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REPLY TO Fresno

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
PROBATION OFFICE

March 20, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue NW
Suite 1400
Washington, DC 20004

attention: Communications Director

RE: COMMENT ON PROPOSED AMENDMENTS
WAB:sj

Dear Sir/Madam:

After reviewing the proposed amendments, I agree with the direction the Commission is taking and I appreciate the clarifying language. As a practitioner who deals with the guidelines on a daily basis, I wish I had time to comment on each of the many changes. Instead, I intend to comment on the three or four issues which seem most significant.

Guideline 2B3.1

The need to include unconvicted robberies in the guideline range is overdue considering the current state of plea bargaining. However, why limit the consideration of the defendant's real criminal conduct in this fashion to robberies only? Why not burglaries and many other non-fungible offenses where the defendant is being allowed to plead guilty to only one or two of several counts? Further, I don't think you will be able to define a common scheme or plan or same course of conduct in such a way as to avoid interminable arguments.

I suggest you either modify Guideline 1B1.4 or create a new policy statement to establish a presumption the court should depart in such cases. I realize the guidelines already allow for such departures but the district and appellate courts seem reluctant to consider conduct outside the count of conviction where the harms are non-fungible.

Guideline 2D1.4

In California at least, we have numerous cases involving the manufacture or attempted manufacture of illegal drugs. Where there is no specific quantity on which to base the offense level, we spend countless hours debating with all parties the defendant's intent. In case after case, the defendant has enough of one chemical to manufacture 50 pounds but only enough of another chemical to manufacture 10 pounds. We need a

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guideline for cases involving the manufacture of illegal drugs where no specific quantity has been seized or cannot easily be determined. In my view, a new guideline to deal with this problem is the single most important amendment you could propose to alleviate problems in the field.

I also believe the two-level enhancement for possession of a firearm during the commission of an offense is both unclear and too limited. This specific offense characteristic does not define what constitutes possession or what constitutes "during." There should be an additional enhancement if the defendant or his co-conspirators possess multiple weapons, particularly of the automatic type. I believe the mere presence of a weapon during the course of a drug offense is a serious matter.

Guideline 3E1.1

I do not agree with the suggestion that the two-level reduction not be available unless the defendant accepts responsibility before adjudication of guilt. Some defendants forthrightly acknowledge their responsibility after adjudication of guilt. They go to trial in some instances on the advice of their attorney for reasons not related to their willingness to admit guilt or not. However, I would like to see greater flexibility in the offense level reduction possible under this guideline. At the present time, to obtain the reduction the defendant must clearly accept personal responsibility. By itself, a guilty plea is not sufficient. The guideline is essentially black and white with really no room for shading. As a practical matter, many defendants plead guilty and are willing to discuss the matter with the court or probation officer but do not do so because of their attorney's advice. Other defendants accept partial responsibility, for example for the counts of conviction, but not for other aspects of their criminal conduct. Some defendants submit letters accepting personal responsibility but do not discuss their criminal behavior verbally. I suggest the Commission consider a reduction of between one and three levels depending on the nature of the acceptance of responsibility. A defendant who pleads guilty but refuses to discuss the offense on advice of counsel might receive a one-level reduction. A defendant who accepts full personal responsibility verbally but who can't remember where the fruits of the crime disappeared might receive a two-level reduction. A defendant who accepts full responsibility verbally and who assists in the recovery of the fruits of the crime or who assists in some way in making the victim whole might receive a three-level reduction.

Guideline for Drunk Driving

We have several felony drunk driving cases pending in our district at this time. This is such a common offense and a matter of such national interest that I believe it justifies a separate guideline.

Guideline 5E1.2

Based on my own observation and discussions with others, the guideline range for fines seems somewhat unrealistic for most of our clients. According to the fine table, for an offense level as low as eight, the

mimum fine is \$1,000. When one includes the costs of supervision, confinement or incarceration, the minimum is substantially higher. While I realize we can recommend only a portion of these fines according to ability to pay, I think officers frequently recommend no fine at all rather than justify why they are not recommending according to the fine table. For many of our clients, a fine of a few hundred dollars is substantial punishment. While I am not in a position to suggest what appropriate fines might be, I do suggest you lower the minimum amounts, narrow the ranges throughout, and clarify the relationship between a fine from the fine table with a fine imposed as costs of supervision or confinement.

Thank you for your consideration of these suggestions. I think you are doing a great job and the guidelines are achieving their intended purpose. Of the suggestions made, far and away the most important is our need to more easily determine the base offense level for drug laboratories when no actual quantity is known.

Sincerely,



WILLIAM A. BARRETT

Deputy Chief U.S. Probation Officer

WAB:sj