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Reply To: SIoux FALLS

November 16, 1990

Honorable William W. Wilkins
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Ave., NW, Suite 1400
Washington, DC 20004

RE: Recommended Guideline Changes

Dear Judge Wilkins:

I am sending you the attached recommendations at the request of Chief Judge Donald J. Porter. The changes represent the views of all of our probation officers who routinely use the guidelines. As you requested, we have offered specific wording changes for selected guideline sections. Following each recommended change, we have provided a brief statement of support.

As a general statement, you will note we are recommending that the Commission consider adding three additional specific circumstances under which departure would be appropriate. We understand that departure in each of these circumstances could have been handled under the general grounds for departure, §5K2.0, Grounds for Departure, but we believe there is justification for highlighting these. The primary justification being that they are much more apt to be given consideration by the probation officer, parties, and the Court if they are listed in Chapter 5, Part K, along with the other suggested departures. In addition to being more readily considered, the fact that they are listed tends to imply that these departure considerations are somehow more acceptable than a departure under the general departure provisions.

The recommended guideline changes are as follows:

RECOMMENDATIONS FOR GUIDELINE CHANGES

5K2.16 - Youthful Offender

If, at the time of the offense, the defendant had not attained the age of 23 years, a lower sentence may be warranted to reflect the extent to which peer influence and/or the defendant's immature judgment or diminished emotional control contributed to the commission of the offense, provided the defendant's history or characteristics do not indicate a need for incarceration to protect the public.

Statement of Support: The existence of an identifiable group of youthful offenders did not disappear with the repeal of the Youth Corrections Act. Nationally, the numbers of cases that fall into this category may be negligible; however, any District Court that has jurisdiction on Indian land will see a number of youthful type offenders.

The youthful offender group is frequently more juvenile-like than adult-like. Their behavior is more often motivated by a desire to imitate and/or gain peer acceptance than by a desire to achieve some criminal goal. Also, peer pressure in reservation communities (and no doubt everywhere) is very real and very powerful. It does influence criminal behavior; it will not disappear because we deny its existence. Moreover, although not defense, their juvenile-like judgment is frequently further impaired by the use of alcohol or drugs.

Admittedly based only on the combined observations of seasoned probationer officers in our district, imprisonment significantly increases the likelihood that an unsophisticated youthful offender will become a sophisticated youthful offender. Moreover, the elevated status in the community as "having done hard time in a federal joint," frequently impedes the reintegration process upon release.

While we cannot prove it, experience tells us that the likelihood of influencing positive behavioral change is significantly greater with youthful offenders. The timing is ripe for giving special consideration to the youthful offender because the commitment to community corrections in terms of correctional treatment resources and manpower available to the probation service has increased dramatically in recent years. Also, the federal probation system nationally is in the process of refocusing its commitment to protection of the community through a variety of intensive supervision practices. With the increased treatment and manpower resources, the Federal Probation System is poised to do a better job dealing with the multi-faceted problems present in the youthful offender type case.

2A2.2(b)(5)

If the assault did not result in permanent or life-threatening or extreme psychological injury, if defendant's actions were spontaneous and occurred while under a highly charged emotional state, and if at the time of the assault the defendant had not attained the age of 23 years, reduce to Level 12.

Statement of Support: Although the goal intended by the above wording could be achieved through departure, it seems there is justification to add this specific offense characteristic under the aggravated assault guideline. Envisioned here is a case where one or more youthful offenders commit a spontaneous assault motivated by something that occurred in the past and then fueled by peer influence and contagion. The goal is to reduce the offense level down to a point where a short period of confinement would be possible along with a community corrections center placement and treatment, if indicated. A parallel goal would be to avoid the negative influences of imprisonment as explained above. Obviously, this assumes the Criminal History Category is I. If it were II or higher, imprisonment would still be required which would be appropriate.

We have offered only one example where a specific offense characteristic could be added to provide special consideration for youthful offenders. There may be other guidelines where similar consideration would be appropriate, i.e., §2B2.2, Burglary of Other Structures.

4A1.1(f)

Add two points if the defendant has ever received a prior sentence of imprisonment for an offense similar to the instant offense.

Statement of Support: In our judgment, prior similar offense behavior has not been given adequate weight. We acknowledge that it is listed under §4A1.3(e), Adequacy of Criminal History Category, as possible grounds for departure, but we believe it is important enough to be elevated to guideline status. Admittedly lacking supporting scientific data, it nonetheless seems safe to assume that the prior commission of like criminal behavior would be an excellent predictor of future behavior. Also, and of equal importance, is our belief that similar prior criminal behavior is not being treated uniformly across the country. This recommendation is made with the knowledge that it might appear to be double counting; however, careful analysis should reveal that we would be sanctioning different behavior.

5K2.18 - Multiple Crimes of Violence

If the defendant injured more than one victim during the commission of one or more offenses, or injured the same victim more than once during the commission of separate offenses, and the Court does not believe that the offense level enhancement resulting from application of the multiple count rules (Chapter Three, Part B) adequately sanctions the totality of a defendant's behavior, the Court may increase the sentence above the authorized guideline level.

Statement of Support: The above-recommendation is made with the knowledge that Commentary to §3D1.4, Background, informs the Court that "additional punishment for additional crimes... can be handled by departure from the guidelines." Nonetheless, it seems that this is such an important issue that it should be given additional attention. The likelihood that the typical reader would find this reference to departure, which is tucked away in Commentary, is remote. This departure consideration would occur most frequently in crimes of violence where several victims are involved or where the same person is victimized repeatedly. The primary goal here is equality in the administration of justice--it does not appear to be fair to the offender who victimizes one person to be treated very similarly to the offender who victimizes two.

5K2.17 - Indirect or Secondary Victims

If an individual(s) other than the victim suffers substantial physical, psychological or economic injury as a result of the commission of the offense, the Court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend upon the severity of the injury and the extent to which the injury was intended or knowingly risked.

Normally, physical injury would be sufficiently severe to warrant application of this adjustment only if "serious bodily injury" or "permanent or life-threatening bodily injury" occurred. (For definitions of "bodily injury" and "permanent or life-threatening bodily injury," see Commentary to §1B1.1, Application Instructions.)

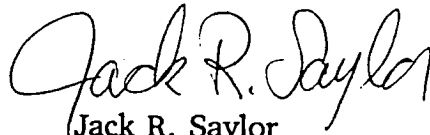
Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional or behavioral functioning of a victim, or when the impairment is likely to be of an extended or continuous duration and/or when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The Court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

Normally, economic injury would be sufficiently severe to warrant application of this adjustment only when there is severe financial hardship resulting in a significant depletion of economic resources or a significant lifestyle alteration.

Statement of Support: Again as a matter of fundamental fairness, a defendant who creates suffering for a single victim should not be treated the same as an offender whose actions create suffering not only for the primary victim but also for secondary victims. The key here is in the statement which indicates that, "The extent of the increase ordinarily should depend upon the severity of the injury and the extent to which the injury was **intended or knowingly risk** (emphasis added)." Offenders who have little or no regard for the suffering of the primary victim nor the ramifications of their behavior beyond the primary victim, should be sanctioned accordingly.

Please call if the Court has any comments or questions concerning the above recommendations.

Respectfully submitted,

A handwritten signature in black ink that reads "Jack R. Saylor". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Jack R. Saylor
Chief Probation Officer

JRS/lmo