

CRJ-114/91

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
FREDERIC N. SMALKIN
UNITED STATES DISTRICT JUDGE

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BALTIMORE, MARYLAND 21201
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January 31, 1991

U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, DC 20004

Attention: Communications Director

Re: Sentencing Guidelines - Proposed
Amendments to Take Effect May 1, 1991

Dear Chairman and Members of the Commission:

I have reviewed your proposed amendments to be reported to the Congress on or before May 1, 1991. I should like to take this opportunity to comment.

First, as a general observation, it seems to me that the Sentencing Guidelines are quickly sinking, under the weight of numerous and complex amendments, to a level of complexity and opacity rivalling, perhaps, only the Tax Code. The practical utility of the Guidelines could thus well suffer from these constant and numerous amendments.

As a second general observation, I should think that, as long as amendments are necessary, the Commission, as an agency within the Judicial Branch, ought to give priority and great weight to the proposals for Amendment (copy attached) generated by the Judicial Conference Committee on Criminal Law and Probation Administration, and approved by the Judicial Conference at its September, 1990 Session. I should hope that these suggestions receive rapid and appropriate consideration.

Turning to specific comments, I have several. The first relates to proposed § 3B1.2. This guideline should certainly be amended, because the current version places too great an emphasis on the quantity of drugs in the overall conspiracy in drug cases, resulting in wildly disproportionate sentences in the case of minor participants, such as spouses or acquaintances, whose roles are essentially to facilitate the participation of their partners or friends, who are the really culpable parties.

Next, the guideline and commentary as to § 5G1.3 need no amendment, as Congress has specifically vested discretion in the matter of consecutive vs. concurrent sentences in the courts, not in the Sentencing Commission. The proposed amendment purports to

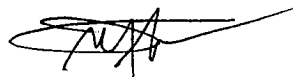
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be justified on the ground that "[t]his guideline has been criticized as leaving too much discretion to the sentencing court." Might one ask by whom it has been so criticized? It seems that, having identified a remnant of judicial discretion in the sentencing process, some unidentified critic feels obliged to extirpate it. In my judgment, the amendment is not necessary.

The third specific comment is on the new proposed § 5H1.11, which disallows the court from considering, except in atypical circumstances--which some appellate courts seem never to find--an individual's military, civilian, charitable, or public service, or other "prior good works." This proposed guideline is not in any way mandated by 28 U.S.C. § 994(d), and it gratuitously takes away from an individual--whether he or she be rich or poor, black or white--the benefit of his or her prior contributions to the community, with no sound reason to do so.

Finally, the proposed new § 5K2.15 as to the making of restitution, while apparently well-intentioned, should not require that full restitution have been made, but simply meaningful restitution, before discovery of the offense.

Very truly yours,



Frederic N. Smalkin
United States District Judge

FNS/skp

Attachment

cc All Fourth Circuit District Judges

COMMITTEE ON COURT SECURITY

LEGISLATION TO AUTHORIZE JUDICIAL OFFICERS TO CARRY FIREARMS

The Judicial Conference approved a legislative proposal of the Committee on Court Security that would authorize federal judicial officers to carry firearms. The proposed legislation would overcome what are often varied and conflicting provisions of state law on firearm possession, so as to allow all judicial officers who so desire to carry firearms to enhance their personal security.

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

SENTENCING GUIDELINES REVISION - RECOMMENDATIONS TO THE SENTENCING COMMISSION

The Judicial Conference authorized the Committee on Criminal Law and Probation Administration to act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the Sentencing Guidelines, including proposals that would increase the flexibility of the Guidelines. The Conference also approved submission to the Commission of the following specific proposals:

1. Change the minimum imprisonment requirement of §§ 5C1.1(c)(3) and 5C1.1(d)(2) from "at least one-half of the minimum term" to "at least 1 month", to allow the sentencing court to determine the appropriate mix of imprisonment and confinement conditions when imposing a "split sentence."
2. Modify §§ 5B1.1(a)(2) and 5C1.1(c), and eliminate § 5C1.1(d), to permit probation with confinement/home detention conditions as a within-guidelines sentence in the ten guideline cells (those with minimum terms of from seven to ten months) for which a "split sentence" is the only current alternative to imprisonment for the full guideline term.
3. Permit probation without confinement/home detention conditions at two additional offense levels (seven and eight) for Category I offenders by changing the ranges in the cells to zero to six months.

4. Modify § 5H1.1 to permit greater flexibility to consider age as a basis for departure or the use of sentencing options.
5. Modify Chapter 5, Part H by adding an application note clarifying that offender characteristics that are not ordinarily relevant to sentencing may be considered if, alone or in combination, they are present to an unusual degree.
6. Promulgate a two-part policy statement to replace the current § 4A1.3, to clarify that departures due to the inadequacy of the criminal history score may be based on either degree of risk or type of risk.
7. Rewrite the relevant conduct guideline (§ 1B1.3), and accompanying commentary, to clarify that judges have flexibility to individualize the offense level according to the harm for which the defendant was personally culpable.
8. Reconsider the acceptance of responsibility guideline (§ 3E1.1) with particular attention as to whether the two offense level adjustment should be increased, whether a greater adjustment should be available for higher offense levels than for lower offense levels, and whether a range of adjustments (rather than a fixed two offense level adjustment) should be made available.

FEDERAL COURTS STUDY COMMITTEE RECOMMENDATIONS

On recommendation of the Committee, and also of the Committee on Defender Services, the Judicial Conference *supported* the following FCSC recommendations:

1. Initiatives should be taken that would coordinate prosecution efforts with local authorities in seeking to limit federal drug prosecutions to charges that cannot or should not be prosecuted in state courts.
2. The Attorney General should convene a conference on the problems of complex criminal trials.