

UNITED STATES SENTENCING COMMISSION
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April 9, 1990

MEMORANDUM:

TO: Chairman Wilkins
Commissioners
Staff Director
Senior Staff, Legal & Drafting Staffs

FROM: Paul K. Martin *PK*

SUBJECT: Public Comment

Appended for your review are additional comments from probation officers in Fresno, CA, and Kansas City, KS, regarding the Commission's proposed amendments. Delivery of the letters to the Monitoring Unit resulted in a delay in circulation.

Attachments

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS
PROBATION OFFICE

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CHIEF PROBATION OFFICER

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REPLY TO: Kansas City

March 29, 1990

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(316) 269-6184
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Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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Washington DC 20004

Dear Sir:

The following comments will reflect the ideas of U.S. Probation Officer John J. Cahill and U.S. Probation Officer William H. Martin from the District of Kansas. The comments made by the two writers will undoubtedly reflect a philosophy developed from their positions as presentence writers.

Page 6, No. 4(a), Real Offense vs. Charge Offense Sentencing. The writers believe that a serious problem exists in that U.S. Attorneys are able to dismiss numerous counts of an Indictment in exchange for a plea of guilty to one count of the Indictment, and the presentence writers are thus left to determine all of the relevant conduct which usually results in a significantly higher offense level than had the presentence writer merely determined an offense level based upon the count of conviction. The fact that the U.S. Attorney can reduce the actual elements of the real offense to a charge offense puts the Probation Officer in the position of being an investigative agent, jury, and ultimately judge of the defendant's actual conduct.

Page 8, No. 4(b), Departures. The writers believe that the Sentencing Commission should enlarge the number of reasons for a Court to depart from the guidelines. Several factors that were considered important in pre-Guideline presentence reports (age, lack of any criminal record, and the defendant's attitude and motive for the offense) are subjected to parameters in the Guidelines that are inflexible and oftentimes incapable of truly reflecting the subtleties of each offense. The writers also believe that re-writing the Guidelines will create numerous problems unforeseen at this time in the presentence writers applying Guidelines which have been amended. We ask for clear and complete instructions on the specific implementation of the amendments. The overall effect of these continuing amendments will result in defendants receiving longer or shorter sentences based merely on the date of the commission of the offense. The writers would recommend that the Sentencing Commission allow itself greater time to study all of the problems surrounding the Guidelines and attempt to resolve these problems at one time rather than constantly amending and updating the Guidelines. The writers wish to note that changes are certainly neces-

sary but often confusing and difficult for defense counsels, U.S. Attorneys, and presentence writers at the implementation stage.

Page 9, No. 4(c), Plea Agreements. Paragraph 3 of this section reflects that the Guidelines are expected to create a clear, definite expectation in respect to the sentence that a Court will impose if a trial takes place and that a prosecutor and defense attorney should seek to agree about a likely sentence or range of sentences and no longer will be working in the dark. The writers feel that, three years after implementation of the Guidelines, the U.S. Attorneys and defense attorneys continue to enter into plea agreements which are meaningless in light of the offense conduct and appropriate Guideline calculations. The writers feel that this problem is escalating and we are often put in a position where we must, based upon the facts of the offense, which are known to both attorneys, determine a guideline range that is significantly higher than that reflected in the plea agreement.

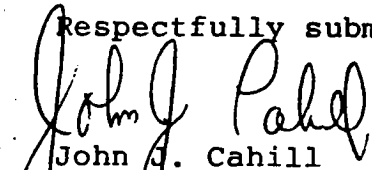
Page 11, No. 4(g), Sentencing Ranges. The presentence writers feel that the sentencing ranges pertaining to first-time offenders with no prior record require much lengthier sentences than those imposed prior to the Guidelines. Based upon the experience of the writers, the average sentences imposed under the Guidelines are not reflective of the average sentence imposed prior to implementation of the Guidelines. The writers note that two-level enhancements at the upper range of the Sentencing Table often punish a defendant more for behavior as an offense characteristic than if the defendant had been convicted of a separate crime, based upon the same behavior.

Page 74, Chapter Seven, No. 69. The writers feel that Option 2 would require probation officers to complete an entirely new presentence investigation based upon investigative materials and prosecutorial judgments made in city, county and state courts. The probation officer would be put in an untenable position with respect to making judgments that could be wholly inappropriate. For instance, an individual could be convicted of possession of 20 grams of cocaine base in a state court and receive a sentence of 1 - 5 years imprisonment. After proper investigation, and determining the relevant conduct pertaining to that offense, the probation officer could be put in a position of determining that there was actually over 500 grams of cocaine base that could be directly attributed to the defendant, and a combination of specific offense characteristics and other adjustments might result in the probation officer interpreting the guidelines to reflect that a defendant should be sentenced to life imprisonment. While the writers are aware that the Court would probably be restricted by the statutory maximum of the original sentence, there is nothing in No. 69 that would so indicate. ~~*~~In any event, the writers feel that Option 2 is wholly unworkable and would most often result in a defendant being sentenced at the statutory maximum authorized by his original offense. The writers strongly feel that the current procedure pertaining to violations of probation and supervised release allowing the Court to

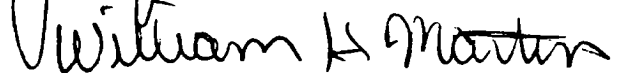
U.S. Sentencing Commission
March 29, 1990
Page 3

impose any sentence authorized by statute is markedly superior to the proposed amendment.

Respectfully submitted,



John J. Cahill
U.S. Probation Officer



William H. Martin
U.S. Probation Officer

JJC/WHM/dms