

memorandum

DATE: September 14, 1990

REPLY TO: Raul A. Cavazos, Supervising
ATTN OF: U.S. Probation Officer-McAllen

SUBJECT: COMMENTS ON GUIDELINE ISSUES

TO: Louis G. Brewster, Chief
U.S. Probation Officer-Houston

The following is submitted, pursuant to your memorandum of 8/20/90, on the above-captioned subject. All PSI Unit SUSPOs were contacted for input.

Five matters were identified by the Commission for comment. Comments will focus on items 1 & 5: Problem areas in guideline application and adequacy of current training program and informational materials. These two items, by far, directly impact on our daily PSI operation. Consequently, they have generated the greatest number of problems and concerns for our staff.

Problem areas in guideline application have evolved from an initial "many" to a current "few." The following are the current "few:"

- 1) Chapter 3, Part D, Multiple Counts remains the most troublesome. Specifically, 3D1.2, Groups of closely-related counts, (a-d). The trouble lies in the complexity per se, of the concept. Sheer practice in application and the resulting experience help diminish the problems. I don't know of any easy solution, other than, perhaps, training and rewriting the guideline in simpler form.
- 2) Chapter 7 - Violations of probation and supervised release, 7A1.2 and 7A1.3-Revocation of Probation and Supervised Release need to be more definitive, specifically 18.3565(a) (2): "Revoke the sentence of probation and impose any other sentence that was available under Subchapter A at the time of the initial sentencing." Any other sentence is vague and subject to interpretation.
- 3) 5E1.2, Fine for individual defendants; specifically, (i)... "The Court shall impose an additional fine amount that is at least sufficient to pay the costs to the Government of any imprisonment, probation, or supervised release ordered. Does this mean that the Court cannot impose, as a special condition of supervised release, the cost of supervision, unless it imposes a fine?
- 4) Part D, Offenses involving drugs - 2D1.2(c)-Drug Quantity Table - The incremental increases of marihuana are comparatively low from level 6 thru level 24; from level 26, on up, the amounts of marihuana increase dramatically; moreover, the within range amounts of marihuana, from level 26, on up, are of considerable variance when compared with those of level 24, on down. It would seem more reasonable to have a more gradual increase with less variance within the levels.
- 5) Given the current scandals involving the Savings and Loans and the Housing and Urban Development, outrageous disparities exist between "white collar" base offense levels and drug offenses levels.

- 6) Another item of concern deals with the disparity between maximum terms available for violations of 18 USC 922(g) offenses "felon in possession of firearms and/or ammunition" and the maximum guideline ranges available. It would appear that the maximum, as prescribed by statute (10 years) cannot be reasonably reached for this serious offense, despite the November 1989, upward revisions made for this type of offense. As an example, a defendant with a total offense level of 10 and a criminal history category of VI, would only be sentenced to a guideline range of 24-30 months imprisonment. This is quite incongruous, considering that an offender would already be at level VI and that it would likely take an unusual departure to raise that sentencing range close to the ten years.
- 7) A good many of the offenses we encounter involve multi-defendant drug cases. It is difficult to differentiate between "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" 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 "broker" in an offense, or a participant whose only role was to transport a large amount of drugs to a particular destination.

- 8) 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 a 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 defendant receives 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 rule, 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 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 ramification (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 be given two points, unless additional points are assigned under 4A1.1(d), at which time only one point would be given for the conviction. This would insure 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.

- 9) In an attempt to assist us with understanding the guidelines, any information that may be available regarding the philosophy of the Sentencing Commission in formulating Chapters 2&4 would be appreciated. Courts have often asked the probation office, if we understood the reasoning the Sentencing Commission used in certain aspects of Chapter 2&4, when formulating the guidelines for those chapters.

The following are concerns, regarding training:

- 1) The train the trainer approach initiated by the Commission in October 1987, has, by and large, served our district well. Each PSI unit supervisor has had this training. Nevertheless, staff consensus reflects a need for more follow-up training of the trainer. Follow-up workshops every nine months are suggested. Having Supervisor Denzlinger, who, on several occasions

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has been on loan to the Commission, as the district's guideline "guru" has been an invaluable asset.

- 2) Updating the Commission's ASSYST program is urgently needed.

In summary, staff adjustment to guidelines has been progressing well. The staff is becoming more and more proficient with guideline application and the guidelines, *per se*, are becoming less and less arcane. The aforementioned comments reflect more a need for "fine tuning" the district's comparatively smooth guideline operation.

Thank you.

RAC/erg

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October 5, 1990

Mr. Raul A. Cavazos
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Dear Mr. Cavazos:

On behalf of the Commission, I thank you for your recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

We appreciate you taking the time to write and share your very practical comments.

Regards,

A handwritten signature in black ink, appearing to be "PK" or "P. K. Martin".

Paul K. Martin
Communications Director