiguous; just what is nefarious anyway? The Oxford English Dictionary defines nefarious as “wicked, iniquitous, villainous, despicable.” And Merriam-Webster puts it about the same, while Black’s Law Dictionary contains no definition of the word - an omission that itself is worthy of note. These definitions really provide little insight into what would constitute nefarious purposes as the sort of aggravating factor necessary to distinguish the lesser crime of false imprisonment from the Guideline-enumerated crime of violence, kidnapping. While courts are obviously charged with interpreting ambiguous language, I question whether we should be the ones creating it.

I think it is important to at least ask the question of what is lost and what is gained by incorporating the Model Penal Code definition of the crime of kidnapping as the definition for the crime in the Guidelines in its stead. If the purpose of the Guidelines is to foster uniformity and evenhandedness in the sentencing of criminal defendants, then I tend to believe that the less ambiguous the Guidelines definitions are, the more uniform the sentencing results would be, across district courts and across the courts of appeals that review them. I prefer the Model Penal Code definition of kidnapping because it avoids the use of the word nefarious.

Under the Model Penal Code: A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:

- (a) to hold for ransom or reward, or as a shield or hostage; or
- (b) to facilitate commission of any felony or flight thereafter; or

- (c) to inflict bodily injury on or to terrorize the victim or another; or
- (d) to interfere with the performance of any governmental or political function

As has been well explained in the Model Penal Code commentary, the very specific list of four “nefarious” purposes: (a) to hold for ransom or reward, or as a shield or hostage; or (b) to facilitate commission of any felony or flight thereafter; or (c) to inflict bodily injury on or to terrorize the victim or another; or (d) to interfere with the performance of any governmental or political function sufficiently defines aggravating conduct that encompasses the vast majority of state’s statutes concerns.

A similar provision to the portion of paragraph (a) that punishes for intent to hold for ransom or reward exists in the vast majority of American jurisdictions. However, as drafted, you will note that paragraph (a) also covers a purpose to use the victim as a shield or hostage.

Paragraph (b) proscribes removal or confinement with intent to “facilitate the commission of any felony or flight thereafter.” Kidnapping in order to commit or escape from a serious crime is especially likely to create a risk to the victim. This provision permits conviction for kidnapping by a fleeing felon.

Paragraph (c) sets forth the aggravating factors of “to inflict bodily injury on or to terrorize the victim or another”. This language has as its purpose to cover vengeful or sadistic abductions involving threat of torture, death or other extremely frightening experiences.

Paragraph (d) adds “to interfere with the performance of any governmental or political function”. This provision reaches the concerns of political terrorism.

It is possible that in using the Model Penal Code definition in the Guidelines, some state kidnapping laws that would otherwise constitute a crime of violence using the “nefarious purpose” definition, would not now constitute a crime of violence. So something may be lost in casting this narrower, yet more clearly drawn net in the furtherance of clarity. I believe that this is a worthwhile tradeoff, however. It avoids some of the problems courts have encountered when interpreting the more vague language of the Guidelines. The use of nefarious injects some of the issues back into the Guidelines that the Proposed Amendment is designed to remove.

And, at least to some degree, sentencing courts can correct for this narrower net of the kidnapping crime of violence by using the familiar tools available to it, such as an upward variance or special terms of supervised release, to capture those instances when the crime of violence enhancement is found not to apply, but the underlying state conviction is indeed “nefarious.”

Thank you for the opportunity to address the Commission. I would be glad to answer any questions you might have.