

PCRI-48/91

United States District Court
Southern District of California
940 Front Street
San Diego, California 92189

Chambers of
Judith N. Keep
Judge

October 3, 1990

TO: U.S. Sentencing Commission
FM: Judge Judith N. Keep *JNK*
RE: Guideline Sections or Policy
Statements Which Need Review

What follows are my thoughts re: three guideline sections/policy statements which need review.

(1) High speed chases in alien smuggling cases. I understand your current proposal is that a high speed chase will increase the base offense level by 2 points. I suggest this is too low and the court should have the discretion to increase the base offense level by from 2 to 4 points depending upon the length of the chase and the severity of the threat to the aliens in the vehicle and other drivers (including the law enforcement) on the road. The base offense level for alien smuggling is quite low. For a nonchase case, that is ok. However, for a case involving a chase, two points is negligible, depending upon the nature of the chase. Let me give you two examples both of which are typical here.

a. The defendant refuses to stop at the checkpoint, accelerates to 80-90 mph, and drives in a dangerous fashion in moderate traffic for 30 miles, with police pursuing.

b. The defendant refuses to stop, accelerates in heavy traffic, forces several cars off the road, rams a pursuing border patrol car causing damage to the vehicle, and when traffic causes his car to slow, he jumps out of the vehicle, leaving it in gear and runs on foot. The aliens in the trunk of the car are clearly in a life-or-death situation and many may be injured if the vehicle careens off the road and smashes into a guard rail.

Also, we have many alien smugglers who have not only engaged in a high speed chase in the current case, but have done so in the past. Their response is not one of panic but calculated, and I think repetition of a chase should be a factor in computing points for a chase regardless of the severity of the chase.

(2) I suggest you compare the base offense level of attempted murder with that for sales of drugs. I recently had a case where the defendant attempted to kill a DEA agent after the agent attempted to arrest the defendant during an undercover drug sale. Because the base offense level for the drug charges was so high and the base offense level for attempted murder was over 12 points lower, the defendant received no guideline consequences for attempted murder. This is appalling.

(3) We need a clarification of "relevant conduct" for determining the base offense level and "related conduct" for determining whether a defendant is entitled to acceptance of responsibility points. I realize they are separate items, but they are related.

As to "relevant conduct" for purposes of determining the base offense level, our circuit has gone back and forth on this. United States v. Restreppo has again been scheduled for another en banc hearing.

As to related conduct, for purposes of determining an acceptance of responsibility deduction, some circuits point only to the count of conviction and not the related conduct. However, this forces defendants to lie and be evasive. I personally believe such a construction perpetuates a feeling the criminal justice system is phony and hypocritical. A defendant is urged to lie and be evasive, yet still gets -2 if he/she is somewhat honest about the count of conviction. What are we fostering by such gamesmanship? I believe it is important for a defendant, at sentencing, to be honest to the court and in turn to himself/herself and his or her family. Many psychiatrists report such honesty is a necessary first step in any rehabilitation. I appreciate rehabilitation is not the chief goal of sentencing today, but our procedures should not be counter-productive to it.