

PCR-126/91

United States District Court
Western District of North Carolina
Charles R. Jonas Federal Building
401 West Trade Street, Room 195
Charlotte, NC 28202

Chambers of
Robert B. Potter
Chief Judge

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November 13, 1990

Mr. Paul Martin, Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Mr. Martin:

At the request of Judge Wilkins in his letter of September 27, 1990, I have discussed his request with the Probation Officers and we would make the following suggestions for amendment considerations:

Section 2T3.2 - Receiving or Trafficking in Smuggled Property (Pg. 2.166) seems to lack clarity. Since there is no tax or duty on controlled substances (drugs), it is difficult to apply a value from the Tax Table which the above Guideline refers you to (2T4.1). The Probation Office has no set way of determining the market value, as is suggested in the commentary or any other value, unless it is specifically provided by the investigators, which is often not the case. It seems there should be a way of calculating a specific Base Offense Level in the Section -- there needs to be more guidance rather than indicating the court should impose a sentence above the Guidelines.

Suggestion: Promulgation of a Guideline to focus on determining the Base Offense Level by the type of drugs smuggled in, the "street value" or "market value" of the drugs and then go to the Tax Table for determining the Base Offense Level. For example, if a defendant smuggled 2000 pounds of marijuana and the fair market or street value for the marijuana is \$6000.00, then, go to the Tax Table, Section 2T4.1 would be determined by 2T4.1(C) which specifies more than \$5000 the Offense Level is to be set at VIII.

This may be a long shot and probably too simple for the Commission to consider.

It seems to continue to be a problem for officers to place defendants in their proper role in drug conspiracies (2D1.1) and to determine their role in the overall conspiracy without making each defendant in multi-defendant indictments responsible for the entire amount of drugs in each conspiracy. I realize the Guidelines already deal with aggravating and mitigating circumstances which can be applied various ways under the "Role in the Mr.

Offense" section. However, since most individuals in a drug conspiracy have a specific job, for example, kingpin or leader, driver, "mule", loader, off-loader, etc., I am wondering if it would be fairer for the Commission to give some consideration to placing a cap on some of the least culpable individuals in the conspiracy that would place them further away from the kingpin or leadership role. This becomes quite key in a conspiracy involving 15 individuals with the last five of those individuals having been responsible solely for following the instructions of the leaders of the conspiracy or those most culpable. For example, a conspiracy involving 500 kilograms of cocaine which carries a Base Offense Level of 40 and the #1 defendant has no arrest record; then defendant #15 also pleads guilty to the drug conspiracy, has no arrest record just like the #1 defendant, but the most consideration he can get under Section 3B1.2 (mitigating role) is a -4, unless the court chooses to depart, which I do not believe is viewed by most courts as the appropriate thing to do in drug cases, unless there is unusual cooperation on the part of a defendant.

Our reason for this concern is that a number of defendants who play very small roles in major drug conspiracies seem to end up with Offense Levels very close to those who are the most culpable, i.e., a once or twice participant who drove a truck or picked up a package, etc. I am not sure as to how this could be done, but I do feel it is something that should be clarified.

Sentencing Commission Should Establish Guideline For Illegal Distribution of Anabolic Steroids. No guideline exists for violation of 21 U.S.C. § 333(e), Illegal Possession of Anabolic Steroids. Application notes lead to the conclusion that Guideline 2N2.1 is not an applicable Guideline for this violation. We currently have a pending case in this District and concern about abuse of these drugs by athletes would hint that we can anticipate prosecution throughout other Districts.

Proposed Chapter 7 Amendments (Violation of Probation and Supervised Release) (Proposals Placed on Hold by the Sentencing Commission Earlier This Year, 1990). The Commission proposed amendments early in 1990, which were placed on hold for further consideration. These amendments classify the violations into three classes and then specify to the Court a range of punishments. Under the current system, if the Court finds that the defendant has violated his probation then the Court may sentence under the original sentence range, as calculated by the Guidelines at the time of sentencing. This appears to be consistent with determinate sentencing, allowing the defendant to know at the time of sentencing his/her range of punishment.

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The present scheme of punishment for supervised release violations in 18 U.S.C. § 3583(e)(3) is simple, fair and sound! The proposal to revoke supervised release and then sentence to a new term of supervised release is inconsistent with the concept of determinate sentencing in which the defendant does not receive added punishment after the sentence begins and has some reasonable expectations as to when the sentence will end.

After careful review, we suggest that Robbery under 2B3.1 Base Offense Level should be increased from 20 to 22. The logic for this increase is not based on the brandishing dangerous weapons but is based on the fact that an individual who approaches anyone and either orally or in writing, demands money or announces robbery, it would stand to reason that there is automatically expressed a threat of bodily injury or even death if the demands are not met. I am sure that practically all individuals who give up valuables when demanded to do so would agree wholeheartedly. I do not feel that this should be listed under specific offense characteristics as it is in 2B3.1(b)(2). That section should remain as is.

Another section that continues to bother us is Section 5E1.2(f) which states if the defendant establishes "(1) he is not able and even with the use of a reasonable installment schedule is not likely to become able to pay all or part of the fine required by the preceding provisions or (2) imposition of a fine would unduly burden the defendant's dependents, the Court may impose a lesser fine or waive the fine."

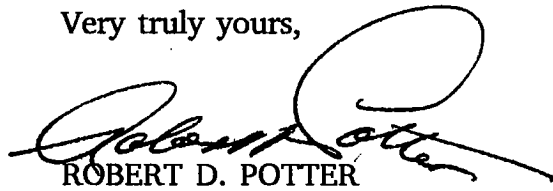
We now refer to 5H1.5 which concerns previous employment record. In this section, it specifically states "that an employment record is not ordinarily relevant in determining whether a sentence should be outside the Guidelines or where within the Guidelines the sentence should fall." It appears that there is a reverse incentive built into these two sections. For example, if an individual has never been regularly employed in legitimate work, he would have no assets and therefore would be unable to pay the fine. On the other hand, if an individual has been regularly employed, met his responsibilities, worked diligently and been frugal with his earnings, he could be fined substantially and thereby punished more severely than the irresponsible or unproductive individual. However, I see no way that any concessions can be made for this, since under the law, 28 U.S.C. § 994(e) states that it is inappropriate to consider among other things employment in a term of imprisonment or length of term of imprisonment.

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Perhaps the Sentencing Commission cannot take any action on its own in order to correct this injustice, but it may be a matter which the Commission can call to the attention of Congress.

We hope the above comments will be helpful to the Commission.

Very truly yours,



ROBERT D. POTTER

RDP/lmh

cc: Honorable William W. Wilkins, Jr.