

United States District Court
For the District of Oregon
United States Courthouse, Room 224
211 E. 7th Avenue
Eugene, Oregon 97401

Chambers of

Robert E. Jones
United States District Judge

October 2, 1990

Hon. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Judge Wilkins:

Thank you for your letter of September 21 and the opportunity to comment upon changes I perceive to be desirable in the existing sentencing guidelines. As you are aware, I am relatively new to the federal bench and have therefore not had the extent of exposure to the guidelines as have my peers. Nonetheless, during my subsequent "baptism under fire" wherein I have sentenced a number of drug offenders, I have identified what I believe to be problems and inequities as follows:

To date, I have found that presentence reports prepared by our probation office frequently include larger amounts of drugs, specific offense characteristics and Chapter III adjustments which are not a part of the parties' stipulations or plea agreements. While I am reasonably satisfied that the probation officer's computation is usually an accurate one based upon the guideline instructions, the government frequently enters into a very specific agreement (presumably to elicit a guilty plea) which is less than reported in the presentence report. The parties, of course, have little interest in seeing that agreement disturbed. I then must conduct a hearing which, in effect, "tries" that aspect of the case in which the probation officer and the parties are not in agreement. Needless to say, this is a "catch-22" situation for all of us. Summarily, I question whether we should devote the time and resources to conduct these "mini-trials" in the manner envisioned by the drafters of the guidelines but, if we don't, the potential for disparity evolving from the prosecutors' bargains may well be greater than the previous system wherein the Court retained substantially more discretion.

Turning now to specific guidelines, please refer to guideline 2D1.1. The footnote at the conclusion of the drug quantity table (page 2.45) instructs us to treat each marijuana plant as the equivalent of one kilogram of marijuana if the offense involved 50 or more plants. (Otherwise, each plant is to be treated as 100 grams.) I presume this instruction is intended to differentiate between those who grow marijuana for commercial purposes as opposed to their own consumption. Nonetheless, I believe this formula is very excessive for two reasons. First, from a pragmatic perspective, it is extremely unlikely that one plant

would produce a kilogram of marijuana. It is my understanding that the previous Parole Commission formula provided for 1/4 pound per plant which is fairly consistent with the 100 gram per plant formula (i.e. - 1/4 lb = 113 grams). Perhaps that estimate was too modest, but it occurs to me that increasing the formula ten-fold is unrealistic and unnecessarily punitive. In fact, it may be subject to a valid constitutional challenge as lacking a rational relationship to fact. Secondly, the current formula places the defendant in the same category as other offenders who I view as posing a distinctly more serious threat to the community. For example, an offender who grows 100 marijuana plants is placed in the same offense category as an individual who distributes up to 399 grams of heroin or methamphetamine, or up to 1.9 kilograms of cocaine. While relative societal harm is often difficult to measure, I believe this is clearly inequitable.

In view of the foregoing, may I suggest that consideration be given to the following formula:

1-50 plants = 100 grams per plant;

50-300 plants = 226 grams (1/2 lb.) per plant; and,

300 plants upward = 1 lb. per plant

I suggest that the proposed revision would better reflect the relative seriousness of the offense and, further, would more clearly differentiate between offenders who cultivate marijuana for their own consumption, the small commercial and the more sophisticated large-scale enterprises.

I also find guideline 3B1.2 (Role in the Offense/Mitigating Role) to be troublesome. That is, I do not believe that the present guideline provides for an adequate distinction between those offenders who constitute the "average" drug dealer and those individuals who serve simply as errand or messenger boys, bottle washers, etc. in conspiracy cases, for example, the relevant conduct guideline requires that all participants be held accountable for the total amount of drugs involved in the conspiracy. Yet, this guideline provides for no more than a four level reduction for those least involved. Conceivably then, an individual with no prior criminal record who washed the glassware at a methamphetamine laboratory which produces 1-2.9 kilograms would receive a minimum 6-1/2 year prison term. While such a sentence appears overly punitive to me, the more important issue is that his codefendant - the average dealer who was selling the methamphetamine in the community - would receive a sentence which is only 3-1/2 years more. Again, I suggest that a greater distinction be made possible concerning the various roles, particularly those involving mitigating and aggravating circumstances.

More specifically, I would suggest the following:

Hon. William W. Wilkins, Jr.
Page 3
October 2, 1990

- 1) Minor role - decrease by 2 levels;
- 2) Minimal role - decrease by 4 levels;
- 3) Peripheral role - decrease by 6-10 levels; and
- 4) Major role - increase by 6 levels (if 5 or more).

Accompanying application notes would also be necessary to more succinctly define each of the aforementioned roles.

I was very involved in the development of the sentencing guidelines which now govern our state system here in Oregon and therefore have some understanding of the difficulty and complexity of your task. The foregoing is offered in the spirit of constructive criticism and, again, I appreciate this opportunity to express my views.

Sincerely,

A handwritten signature in black ink, appearing to read 'Robert E. Jones', with a stylized flourish at the end.

Robert E. Jones
U.S. District Judge