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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF VIRGINIA

Room 320

255 WEST MAIN STREET

CHARLOTTESVILLE, VIRGINIA 22901

JAMES H. MICHAEL, JR.

JUDGE

November 21, 1990

804-295-3148

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

Dear Billy:

Thank you for your letter of September 21, 1990.

Considering the Congressional direction to establish the Sentencing Guidelines, it seems to me that the Guidelines have been working reasonably well. This is not to say that I approve of them in all respects, but I have been able to follow them with reasonably little controversy.

As an adverse comment, it does seem to me that the sentencing process now takes, simply put, too much time. Most of the sentencing instances before me are relatively simple matters, involving relatively simple offenses. They range from the illegal hunting of bear to conspiracy to distribute cocaine. Obviously, in the latter category, there are occasionally very difficult issues to resolve, but such issues scarcely present themselves in the game violation cases. Nonetheless, the time involved in both categories is about the same. This is not totally accurate, since some of the more serious cases can involve much more time than the run-of-the-mill cases, but, generally speaking, it seems to me that we spend too much time in what I might refer to as the medium and minor offense categories in going through the litany for the sentencing process.

Recognizing that due process concerns mandate some of the matters which the Commission sets out, I still am of opinion that for certain cases the time could be considerably shortened. This is particularly important to the trial bench, since time is an increasingly rare commodity for us.

In many ways, the litany to be followed in the sentencing process is similar to the litany to be followed in accepting a guilty plea: both seem to me to soak up too much time. Again, I recognize the constraints of the due process clause, but believe those constraints could be met with considerably less precise requirements than are presently the case in both situations.

A second point of some concern to me relates to the application of the Guidelines to the first offender. I realize that it is difficult to draw lines in this area, but believe that the courts could be afforded some more discretion for a downward departure, where a defendant is before the court for the first time, where his offense is not of grave severity, and where his attitude and acceptance of responsibility give reasons to think that a more lenient disposition would be appropriate. Particularly is this so, in my mind, with the very young defendants. What will happen to those young persons when they get into the hardened prison population is a prospect that I have in my mind when I am doing the sentencing, and it is a prospect which worries me a great deal. Whether this can be done is perhaps a question of the philosophy of the Sentencing Commission, and I do not have specific language which I could offer you to work this change. It is probable that it can only be done by some sort of general statement, rather than one that relates to specific offenses.

As to this comment, I am probably straying off my reservation of the Western District of Virginia, but I have been concerned by some of the matters set out in the opinion of Judge Green, of the United States District Court for the District of Columbia, concerning the interrelationship between the United States Attorney and the court under the Guidelines. First, let me hurry to say that we have not to my knowledge had any of this problem in the Western District. The United States Attorney's Office here seems to me to have done a very fine job in discharging its obligations under the Guidelines, and I have no complaint whatever with this situation in the Western District. If, however, it is a problem of the severity indicated by Judge Green in other districts, it certainly is something which ought to have careful attention. The United States Attorney must have full discretion in determining what charges to bring, what charges to omit or to downgrade, etc. However, if that discretion can be coupled with the Guidelines so as to hamper the court's role in determining the degree and severity of the offense, then some sort of corrective mechanism needs to be put in place.

In some measure, the comments concerning the situation addressed by Judge Green raise also the question of the very heavy responsibility and burden which the Guidelines, in effect, place on the probation officers. The probation people in the Western District of Virginia produce some presentence reports which I consider to be superb, but they do so with some apparent concern on their part that they are called on to make legal judgments, etc., which they feel they are perhaps not fully qualified to make. Contrary to my comment about the United States Attorney's Office in this district, I do sense this aura of concern on the part of the probation officers in this district. They do not permit it, so far as I can see, to affect the thoroughness or the rationale of the presentence reports, but I do believe that they are to some degree worried about being called on to make some of the judgments which they feel they must make under the Sentencing Guidelines. I cannot come up with a solution for this point, but hope that, if the point has any validity at all, the Commission may give some attention to it. Wiser heads than mine may well be able to find some relief for this problem -- always assuming that it is a problem.

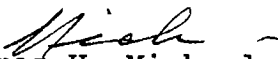
Those are the only comments which I have about the Sentencing Guidelines themselves and their application.

I do want to express my strong support for the Commission's message to Congress not to enact additional mandatory minimum sentences. Recently, I had before me a 19 year old, with no previous record of any sort, who had been found with cocaine in his possession while carrying a weapon, and, albeit without his knowledge, making sales of that cocaine within the proscribed limit of a school. The statutory requirements in that situation are for five years on each charge, to be served consecutively, with no prospect for parole. Those are mandated sentences, and I confess that I felt strongly that the total sentence imposed was too much, but did not feel any comfort in trying to deviate from the Congressional mandates in the case. Certainly, the argument can be made that the defendant made his bed, and he must now lie in it. However, this seems to me totally to ignore at least the possibility that this young man could be a reasonable citizen after a reasonable punishment for the offenses. All of this, however, is a matter within the purview of Congress, rather than the Sentencing Commission, but I do think that the position of the Commission on the subject is exactly right. The Guidelines themselves seem to me to provide an adequate approach, and mandatory minimum sentences seem inconsistent with a Guidelines system.

Hopefully, these comments will be of some value, but they are sent on for what they may be worth.

With sincerest personal regards, I am,

Cordially,


James H. Michael, Jr.