

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHAMBERS OF

October 17, 1990

GILBERT S. MERRITT

CHIEF JUDGE

SUITE 303 CUSTOMS HOUSE

701 BROADWAY

NASHVILLE, TENNESSEE 37203

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

Re: Your Letter of Inquiry of 9/21/90

Dear Billy:

In the last three years we have reviewed many cases under the new Sentencing Guidelines that suggest the need for some revision. I was therefore encouraged by your letter of September 21, 1990, in which you asked for my top three guideline sections or policies that I believe need reconsideration. The Commission needs to clarify the standard of review that appellate courts should apply to departure cases, should revise the relevant conduct provisions of section 1B1.3, and should encourage judges to interpret and apply the Guidelines in light of constitutional provisions regarding procedure.

First, it has never been clear what standard of review an appellate court should apply in downward departure cases. Because appellate courts in this country have never had any sentencing cases, we have no common law principles of sentencing to which we can refer for guidance. Some judges think that the decision to depart from the Guidelines is a decision of law and should be reviewed *de novo* like other issues of law. Other judges, including myself, believe that a much more deferential standard should apply. For an example, see my opinion in *United States v. Brewer*, 899 F.2d 503, 511 (6th Cir. 1990). Regardless of which standard of review should apply, standards of review need to be stated.

Second, I believe that the Commission should limit the relevant conduct provisions of the Guidelines severely. They leave the trial judge no discretion. The Guidelines require a sentencing court to increase the base offense level for offenses not included in the indictment but admitted by the defendant or introduced by the government and proved by hearsay. Cases often arise in which imprisonment is doubled or tripled. The application of these provisions raises serious due process problems as defendants are sent to jail for crimes that they were never indicted for or convicted of. This undermines principles of notice and fairness. I have elaborated on these reasons in a dissenting opinion I wrote in *United States v. Miller*, 910 F.2d 1321, 1329 (6th Cir. 1990). If these provisions are not amended, the real indictment in each case will continue to be made up at the probation officer's desk -- a policy hard to square with principles of notices and due process.

Finally, I think that the Commission should recognize that some constitutional problems will arise under the Guidelines and should therefore encourage sentencing courts to weed them out. Recently, for example, Judge Arnold of the Eighth Circuit wrote a compelling and persuasive opinion addressing a problem under the Confrontation Clause. *United States v. Fortier*, 911 F.2d 100 (8th Cir. 1990). His case was by no means unique. Judges have focused so narrowly on the sometimes difficult, technical application of these rules that they have forgotten the constitutional framework in which the rules must be applied.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Merritt", written over the printed name.

Gilbert S. Merritt
Chief Judge

slp