

PCRI-30/91

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

CHAMBERS OF
MICHAEL M. MIHM
DISTRICT JUDGE

October 31, 1990

Room 216, Federal Bldg.
100 N.E. Monroe Street
Peoria, Illinois 61602
Phone 309-671-7113
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Chairman William W. Wilkins, Jr.
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington D.C. 20004

RE: GUIDELINE MODIFICATIONS/REFINEMENTS

Dear Chairman Wilkins:

In response to your communication of September 27, 1990, I have identified the following issues where modifications/refinements of the Sentencing Guidelines may be appropriate.

I. Guideline 2B5.1 -- Offenses Involving Counterfeit Bearer Obligations of the United States

This guideline currently carries a base offense level of 9 and provides 2 increases for specific offense characteristics. Notwithstanding the fact that the specific offense characteristics provide potential increases, I believe that the current base offense level of 9 is inadequate when one considers the seriousness of this offense and its potential for undermining the monetary system and disrupting the Government.

When one considers the base offense level for Engaging in a Gambling Business (2E3.1) and/or Transmission of Wagering Information (2E3.2), both of which carry base offense levels of 12, as well as the guideline for Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity (2S1.2) and/or Failure to Report Monetary Transactions (2S1.3) which carry base offense levels of 17 and 13 respectively, the guideline for Offenses Involving Counterfeit Bearer Obligations of the United States (2B5.1), specifically the base offense level of 9, appears to be inadequate and should be increased to at least 12.

II. Guideline 3B1.3 -- Abuse of Position of Trust or Use of Special Skill.

I believe some clarifying language should be added to the guideline specifically regarding the abuse of position of

trust element where the trust that is abused is not directly related to the victim and/or the victim's loss. As an example, where a regulatory body grants an individual (defendant) the authority and/or requisite power to conduct certain types of financial transactions, i.e., credit transaction approvals and the individual then uses this authority/power to facilitate the commission of a fraud on a financial institution (victim). In such an instance, the regulatory agency from which the position of trust emanated is not the victim but rather is a third party. The financial institution is the actual victim and suffers the loss. Language should be added to the guideline indicating that the trust being violated does not have to be extended by the victim of the offense but rather can be trust extended by a third party.

III. Guideline 2D1.1 -- Unlawful Manufacturing Importing, Exporting, or Trafficking (Including Possession with Intent to Commit these Offense)

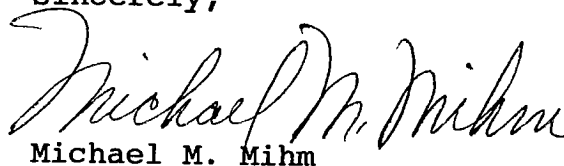
A specific offense characteristic at 2D1.1(b)(1) states, "If a dangerous weapon (including a firearm) was possessed during commission of the offense, increase by two levels." Neither the Commentary/Application Notes nor the definitions at 1B1.1 clarify what is meant by "possession of a dangerous weapon during commission of the offense." For instance, if during the drug trafficking offense, the drug distributor accepts a firearm in trade for drugs, is this considered possession of a dangerous weapon thereby triggering application of this specific offense characteristic? It would be helpful to have language added to Application Note No. 3 reflecting that such a drugs-for-gun trade would or would not trigger this specific offense characteristic. This is especially important if the firearm is not transferred simultaneously with the drugs. In such case, the possession is not contemporaneous with the handling of the drugs, Ergo, was there a "possession" during commission of the drug offense?

IV. Guideline 3B1.1(c) -- Aggravating Role

Where the terms "organizer," "leader," "manager," or "supervisor" are used, do these terms necessarily require that, to be designated as such, the defendant had to organize, lead, manage, or supervise at least one other "participant" or can the defendant's general degree of culpability be utilized to place him in one of these roles? In other words, can the quantity of drugs the defendant obtained from his source and subsequently distributed to others, the length of the defendant's involvement in the offense, and/or his use of sophisticated methods to commit the offense be utilized to place him in one of these roles.

Typically in drug offenses, a defendant buys drugs from his source, dilutes and repackages the drug into smaller quantities, and then resells it to his customers. Other than being a link in the distribution chain, he does not necessarily organize, lead, manage, or supervise any other participants. However, his relative responsibility/degree of culpability may be considered very high because of the quantity of drugs, the span of time involved, his profits, and/or his sophisticated methods. Under 3B1.1(c), can he be given a two level increase even though he did not organize, lead, manage, or supervise another participant? E.g., if he simply bought from a supplier and resold to a customer on numerous occasions? If a two level increase is applicable, it would be helpful to have appropriate language enlarging the definition of the terms organizer, leader, manager, or supervisor included in Application Note No. 3 under the Commentary to 3B1.1.

Sincerely,

A handwritten signature in cursive script, reading "Michael M. Mihm". The signature is written in dark ink and is positioned above the printed name.

Michael M. Mihm