

PCRI-44/92

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December 10, 1991

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20003

Re: December 12, 1991 Commission Meeting

Dear Chairman Wilkins:

The next scheduled meeting of the United States Sentencing Commission is for Thursday, December 12, 1991 at 9:30 a.m.

On behalf of the Practitioners' Advisory Group, the Chairman, Samuel J. Buffone, Esquire, has asked that I communicate with the Commission in connection with some proposed Guideline amendments that the Practitioners' Advisory Group would like to have circulated for Commission consideration at its December 12, 1991, meeting. Mr. Buffone will be out of town on Thursday, December 12, 1991, and he has delegated to me the responsibility of communicating with you.

I also have served as Chair of the Practitioners' Advisory Group Subcommittee on Role in the Offense - Drug Cases. I have received the December 4, 1991, memorandum from the Drug Working Group setting forth proposed amendments for publication in the Federal Register. On behalf of the Practitioners' Advisory Group I urge that all of the amendment options of the Drug Working Group be published in the Federal Register so as to give the Courts, prosecutors and defense attorneys around the country as broad as possible options to choose from when comments are asked for by the Commission.

In addition to the proposed amendments for publication in the Federal Register by the Drug Working Group I am enclosing herewith two (2) proposed amendments to the Commentary to Sections 3B1.1 and 3B1.2 (see attached Exhibits "A" and "B"). The Practitioners' Advisory Group would like to have these proposed Guideline changes published.

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The Practitioners' Advisory Group also would like to have published as a proposal for comment a proposed amendment to policy statement Section 5K1.1, Substantial Assistance to Authorities (Exhibit "C" - two pages). This is a very controversial area and the Commission should be soliciting comment on the issue of whether there are certain cases in which a downward departure for cooperation should be allowed even without a Government motion. I note that on December 9, 1991, the Supreme Court granted certiorari in United States v. Wade, 986 F.2d 169 (4th Cir. 1991), which raises this very issue.

The Practitioners' Advisory Group would also like the Commission to reconsider an amendment to Section 6B1.2, Standards for Acceptance of Plea Agreements (Commentary). The proposed Commentary language was defeated in a four-three vote by the Commission in September, 1991, but that was at a time when the Commission was working on technical changes to the Commentary to be sent to Congress in connection with the 1991 amendments. I have attached hereto as Exhibit "D" the proposed Commentary language. This Commentary language is supported by both the Practitioners' Advisory Group and the Federal Defenders.

In regards to proposed amendments to Sections 2Q1.1, 2Q1.2 and 2Q1.3 (individual Guidelines for environmental offenses), the Practitioners' Advisory Group has previously forwarded to you a memorandum on or about December 6, 1991, in which the Practitioners' Advisory Group urges the Commission not to go forward with any amendments in this area. The Practitioners' Advisory Group met on Monday, December 9, 1991, and we strongly urge the Commission to defer publication of the proposal for comment on individual Guidelines for environmental offenses.

Finally, in the area of proposed amendments, I am enclosing herewith a proposed amendment to Section 1B1.8 - Use of Certain Information which is supported by the Practitioners' Advisory Group. This proposed amendment is attached as Exhibit "E".

There are two other matters that were discussed at the December 9, 1991 meeting of the Practitioners' Advisory Group. It was unanimously agreed that whatever proposed amendments and request for comment are published in the Federal Register, the Commission needs to "gear up" very soon on a Prison Impact statement. As you know, the Prison Impact statement prepared on the

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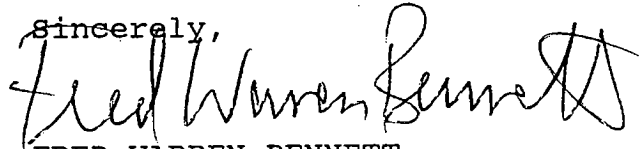
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last amendment go around came very late in the day. Also, in connection with whatever is finally to be published in the Federal Register, the Practitioners' Advisory Group would strongly urge that the public and other interested parties be told that Working Group reports are available for review in connection with those proposed amendments or requests for comment that have Working Group reports on file with the Commission.

Thank you for your attention to this letter and I would respectfully request that this letter and Exhibits "A" - "E" be circulated to the other Commissioners for Commission consideration at its December 12, 1991, meeting.

With warmest personal regards, I am

Sincerely,

A handwritten signature in cursive script that reads "Fred Warren Bennett". The signature is written in dark ink and is positioned above the printed name.

FRED WARREN BENNETT
Federal Public Defender

FWB:cm
enc.

COMMENTARY

Application Notes:

1. Subsection (a) applies to a defendant who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.
2. It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marijuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.
3. In addition to a downward adjustment for a minimal participant, a downward departure may be warranted on the ground that minimal participation exists to a degree not contemplated by the guidelines. For example, a downward departure in addition to a downward adjustment for a minimal participant may be warranted in a case where the offense level as applied to a defendant has been extraordinarily magnified by a circumstance that bears little relation to the defendant's role in the offense.

New Application Note 3 (Underlined Material) to the Commentary to Section 3B1.2 is supported by the reasoning of the Second Circuit in United States v. Restrepo, 936 F.2d 661, 666-668 (2nd Cir. 1991).

FWB/fw

Exhibit "A"

COMMENTARY

Application Notes:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.
2. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.
3. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.
4. This guideline, which provides for an upward adjustment when a defendant is an organizer, leader, manager or supervisor in criminal activity, applies only when the offense is committed by more than one criminally responsible person. Thus, this guideline cannot apply unless: (a) the defendant is either an organizer, leader, manager or supervisor in criminal activity; and (b) said criminal activity involved at least the defendant and one other criminally involved person.

New Application Note Four (underlined material) to the Commentary to Section 3B1.1 is supported by the reasoning of the 9th Circuit in United States v. Anderson, 942 F.2d 606, 614-617 (9th Cir. 1991).

FWB:fw

Exhibit "B"

Proposal for Comment

The Commission solicits comment on following proposed amendment to policy statement §5K1.1, Substantial Assistance to Authorities:

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

Upon a finding that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

- (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
 - (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
 - (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
 - (3) the nature and extent of the defendant's assistance;
 - (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
 - (5) the timeliness of the defendant's assistance.
- (b) Substantial weight should be given to the government's evaluation of the extent and value of the defendant's assistance, particularly when the extent and value of the assistance are difficult to ascertain.
- (c) A departure below a statutorily required minimum sentence may be made only upon the motion of the government. 18 U.S.C. § 3553(e).

Commentary

Application Notes:

1. *Because of the nature of this factor, it is expected that the consideration of a downward departure will generally be based upon the motion of the government. As provided in subsection (b), substantial weight should be given to the government's evaluation of the extent and value of the defendant's assistance, particularly when the extent and value of such assistance are difficult to ascertain.*

Exhibit "C"

2. *The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's recognition and affirmative acceptance of personal responsibility for his own criminal conduct.*

§6B1.2. Standards for Acceptance of Plea Agreements (Policy Statement)

* * *

Commentary

* * *

The Commission encourages the government, in plea discussions, to disclose to the defendant facts and circumstances of the offense and offender characteristics, known to the government, that are relevant to application of the sentencing guidelines.

PRACTITIONERS' ADVISORY GROUP

**Recommended Amendment to Section 1B1.8.
Use of Certain Information**

Amended §1B1.8(a) to read as follows:

Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others or the defendant, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used in against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

Amend "Application Notes":

1. This provision does not authorize the government to withhold information from the court but provides that self-incriminating information obtained under a cooperation agreement is not to be used to determine the defendant's guideline range. Under this provision, for example, if a defendant is arrested in possession of a kilogram of cocaine and, pursuant to an agreement to provide information concerning the unlawful activities of co-conspirators or himself, admits that he assisted in the importation of an additional three kilograms of cocaine, a fact not previously known to the government, this admission would not be used to increase his applicable guideline range, except to the extent provided in the agreement. Although this guideline, consistent with the general structure of these guidelines, affects only the determination of the guideline range, the policy of the Commission is that where a defendant as a result of a cooperation agreement with the government to assist in the investigation or prosecution of other offenders or to disclose additional unlawful conduct of himself/herself reveals information that implicates him in unlawful conduct not already known to the government, such defendant should not be subject to an increased sentence by virtue of that cooperation where the government agreed that

Exhibit "E"

the information revealed would not be used for such purpose.

Reasons for Amendment:

§1B1.8 does not permit the government to agree not to use self-incriminating information against a defendant who wishes to plead and cooperate unless the cooperation consists of "providing information concerning unlawful activities of other." As a result, if a defendant has no such information, he/she has no incentive to plead guilty and cooperate other than to obtain the two level reduction for acceptance of responsibility. Although the two level reduction is always desirable, it may not produce a sufficient incentive to plead if, for example, a fraud exceeds one million dollars. Yet the Government may be fully satisfied with the guideline sentence resulting from the fraud it can prove and wish (1) to avoid a lengthy trial, (2) to learn from the defendant, for example, about how he/she was able to perpetrate the fraud, and (3) to learn of other unlawful conduct at the time unknown to it. In other words, if the Government makes the decision that it is satisfied with the guideline result, there is no reason to preclude a defendant who wishes to cooperate by disclosing his/her other unlawful conduct and the methods utilized, at the time unknown to the government, even if others are not implicated by his/her testimony.

Members of the Practitioners Advisory Group have had Assistant United States Attorneys express their frustration about not being able to accept a plea to a substantial offense, with an agreement not to use further self-incriminating information against the defendant.

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November 26, 1991

SENTENCING COMMENTARIES

In stating that failure to follow certain commentary "could constitute an incorrect application of the guidelines," the Commission simply means that in seeking to understand the meaning of the guidelines courts likely will look to the commentary for guidance as an indication of the intent of those who wrote them. In such instances, the courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter.

Historical Note: Effective November 1, 1987.

§1B1.3. Use of Certain Information

- (a) Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.
- (b) The provisions of subsection (a) shall not be applied to restrict the use of information:
 - (1) known to the government prior to entering into the cooperation agreement;
 - (2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender);
 - (3) in a prosecution for perjury or giving a false statement; or
 - (4) in the event there is a breach of the cooperation agreement by the defendant.

Commentary

Application Notes:

1. This provision does not authorize the government to withhold information from the court but provides that self-incriminating information obtained under a cooperation agreement is not to be used to determine the defendant's guideline range. Under this provision, for example, if a defendant is arrested in possession of a kilogram of cocaine and, pursuant to an agreement to provide information concerning the unlawful activities of co-conspirators, admits that he assisted in the importation of an additional three kilograms of cocaine, a fact not previously known to the government, this admission would not be used to increase his applicable guideline range, except to the extent provided in the agreement. Although this guideline, consistent with the general structure of these guidelines, affects only the determination of the guideline range, the policy of the Commission is that where a defendant as a result of a cooperation agreement with the government to assist in the investigation or prosecution of other offenders reveals information that implicates him in unlawful conduct not already known to the government, such defendant should not be subject to an increased sentence by virtue of that cooperation where the government agreed that the information revealed would not be used for such purpose.

SENTENCING GUIDELINES

2. Subsection (b)(2) prohibits any cooperation agreement from restricting the use of information as to the existence of prior convictions and sentences in determining adjustments under §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender). The Probation Service generally will secure information relevant to the defendant's criminal history independent of information the defendant provides as part of his cooperation agreement.
3. On occasion the defendant will provide incriminating information to the government during plea negotiation sessions before a cooperation agreement has been reached. In the event no agreement is reached, use of such information is governed by the provisions of Rule 11 of the Federal Rules of Criminal Procedure and Rule 410 of the Rules of Evidence.
4. As with the statutory provisions governing use immunity, 18 U.S.C. § 6002, this guideline does not apply to information used against the defendant in a prosecution for perjury, giving a false statement, or in the event the defendant otherwise fails to comply with the cooperation agreement.

Historical Note: Effective June 15, 1988 (see Appendix C, amendment 5). Amended effective November 1, 1990 (see Appendix C, amendment 308).

§1B1.9. Class B or C Misdemeanors and Infractions

The sentencing guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction.

Commentary

Application Notes:

1. Notwithstanding any other provision of the guidelines, the court may impose any sentence authorized by statute for each count that is a Class B or C misdemeanor or an infraction. A Class B misdemeanor is any offense for which the maximum authorized term of imprisonment is more than thirty days but not more than six months; a Class C misdemeanor is any offense for which the maximum authorized term of imprisonment is more than five days but not more than thirty days; an infraction is any offense for which the maximum authorized term of imprisonment is not more than five days.
2. The guidelines for sentencing on multiple counts do not apply to counts that are Class B or C misdemeanors or infractions. Sentences for such offenses may be consecutive to or concurrent with sentences imposed on other counts. In imposing sentence, the court should, however, consider the relationship between the Class B or C misdemeanor or infraction and any other offenses of which the defendant is convicted.

Background: For the sake of judicial economy, the Commission has exempted all Class B and C misdemeanors and infractions from the coverage of the guidelines.

Historical Note: Effective June 15, 1988 (see Appendix C, amendment 6). Amended effective November 1, 1989 (see Appendix C, amendment 81).