

FCKL-38/9,

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

CHARLES CLARK
CHIEF JUDGE
245 EAST CAPITOL STREET, ROOM 302
JACKSON, MISSISSIPPI 39201

October 24, 1990

601-965-4445
601-965-4445
FTS 490-4445

The Hon. William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, DC 20004

Dear Billy:

When I received your letter of September 7, I solicited the views of all Fifth Circuit circuit and district judges (the latter through the chief district judges). I had only two circuit judge responses. They are attached. The chief district judges advise me that their judges are responding directly to the Commission.

Thank you for a yeoman's effort on the Commission.

Sincerely,



Thank you, too,
for the help with
Senator Thurmond
and his staff.

CC

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

DATE: October 4, 1990
TO: Chief Judge Clark
FROM: John M. Duhé Jr.
SUBJECT: Sentencing Commission's Request for Comments
on the Guidelines

The interpretation of guidelines sections 1B1.3(a)(2) and 1B1.8(a) has created some confusion in this circuit. One recent case, *United States v. Kinsey*, is being remanded to the district court for further development of the facts. Although the court may be able to decide the case on another ground, it may be forced to resolve the apparent tension between these sections.

Section 1B1.3(a)(2) instructs a judge, "[u]nless otherwise specified," to consider "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction" in determining the base offense level.

Section 1B1.8(a) provides:

Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and the government agrees that self-incriminating information so provided will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

I have the following questions concerning application of the two sections:

(1) Is information provided to a probation officer in a presentencing interview part of the information that shall not be used against the defendant in determining the guideline range? In other words, is a probation officer part of "the government" as that phrase is used in the section, or is a probation officer only an official of the court--as distinguished from "the government"?

(2) What if a defendant reveals in a presentencing interview self-incriminating information that does not concern "unlawful activities of others"? May the judge consider this information in determining the applicable guideline range?

(3) Must a plea agreement specifically mention the court's ability to consider the defendant's disclosures during debriefing or during the presentencing interview before a court may consider them in determining the appropriate sentencing range? Suppose the government includes a broad statement that "there are no agreements regarding what sentence the defendant will or should receive." Is this statement sufficient to preserve the judge's ability to consider self-incriminating disclosures by the defendant?

Referring to the conflict as "an important issue of first impression under the Federal Sentencing Guidelines," the Tenth Circuit has recently resolved the third question. See *United States v. Shorteeth*, 887 F.2d 253, 254 (10th Cir. 1989). The court in that case held that "the language and spirit of Guidelines § 1B1.8 require the agreement to specifically mention the court's ability to consider defendant's disclosures during debriefing in calculating the appropriate sentencing range before the court may do so." *Id.* at 257.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO: Chief Judge Clark
FROM: John R. Brown
DATE: October 11, 1990
SUBJECT: Sentencing Commission Letter

My dear Chief:

On the Sentencing Commission request for recommendations, as a Senior Judge I have such little exposure to the problems that I cannot contribute much. One thing not commented on is the atrocious method of the internal system of citations. It is neither Dewey Decimal, alphabetical or numerical, just a jumble of all three.

Sincerely yours,

cc: All Judges