

United States District Court

Post Office and Courthouse Building

Boston, Massachusetts 02109

CHAMBERS OF
ROBERT E. KEETON
DISTRICT JUDGE

October 3, 1990

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Thank you for your letter of September 21st, inviting comments on guideline sections and policy statements that may need review, amendment, or clarification.

By far the most pressing problem, in my view, is that in practical impact the guidelines have sharply reduced the effect of guilty pleas in the more serious cases. I am aware of reported data of early experience under the guidelines that have been interpreted as indicating no such effect has occurred. That is distinctly contrary to my own experience and that of most other judges with whom I have had conversations on this subject, both in my own district and in many others. Moreover, the difference in percentage of pleas increases as the charges grow more severe. As a consequence, we are trying more cases, and especially more of the cases involving the most severe charges and longer trials. My recommendation is that a principle of proportionality be adopted, so the credit for acceptance of responsibility is stated in percentage or proportional terms rather than a fixed number of two points.

Second, I recommend that the sentencing judge have discretion, within the proportional point limit established by a revised guideline, to allow a different number of points (within the lower and higher limits set by a revised guideline), depending on the judge's assessment of the degree to which the defendant has moved toward fully accepting responsibility. A case in which the defendant had already turned his life around before being apprehended and charged, and then freely admits his guilt, is very different from a case in which remorse, even if perceived by the judge as genuine, is expressed only after he has been caught and realizes that the evidence of guilt is overwhelming.

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Perhaps both of these problems would be addressed by a draft along the following lines:

§3E1.1(a):

If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by a number (rounded to the nearest whole number) not less than 15 percent and not more than 40 percent of the Adjusted Offense Level.

Of course, other figures might be used where I have suggested 15 percent and 40 percent. The central ideas I recommend are adopting a principle of proportionality and giving the sentencing judge some range of discretion to take account of different circumstances of acceptance of responsibility.

Third, I would recommend reconsideration of the instances in which guidelines require a judge to choose one or the other of two categories of classification that are many points apart. An example that has troubled me is the 14-point break in relation to arson offenses of nonresidential property, depending on whether "the defendant recklessly endangered the safety of another," §2K1.4(b)(2). I have in mind a case of arson of restaurant premises at night, in circumstances in which defendant would reasonably believe no person was present. The inevitable endangerment of firefighters appears not to be the basis for a finding that defendant "recklessly endangered" safety of another, since a lesser increase is prescribed for "destruction of a residence," which would be equally likely to involve danger to firefighters. I am sensitive to the fact that the guidelines direct us to consider crimes by type rather than holding extensive evidentiary hearings and making findings about details of the particular offense. I fully agree with that general approach. My concern is that trying to fit all the range of offenses involving arson of nonresidential premises into just one or the other of a 6-point type and a 20-point type (6 + 14) seems to me to allow less leeway than is needed.

This matter might be addressed by a revision such as the following:

§2K1.4(b), add (4):

- (4) If the defendant negligently endangered the safety of another, increase by 7 levels.

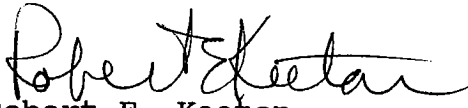
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I hope these comments will be useful, and I would be pleased to respond if you or a member of the Commission staff wish further explanation from me.

I emphasize that my recommendations do not spring from dissatisfaction generally with guideline sentencing. I believe the guidelines have brought us dramatically closer to consistency in sentencing, and I firmly support the system.

Best regards.

Sincerely,


Robert E. Keeton