

United States District Court
District of Kansas

Carl E. O'Connor
Chief Judge

PCRI-26/91
122 U.S. Courthouse
812 North Seventh Street
Kansas City, Kansas 66101

October 29, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Attention: Communications Director

Dear Sirs:

I am writing this letter pursuant to the request of the Honorable William W. Wilkins, Jr., Chairman of the United States Sentencing Commission, in his letter dated September 27, 1990. Specifically, Judge Wilkins requested the benefit of my thoughts on the top three guideline sections or policy statements that I believed needed review, amendment, or clarification. I wish to offer the following:

I.

(1) Acceptance of Responsibility. There exists a judicial philosophy in some courts that a plea of guilty automatically deserves a two-level reduction in the offense level regardless of any other circumstances in the case. The application notes of Section 3E1.1 indicates that a defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea and also emphasizes that a defendant who enters a plea of guilty is not entitled to a sentencing reduction under this section as a matter of right. Perhaps a person who pleads guilty is deserving of some automatic consideration for a reduction in the offense level, but the application notes under that section clearly indicate that there are other considerations that might be used which further substantiate the court's decision to grant acceptance of responsibility or provide justifiable reasons for denial of the two-level reduction for plea of guilty.

In an effort to support a judicial philosophy which would automatically award a reduction in the offense level for a plea of guilty and guard against punishing a defendant who exercises his Constitutional right to a trial, I suggest that there may be some merit in arriving at a total offense level

reduction for acceptance of responsibility which would address both issues. For instance, Section 3E1.1 could be changed to read as follows:

(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, the total offense level may be reduced by two levels through a combination of the following:

Plea of Guilty - reduce one level.

Voluntary termination or withdrawal from criminal conduct or association - reduce one level.

Voluntary payment of restitution prior to adjudication of guilt - reduce one level.

Voluntary and truthful admission to authorities of involvement in the offense and related conduct - reduce one level.

Voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense - reduce one level.

Voluntary resignation from the office of position held during the commission of the offense - reduce one level.

Any other factor which clearly demonstrates to the court the defendant has shown affirmative acceptance of personal responsibility for his criminal conduct - reduce one level.

II.

Chapter Four - Criminal History and Criminal Livelihood

Chapter Four provides instructions for determining the criminal history score. Section 4A1.2.(d)(2)(A) provides for the addition of two points for each adult or juvenile sentence to confinement of at least 60 days, and Section (B) adds one point for each adult or juvenile sentence not covered in (A). In the District of Kansas, we have not experienced problems in securing juvenile court records, so the awarding of points for offenses committed prior to age 18, as provided in the guidelines, has not proven to be a problem. However, there are districts in the country where juvenile court records are not available to the probation service. I also know that there are juvenile courts which tell juvenile defendants that their juvenile record will not be held against them in future circumstances.

The result is that defendants in Kansas face greater penalties because we have access to juvenile court records. Defendants in other states who may have very similar juvenile records may not face the same sentence in federal court because those juvenile court records are not available. This seems to violate the Sentencing Commission's precept that the guidelines are designed to insure that similar defendants with similar back grounds who commit similar offenses should receive similar sentences. If this is in fact the case, it may be appropriate that no points be awarded for juvenile records, but that where juvenile records are available to the court, they may be used in guiding the court in selecting the low, middle or upper limits of the established range.

III.

Part H - Specific Offender Characteristics

This section primarily deals with offender characteristics by indicating that such are not ordinarily relevant in determining whether a sentence should be outside the guidelines, or in determining the type of sentence to be imposed when the guidelines provide sentencing options. The Criminal Law and Probation Committee issued a report to the Chief Justice and members of the Judicial Conference in September 1990, suggesting that the judges need greater flexibility to consider some offender characteristics as a bases for sentencing. In that report, which I believe was approved by the Judicial Conference, the Committee suggested changes which would allow judges greater flexibility to consider offender characteristics present in unusual degrees or combinations. The Committee provided specific language for changing Part H of Chapter Five to allow that greater flexibility. I strongly endorse that report and the action of the Conference.

Thank you for soliciting my suggestions, and I hope my response will be helpful.

Sincerely,



Earl E. O'Connor

cc: Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission