

Thomas R. Brett
Judge

United States District Court
Northern District of Oklahoma
333 West Fourth, Room 4-508
United States Courthouse
Tulsa, Oklahoma 74103

November 6, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Gentlemen:

This letter is written out of our concern for the sentencing mandates promulgated by the United States Sentencing Guidelines.

While the Guidelines appear admirable in their intent, in practical application they leave much to be desired.

As specified in Title 28, United States Code, Section 991(b), the Sentencing Guidelines are designed to:

1. Effectuate the purposes of sentencing enumerated in Title 18, United States Code, Section 3553(a)(2). In brief, those purposes are just punishment, deterrence, incapacitation, and rehabilitation;
2. Provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct, while permitting sufficient judicial flexibility to take into account relevant aggregating and mitigating factors; and
3. Reflect, to the extent practical, advancement in the knowledge of human behavior as related to the criminal justice process.

It is the second goal of the Guidelines that causes a great deal of concern for many who are mandated to uphold the sentencing laws as enacted by the Congress of the United States.

Certainty and fairness in sentencing, absent unwarranted disparity, is surely a worthy goal. However, the Guidelines do not allow sufficient flexibility. A prime example of the lack of adequate flexibility lies in the Commission's Guidelines relating to relevant conduct, (USSG 1B1.3). 1B1.3(a)(1) states that for sentencing purposes a defendant shall be held accountable for "all

acts and omissions committed or aided and abetted by the defendant, or for which the defendant would otherwise be held accountable" Application Note 1 under this section states that the phrase "would be otherwise accountable" includes the "conduct of others in furtherance of the execution of the jointly undertaken criminal activity that was reasonably foreseeable by the Defendant. . . ."

With that Guideline in mind, consider the scenario of a large scale drug conspiracy wherein there are defendants with varying degrees of culpability who distribute approximately 6 kilograms of cocaine base. At the lowest end of the scale of culpability is a defendant who was generally aware of the scope of the conspiracy, but declined to participate in any of the overt acts with the exception of a few sales totaling 1 gram. Because this defendant was aware of the scope of the conspiracy, he, according to 1B1.3, is to be held accountable for the total amount of drugs involved in the conspiracy.

In this case, assuming all personal characteristics of the defendants are the same, and each pleads not guilty and is found guilty, a defendant who actually sold the majority of the 6 kilograms is at an offense level of 40 and would receive a sentence of between 290 and 365 months, while the defendant who made the sales totaling 1 gram would receive a sentence of between 188 to 235 months, at an offense level of 36 (due to a 4 point reduction as a minor participant.)

The Guidelines permitting adjustment for defendants who play a minor role in the offense (USSG 3B1.2) do not adequately reflect the minor defendant's actual participation in the offense as compared with the other defendants. Since the black community seems to be more involved with crack cocaine, the harshness of the above example falls on young blacks who get caught up as lesser participants in a drug ring. The above example is not a sentencing guideline anomaly, but basic to the limitations on judicial departure. Also, the prosecutor has considerable discretion in the ultimate sentence by the initial selection of the particular charge.

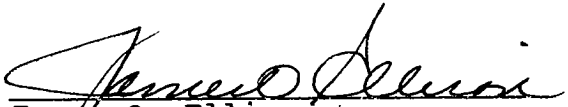
In short, the Sentencing Guidelines should allow judges the flexibility to individualize the offense level according to the harm for which the defendant was personally culpable and be given discretion in assessment of the defendant's potential for future danger to the community.

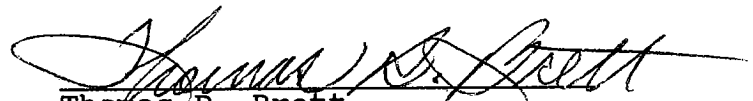
Because the Sentencing Guidelines require the court to view criminal defendants as faceless integers, the 65% federal prison overcrowding is likely to continue its upward spiral. All this is

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under the rubric of law and order, with too little thought being given ultimate cost to society. Individual lives are destroyed when "sentencing by the numbers" is carried too far. Trial judges must be given more discretion in departing both upward and downward under the Guidelines.

Sincerely yours,


James O. Ellison
United States District Judge
Northern District of Oklahoma


Thomas R. Brett
United States District Judge
Northern District of Oklahoma

cc: The Honorable William H. Rehnquist
The Chief Justice of the United States
The Supreme Court of the United States
One First Street NE
Washington, D.C. 20543

P.S. See the attached recent New York Times article.

Criticizing Sentencing Rules, U.S. Judge Resigns

Special to The New York Times

SAN DIEGO, Sept. 29 — Federal District Judge J. Lawrence Irving, who has presided over a series of highly publicized cases in San Diego, has announced that he is resigning because he believes Federal sentencing guidelines are too harsh.

"If I remain on the bench I have no choice but to follow the law," Judge Irving said Thursday, when his resignation was announced. "I just can't, in good conscience, continue to do this."

Judge Irving said he believed he was the first Federal judge in the nation to resign over sentencing guidelines. The guidelines, which went into effect on Nov. 1, 1987, require longer minimum sentences and no parole, even for first offenders. Judges are left with little or no discretion to modify sentences.

Judge Irving once ruled the Federal guidelines unconstitutional, but was overruled by higher courts. In January 1989, the Supreme Court upheld the

constitutionality of the guidelines.

"I've had a problem with mandatory sentencing in almost every case that's come before me," he said.

Split Sentence in Drug Case

As an example he cited a 19-year-old man charged with possession and intent to distribute cocaine.

"The judge, under the old law, gave him a split sentence: six months in prison with five years' probation," the judge said. "The young man understood that if he violated probation he'd go back to prison to serve out the rest of his term."

"He did his six months, and after that he remained free of drugs — we know this because of regular testing," the judge continued. "He completed his education, got married, had a child and became a productive, tax-paying member of society."

Under mandatory sentencing guidelines, the judge said, the defendant

would have been sentenced to 20 years in prison with no possibility of parole.

"That's heavy," he said. "And that's my problem. I just can't do it anymore."

Colleagues' Support Cited

In an interview on Friday, Judge Irving said he had received dozens of calls from judges as far away as Little Rock, Ark., who support his stand.

While mandatory sentencing was the main reason for his resignation, the judge said, security problems had also taken a toll on his family. Federal marshals have guarded him and his family while he presided over a number of drug cases involving many defendants.

Judge Irving, a former civil lawyer, was named to the Federal bench in July 1982 by President Ronald Reagan.

The judge said he expected to continue doing mediation work for the courts, and might join a private law firm in San Diego. His resignation is effective on Dec. 31.