

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

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January 19, 1990

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PLEASE REPLY TO: Corpus Christi

Mr. Paul Martin
U. S. Sentencing Commission
1331 Pennsylvania Avenue NW, Ste. 1400
Washington, D. C. 20004

Attn: Communications Director

RE: ROLE IN OFFENSE DEFINITIONS
AND CRIMINAL HISTORY SCORING

Dear Mr. Martin:

During 1989, I wrote 129 Guideline Presentence Reports, and two of my colleagues in this office wrote at least the same number. During that time, we have noted one particular problem area which takes up an inordinate amount of time not only in discussions among ourselves, but also in court at the time of sentencing. That area has to do with a defendant's role in the offense. Specifically differentiating between a minor participant, and a participant who receives no adjustment. Also addressed in this letter is an area of concern I have concerning criminal history scoring, and an apparent disparity in that area. First, I will provide input regarding role in the offense.

Many of the offenses we encounter involve multi-defendant drug cases. It is difficult to differentiate between a "minor" participant and a participant who should not receive any adjustment as indicated in 3B1.4. It is believed Sections 3B1.2 and 3B1.4 need further clarification as the definitions provided do not supply enough guidance. To a lesser extent, there are also problems differentiating between a "minor" and a "minimal" participant. Section 3B1.1 has not proved as problematic. In an effort to further clarify how to evaluate the roles of defendants, a definition is being offered. It is suggested the following be added to Application Note #3 following 3B1.2:

A "minor" participant generally means any participant who works under the direction of and/or is paid by another participant, and does not have decision making authority, nor does this participant direct the activities of others. This participant is recruited by others, and is involved in the offense to a greater extent than is described as minimal. Examples of a "minor" participant would be a bodyguard, an individual who is a messenger on a continuing basis, or an individual who facilitates the commission of the offense, but whose role is not necessary to the offense.

To further differentiate when a person is a "minor" participant and when no points are involved, it is suggested the following be added to the commentary for 3B1.4:

No adjustment should be given to participants whose role is important in the commission of the offense, but have little decision making authority and do not qualify for an adjustment under 3B1.3. Examples of this would be a participant whose only role is that of a "broker" in an offense, or a participant whose only role was to transport a large amount of drugs to a particular destination.

In reference to scoring criminal history, it is felt there is some disparity. Section 4A1.1(c) provides for one point to be added to each sentence not included under 4A1.1(a) or (b). Under this provision, defendants can receive the same increase for remarkably different offense severities. For example, a defendant may receive one point for misdemeanor possession of marihuana that involved only a few grams and where a fine was the only penalty; yet another defendant may be convicted of a felony drug offense involving perhaps 100 pounds of marihuana, and receive probation. Under both sentences, the defendants receive one point. To take this further, it is possible for a defendant convicted of a class C misdemeanor involving petty theft (in Texas, this offense carries a fine as the only punishment), and receive one point; yet another defendant will receive the same increase for a sentence of probation assessed in a crime of violence such as burglary of a habitation. There have been a number of occasions where I have scored a defendant whose instant offense is a drug offense as a category I offender, when this same defendant has had a previous scoreable felony drug conviction, for which he received probation. It seems quite inconsistent that a defendant who has a previous felony conviction for which he received probation to be in the same criminal history category as the defendant who has no prior convictions.

Additionally, under the scoring rules, it is possible for a defendant with a previous drug or crime of violence conviction for which probation was assessed to be placed in criminal history category number I; yet, with a second drug or crime of violence conviction (which may also carry probation as the sentence), the defendant is designated a Career Offender with its ramifications (provided the instant offense involves drugs or a crime of violence). This appears to be an "all or nothing" provision in the scoring process. It is believed the scoring discrepancy problem is also compounded when contrasted to a defendant who perhaps received 60 days in jail for DWI or child support matter, and is placed in criminal history category II.

In an attempt to resolve this, it is suggested that all scoreable felony convictions for which probation was assessed to be given two points, unless additional points are assigned under 4A1.1(d), at which time only one point

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would be given for the conviction. This would ensure that no defendant with a scoreable prior felony conviction would be a category I offender, and it would differentiate some of the scoring between felony and misdemeanor convictions.

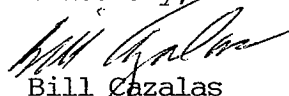
In an attempt to assist us in understanding the guidelines, any information that may be available regarding the philosophy of the Sentencing Commission in formulating Chapters 2 and 4 would be appreciated. Our Court has asked our office in the past if we understood the reasoning the Sentencing Commission used in certain aspects of Chapters 2 and 4, when formulating the guidelines for those chapters.

Additionally, our office has yet to be positive about whether the guidelines are to be applied in a revocation of probation matter. For instance, if a defendant receives probation with no incarceration and is later revoked, are the original guidelines to be applied? Additionally, if the revocation is based on a new conviction, would the new conviction be added in to the criminal history category score? One last area would be if the defendant who received probation also received intermittent confinement, and if the guidelines do apply, would that intermittent then be deducted from the guidelines upon calculating the guideline range at a probation revocation hearing?

I had previously written the Sentencing Commission in December, 1988 with the above concerns, and received no response. I decided to again express these concerns after noting an article in the Probation Division newsletter, "News and Views".

It is hoped my input is of assistance. Should you have any questions, I can be reached at FTS 529-3145.

Sincerely,



Bill Cazalas

U. S. Probation Officer

BC/igc