

United States Court Of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
United States Circuit Judge

19613 United States Courthouse
Independence Mall West
Philadelphia, Pa. 19106-1782

November 5, 1990

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, DC 20004

Dear Billy:

I write in response to your letter of September 7, 1990 in which you solicit comments with respect to possible Guidelines revision.

Preliminarily, I take this opportunity to express my appreciation to you and your fellow Commissioners for the cooperation given to me during my three year term as Chairman of the Judicial Conference Committee on Criminal Law and Probation Administration, a term which began just at about the time the Guidelines became effective. I believe that the cooperation between the Commission and the Committee was a significant factor in the successful implementation of the Guidelines. One special note in this regard -- the Committee was especially appreciative of your response to our concerns about the monitoring of departures. I believe that this good working relationship helped inform the Committee's unanimous vote to disapprove the recommendation of the Federal Court Study Committee that the Guidelines be made advisory. As all the Commissioners are doubtless aware, the Judicial Conference adopted our view and declined to endorse the Study Committee's recommendation.

I deem the aspirations of the Committee in the guidelines sentencing area to be best reflected at this point by the Committee's recommendations, approved by the Judicial Conference, for revisions in the Guidelines. I transmitted these to you on behalf of the Judicial Conference in September 1990. I earnestly hope that these recommendations will be the subject of serious consideration by the Commission. The Commissioners may wish to note that the Judicial

Conference has authorized the Committee to submit to the Commission further recommendations from time to time without the necessity of Conference approval. I assume that you will be hearing in this regard from my successor, Judge Vincent Broderick, in the months and years ahead.

I take the liberty of making some suggestions beyond those made by the Committee. On these I am speaking only for myself, for I no longer have authority to speak for the Committee or the Judicial Conference. While the principal thrust of my comments relates to the need for moderating the harshness of some sentences, this is not a plea simply to reduce the Guideline ranges, or provide more downward adjustments. Indeed, it is my belief that there are a number of areas in which the Guidelines are too low. While I have only anecdotal evidence from talking to probation officers, I can identify document fraud (I hear this concern from probation officers in the New York area), credit card fraud (I hear about this from a lot of sources), and explosives and firearms charges (ditto). On the latter, you might consider my opinion in United States v. Kikumura, No. 89-5129 (3d Cir. Nov. 2, 1990), which makes recommendations for upward revision. I would suggest that the Commission look into these three areas.

However, even the most "hardline" judges and Probation Officers to whom I have talked believe that the Commission must make it possible for judges to give lower sentences to truly low level offenders, particularly in drug operations and fraud schemes, those who really are "errand boys" and have no knowledge of the scope of the enterprise. More specifically, I make the following proposals for the Commission's consideration:

1. I would create a new "low low" criminal history category for first offenders, perhaps even a special category for people with no arrests.

2. I would also like to see some "super" downward adjustments, perhaps with a built-in range of discretion rather than a specific ratchet, for offenders with minimal roles, operative only at higher guidelines levels. At the lower levels the present up to four level adjustment would seem adequate; however, at the upper ranges, one or two levels don't make that much of a difference to a defendant in view of the long

sentence (in absolute terms).^{*} Perhaps a differential proportionality principle could be built in, much as the Committee has suggested with respect to acceptance of responsibility.

3. An alternative approach might be simply to set an offense level ceiling for offenders with minimal roles under the rationale that precise amounts have little to do with determining the seriousness of "errand boy" offenses.

4. I also think that the Commission needs to give more express leeway for defendants with extreme health problems. A lot of judges are discomfited by their apparent inability to respond to such situations. Perhaps 5H1.4 could be put into the 5K2 departure section so as to give them clearer authority.

The judges really are upset about these problems. It is not easy to depart from the Guidelines (and a lot of judges think that the appellate jurisprudence thus far discourages departures). The judges thus find themselves constrained by the Guidelines to impose what they, based upon long experience, consider unduly harsh sentences upon people of very low relative culpability, who often have no prior criminal record or have only a minor record. I think that there is much room to build in flexibility in the kinds of cases that I have described without impairing the integrity or structure of the Guidelines.

I am not, of course, speaking of the mandatory minimums about which not even the Commission can do anything, although I hope that it will continue to work with the Committee to try to talk some sense into the Congress on this subject. I believe that Judge J. Lawrence Irving (S.D. Cal.) was sincere when he wrote the President that his frustration about having to impose what he thought were unduly harsh sentences because of mandatory minimums (and the Guidelines) so discouraged him that he felt impelled to resign from the federal bench.

^{*}. I acknowledge that the current system is statistically proportional. However, I adhere to the point made in the text.

I would hope that the Commission would take the opportunity in the next several months to speak to a large number of sentencing judges about this general subject. I think that the judges will be able to identify for you with particularity the areas of their concern. The Commissioners who attended the small groups at the Fort Worth Sentencing Institute have already heard from some of them. I know that you have, in the past, sent out questionnaires, but these forms tend to go unanswered because most judges don't like filling in forms. And they are not prone to answer letter such as the one I am responding to because they are too busy. I suggest that the Commission consider a monitoring/research project that entails direct communication with a sample of sentencing judges (interviewing is preferable to telephone contact, but either is preferable to a survey). I believe that a direct project to seek judicial input would be beneficial.

I think it fair to state, in terms of its relationship with the federal judiciary at large, that the Commission has been on the defensive for quite some time, though I believe that it was put there in large measure by the attitude of a number of federal judges. However, having now weathered the storm of federal judicial protest and won the judiciary's commitment to work with it as reflected by the Judicial Conference's recent resolution, I would hope that the Commission will reciprocate by responding positively and quickly to the serious and fervent federal judicial concerns about the lack of flexibility in the Guidelines. I have suggested some possible approaches. There are doubtless others.

I would hope too that the Commission would, in the future, revise its statistical format and press releases which characterize sentences within the Guidelines as being "in compliance." This characterization is sharply at odds with the very clear text of the Guidelines and policy statements, which encourage departures and render them a critical part of the ongoing development of sentencing law. This usage sends the wrong message to the public, and angers the judges who believe that they are faithful to their duty when they depart, and yet by the Commission's characterization, departure is publicly branded as non-compliance.

With best wishes and kindest personal
regards, I am

Cordially,



Edward R. Becker

ERB:afr

cc: Members of Sentencing Commission
Members of Committee on Criminal Law & Probation
Administration
Judge Schwarzer
Donald Chamlee
Mike Keenan
Maggie Jensen
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