

UNITED STATES DISTRICT COURT

District of Alaska

222 West 7th Avenue - No. 54

Anchorage, Alaska 99513-7545

H. Russel Holland
Chief Judge

January 17, 1992

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Re: United States v. Floyd
945 F.2d 1096 (9th Cir. 1991)

Dear Judge Wilkins:

The above referenced case which appears in 945 F.2d 1096 (9th Cir. 1991) has, I am sure, already come to your attention. Hopefully there is something that the Sentencing Commission can do to avoid or ameliorate the consequences of this decision. Especially when considered with the prospect of mandatory minimum sentences, we have a form of disparity in sentencing that I personally view as far more pernicious than what existed before the institution of guideline sentencing. I have recently declined to apply Floyd to a case that had facts very, very similar to Floyd. I am hopeful that the decision will get appealed so that another panel of the Ninth Circuit will have an opportunity to look at this situation again. I have some concern, however, that no appeal will be taken and that even if it were that there are too many judges who do not like the guidelines and are only too willing to find any crack they can to avoid applying them. The big trouble with Floyd is that it turns the entire process on its head. Floyd will arguably be applicable as an exception to the guidelines in almost every case involving young defendants. I have no demographics on this; but I have a feeling that at least seventy-five percent of the young people whom I sentence suffer from a youthful lack of guidance in a very real way.

If I am right about this, the result of Floyd could be that the majority of young defendants will slip out from under the guidelines unless they have the misfortune of committing one offense with a mandatory sentence. Any judge with half a brain can mouth the right words to offer some reasons for restructuring the guideline computation once a departure is justified; and the net result is the same kind of subjective sentencing we had under the old law. I am still no big fan of guidelines sentencing; but if we're going to have it, we ought to do it correctly; and the Floyd decision will, I am afraid, create some very serious problems for those of us who are trying to abide by both the letter and the spirit of guidelines sentencing.

Honorable William W. Wilkins, Jr.

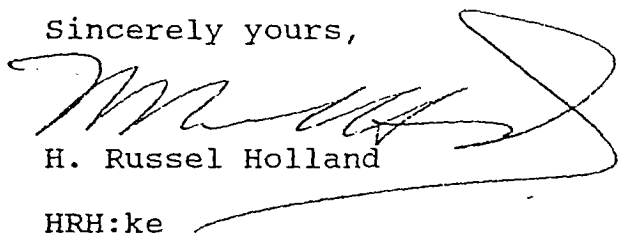
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In fact with Floyd in combination with guidelines sentencing and mandatory minimum sentences, we can have some absolutely awful disparity. The judge in Floyd gave a defendant with a terrible record a very substantial break on his guidelines sentence. Today I sentenced a young man who was "trashed" by his family much as Floyd was but who has a criminal history category of 1. I think he could be rehabilitated; but I have had to send him away for five years because he was caught with a pistol in his car while he was completing a drug deal. The defendant plead to the weapons charges and the drug charges (which involved a sufficient quantity of crack cocaine to result in a guideline sentence of more than five years for even a first offender) were dismissed. The irony of the situation--and this is where the three-way disparity problem between Floyd, the guidelines, and mandatory minimum sentences really comes into focus--is that if the defendant had been willing to gamble with a longer sentence, pleading to the drug charges and bargaining for a dismissal of the weapons charges, he might have been sentenced under Floyd to less time than the mandatory minimum sentence on the weapons charge.

Plainly, disparity in sentencing is still very much with us. I still believe that non-binding guidelines and the abolition of mandatory minimum sentences are the only rational solution. That resolution being unlikely, I certainly hope that something can be done about the Floyd decision.

Sincerely yours,



H. Russel Holland

HRH:ke