

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
FEDERAL BUILDING
100 EAST HOUSTON STREET
POST OFFICE BOX 1499
MARSHALL, TEXAS 75671

SAM B. HALL, JR.
U.S. DISTRICT JUDGE

October 22, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Attention: Communications Director

Gentlemen:

In answer to Judge Wilkins' letter dated September 12, 1990,
I submit the following:

In the past I am presently assigned all of the Marshall and
Texarkana dockets and have previously had part of the Beaumont
docket all in the Eastern District of Texas. These divisions are
somewhat different in the type cases they have and I will present
to you for your consideration some of the problems that have arisen
in these three divisions.

U.S.S.G. §2G2.2 - Transporting, Receiving or Trafficking in
Material Involving Sexual Exploitation of a Minor.

In the Beaumont Division we have recently had several cases
involving individuals receiving child pornography material through
the mail -- all totally shocking and disturbing. As you know, the
producers of this material forced children to engage in both
natural and perverted sex acts. Reason would indicate that forcing
children to become involved in such actions could be
psychologically devastating both in the immediate and distant
future.

Currently, the base offense level for an individual receiving
this type of material is 13. If the material involved a pre-
pubescent minor, or a minor under the age of 12 years, there is a
2 level increase. For the persons involved in the distribution of

United States Sentencing Commission
October 22, 1990
Page Two

this material for pecuniary gain, there is a minimum of a five level increase. The cases we have had thus far involve only the receipt of the material, and most of the material involves pre-pubescent minors or children under the age of 12 years. As such, these individuals have a total offense level of 15. Due to the fact that most accept responsibility for their actions, they receive a two level decrease pursuant to U.S.S.G. §3E1.1. This results in a total offense level of 13. Most of the individuals that have been sentenced in this district have no prior criminal history and as such, the guideline imprisonment range is 12 to 18 months. I personally feel that this period of imprisonment is too lenient and should be increased. As such, I suggest that the base offense level be increased at least four levels. This would result in a guideline imprisonment range of 24 to 30 months for the individuals who receive the pornographic material involving a pre-pubescent minor and who have no prior criminal history. Twelve to eighteen months is entirely too lenient.

U.S.S.G. §4A1.2 -- Application Note #3 indicates cases are considered related if they, (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing. I suggest that criteria #3 be omitted in its entirety. I submit the following as my reasoning.

Because of criterion #3, an individual may commit a burglary on one occasion and three or four months later commit a drug offense. Should that individual appear on the same day before the same district judge for sentencing, these cases are considered related and he receives only one set of criminal history points. On the other hand, if the offenses occurred in different counties, that individual may appear for sentencing on the same day before different judges and would receive criminal history points for each of the convictions. It is my feeling that by applying criterion #3, the seriousness of the defendant's criminal history is under-represented.

Application Note #3 references the fact that related cases may result in a criminal history score that under-represents the seriousness of the defendant's criminal history and that a departure may be warranted subject to U.S.S.G. §4A1.3. By eliminating this criterion #3, the need for departure in some cases will be eliminated as the calculated criminal history category will more adequately reflect the seriousness of the criminal history.

United States Sentencing Commission
October 22, 1990
Page Three

U.S.S.G. §1B1.3
the Guideline Range

Relevant Conduct (Factors that Determine

Much concern has been voiced about this section of the guidelines. This section has the effect in many cases of nullifying the benefits of what has been perceived by the defendant and his lawyer as the benefits of a plea agreement. I realize that this issue has wide ranging implications, however, I would certainly be in favor of in some way narrowing the scope of this particular section, if nothing more than to charged offenses.

I do not think it unwise to delete §1B1.3(a)(2) "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction". This section provides for including alleged criminal conduct in determining a base offense level. Relevant conduct in the majority of the cases is limited to the offense of conviction. In my opinion, it is contrary to the underlying philosophy of the Sentencing Commission and the constitutional premises of "innocent until proven guilty" to include quantities for which there was no conviction to enhance a sentence. Relevant conduct that is not ordinarily criminal conduct will continue to be considered in the "specific offense characteristics" and the Chapter Three - Adjustments. Conduct that is ordinarily criminal conduct requires a conviction or stipulation on record before it can be considered in determining the offense level and thus the sentence to be imposed.

Since I helped work on the original plan while in Congress, I have always maintained that the "probation window" in the guidelines is much too narrow. This has resulted in the unnecessary incarceration of numerous offenders who pose no real threat to society. Specifically, I would like to see the probation eligibility increased to the minimum term of imprisonment level of 10.

Another area that bothers this Court is Chapter Five - Determining the Sentence; Sentencing Table.

In Criminal History Category I only, I would suggest change imprisonment range for offense levels 7 through 9 to 0 to 6 months. This would provide non-imprisonment alternatives to the Court in sentencing the first offender. Such alternatives could

United States Sentencing Commission
October 22, 1990
Page Four

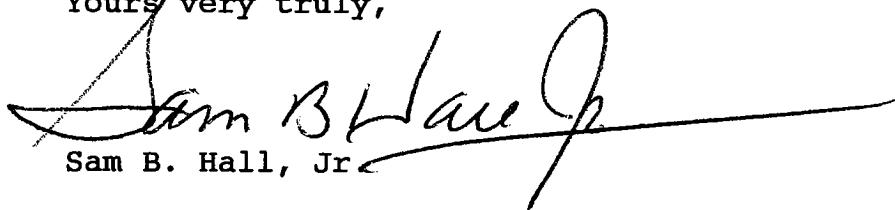
reduce the burden and expense of overcrowding in the Bureau of Prisons and its contract facilities. Such an adjustment to the sentencing table continues to be compatible with the statutory considerations for sentencing in 18 USC §3553 and 28 USC §994. Due to the severe overcrowding of the federal prison system and the fact that many first offenders charged with relative minor offenses fall within this category, probation, without any conditions of confinement, should be an additional option available to the court.

Chapter Seven -- Violations of Probation and Supervised Release

Guidelines should be developed for sentences to be imposed when there is a violation of probation or supervised release. These guidelines should use the original total offense level as the base offense level with two levels added for revocation due to new petty offense behavior or technical violations. If the revocation is for criminal behavior that could be classified as a Class A or B misdemeanor or a felony, then the total offense level is computed for the offense that is the basis for the revocation. The higher offense level (the original total offense level from the sentence to probation or supervised release, or the total offense level from the new offense that is the basis for revocation) is used to determine the sentence from the sentencing table in Chapter Five. The criminal history category should remain the same.

This letter is probably longer than it should be, but it sets out some of the matters that have faced the Court in working with these problems in the Eastern District of Texas.

Yours very truly,


Sam B. Hall, Jr

skj/