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February 27, 1992

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

RE: 1992 GUIDELINE AMENDMENTS:
COMMENTS ON A.O. MEMO
DATED 1/29/92

To Whom It May Concern:

These comments are being offered for consideration in regards to the 1992 proposed guideline amendments.

1) AMENDMENTS RESPONSIVE TO JUDICIAL CONFERENCE RECOMMENDATIONS

Expanded Availability of Nonprison Sentencing Options:

It is my opinion the options proposed regarding expanding the availability of nonprison sentencing options does not compromise the guidelines as originally drafted. Instead, it appears to be a consideration or concession to those individuals who feel the guidelines are too punitive and restrictive, and do not provide for sufficient discretion.

If the commission does decide to adopt these expanded alternatives, they certainly should adopt an "offense by offense" approach and remove from consideration people such as white collar offenders.

In my opinion, there is no need to include additional alternative programs at the low end of the guideline.

Departures Based on Offender Characteristics

The Commission should be cautious in wording departures that may be appropriate when offender characteristics are present to an unusual degree, either alone or in combination. The use of discretion and judgement lead to disparity among offenders in opposition to the purpose of guidelines. Offender characteristics are currently considered under terminology stating that they are "not ordinarily relevant," and there is no reason why one cannot argue in a specific instance why a departure may be relevant to the sentencing process.

One should be careful in considering age; particularly as it relates to young offenders, because they are the most criminally active group in society.

Status of being elderly should not receive leniency simply because it is fair to attribute to these individuals sufficient decision making skills to hold them accountable for their errors in judgement, or their free choices.

An infirm defendant should not be able to use that to obtain leniency.

A defendant's lack of youthful guidance, history of family violence, or similar factors as grounds for departure would place the offender's parents, sociocultural and socioeconomic background on trial in the sentencing process as opposed to the offender.

Downward departure for advanced age should not be considered because those individuals should possess considerable background and experience that would lead them to make good judgements.

Departures Based on Inadequacy of Criminal History Score

Option #1 is preferable to Option #2, as it seems to provide a more structured process. Part B does not appear to be necessary. In Part C, there should be a prohibition against the use of adequacy of criminal history as sufficient reason to depart below the career offender and the armed criminal provisions.

Acceptance of Responsibility

As to Option #1, I have no difficulty with limiting the scope of what is required to receive acceptance of responsibility,

as long as this does not impact the use of relevant conduct in calculating the offense level. This is a practical approach. An individual could be expected to object to his offense level being raised by the use of relevant conduct. However, I have no problem with one acknowledging his responsibility for the offense of conviction, and receiving a downward adjustment while objecting to the relevant conduct which might raise his offense level. This option is expedient and should receive consideration.

Option #2 should not receive consideration. There is an old saying, "If you're going to make a mistake, make it a good one," or "If you're going to make a mistake, make it a big one." Why should one receive more leniency just because he participates in a more serious offense. The guidelines should treat serious offenses seriously.

Option #3 does not appear to be one which would produce sufficient incentive for the defendant to plead guilty. In addition to this, there is no clear indication as to whether one would be entitled to a one level reduction for acceptance of responsibility if there were no relevant conduct issues involved.

Option #4 appears to be better than Option #3 because there is some continued emphasis on offenders not receiving a reduction when they put the government to its proof at trial. In my opinion, this increases pleas of guilty when they are appropriate. One should not receive a one level reduction after the trial has begun. Additionally, this option does not address the issue of whether one would receive a reduction if there were no contested issues regarding relevant conduct.

NOTE: I would also like to suggest to the commission that they consider a revision of USSG 3E1.1, comment (n.4), which indicates "that conduct resulting in enhancement under USSG 3C1.1, Obstructing or Impeding the Administration of Justice, ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. However, there may be extraordinary cases in which adjustments under both USSG 3C1.1 and USSG 3E1.1 may apply." I do not feel acceptance of responsibility should be tied so closely to obstruction of justice. Obstruction of justice may occur early on in the proceedings, and the defendant may later make an adequate demonstration of acceptance of responsibility. The terminology in the application note which bothers me in the interpretation process is the use of the word "extraordinary." There are not many extraordinary cases. I feel this application note is being ignored. Consistency of application would be increased if this application note were revised.

RELEVANT CONDUCT

All of the information presented in this section is essentially positive except the 120-day time frame relating to the same course of conduct, and being significantly connected. I believe 120 days is too short and restrictive.

NOTE: It would be helpful in applying this guideline if there was some emphasis placed on what a defendant must do to withdraw from a conspiracy or concerted activity, and to be no longer accountable. In the commentary, and in the new proposals, there is considerable emphasis on definitions that lead to assessments in other areas. However, one can enter a conspiracy and later withdraw from the conspiracy, or argue that they have done so. I think it should be made clear as to whether this withdrawal is passive or active, and these terms should be defined.

2) ADDITIONAL AMENDMENTS OF SPECIAL INTEREST

ROLE IN THE OFFENSE, ESPECIALLY OFFENSES INVOLVING DRUGS

Amendment 16, Part A, is a good thought. Part B still appears to be vague, and probably should be stated as a factor under which one would receive no aggravating or mitigating adjustments.

Amendment 17 is essentially good but I do not feel you should exclude the terminology "otherwise extensive."

Amendment 18 calling for the deletion of the interpolation is good, and so is the further definition proposed regarding adjustments for mitigation of role, and eligibility and ineligibility for mitigating role reductions.

The commission further requested comments on several items. In regards to Item #1, if one is to receive a mitigating role, it should be clear on the surface, and he should be less culpable than the other participants in the same case, and not someone who is less culpable than individuals who typically participate in similar conduct.

In reference to Item #2, there should be no specific functions that are either eligible or ineligible for mitigating role because this would cause everyone to claim or seek such eligibility or definition.

Item #3, a mitigating role reduction should be available to those in lower positions of priority decision making functions in a structured offense behavior. There are also obviously individuals who should receive no mitigating or aggravating

role as well. The factors considered should be those factors that are situation specific to the offense that tend to set this defendant apart from other defendants as one who deserves a mitigating role.

Item #4, there should not be any bar to receiving role adjustment because one has not been held accountable for all of his relevant conduct. This is a situation and circumstance that can be taken care of under the relevant conduct guideline, and does not need to affect the assessment of role.

Item #5 is no different than Item #4. One should not receive consideration under one guideline just because another guideline has not been correctly applied or assessed.

In regards to Part B of Amendment 18, I do not feel that commentary such as that mentioned is warranted. It would appear to me that if the proper role adjustment had been made, and the proper offense level determined through the use of relevant conduct, that all the appropriate information has been considered, and because of this, there is no departure justified.

In reference to Amendment 19, I do not think it is necessary to establish caps for a minor or minimal participant, as that is already accounted for in the establishment of the offense level through relevant conduct and the role reduction. It would seem to me that these adequately address the issues which this amendment is attempting to focus on.

NOTE: Reference the Commission's request for comments on questions; in particular, that dealing with mandatory minimum sentencing statutes. It is very possible that some of these amendments may place certain offenders below the mandatory minimum, when in fact they will not receive any benefit from the actual guideline application procedures, if they do not receive a 5K1.1 motion from the government.

REDEFINITION OF CAREER CRIMINAL GUIDELINE 4B1.1

As it relates to Amendment 27, Part A, I recommend that the enhanced statutory maximum sentence be used. As it relates to Part B of the amendment, I recommend the definition of prior felony conviction remain unchanged. As it relates to Part C, I think the date should be the date of sentence. As it relates to Part D, I do not think it is necessary to develop a category of "lessor" crimes. As it relates to Part E, I think the guidelines should remain as they are. As it relates to Part F, I think it should remain unchanged, and I do not think there should be any requirement for a "strictly consecutive sequence."

PLEA BARGAINING POLICIES, USE OF ACQUITTALS

As it relates to Amendment 35, I believe these are good ideas. As it relates to Amendment 36, Part W & Part X, I believe they are also good ideas.

As it relates to Amendment 20, I believe that Option #3 is the more appropriate.

As to Amendment 4, Part A, I have had little involvement with these types of cases, and am not familiar with information relating to this guideline. The same is true for Amendment 9.

As it relates to Amendment 36, Part G, I do not think it would be a good idea to remove these citations. They help give structure and direction to the guidelines. Removing them would possibly make the guidelines more flexible, but may also lead to inconsistency in application. As it relates to Part P, I believe the cross-reference idea is good.

ITEM #3, LIST OF ADDITIONAL PROPOSED AMENDMENTS

CHAPTER 1, GUIDELINES & POLICY STATEMENTS

Amendment 2, Parts A & B are both appropriate ideas. So is Amendment 3.

CHAPTER 2, GUIDELINES & COMMENTARY

I have no difficulty with Amendment 4. As it relates to Amendment 5, if you're going to remove the more than minimal planning adjustment, then there should be some corresponding increase in the base offense level.

Amendment 6 is appropriate.

As it relates to Amendments 7 & 8, I have had no significant dealings with these issues, and do not really know how these amendments might impact the guidelines.

As it relates to Amendment 10, it appears to be a logical and appropriate amendment.

As it relates to Amendment 11, I have had no dealings with this guideline.

Amendments 12, 13, & 14 all appear to be appropriate amendments.

CHAPTER 3, GUIDELINES & COMMENTARY

NOTE: No opinion or comments offered.

NOTE: It would be helpful to give some attention to examples relating to grouping issues involving money laundering guidelines and other offenses. This is something that, to my knowledge, is currently not in the application notes in Chapter 3, Part D, and I believe it would be useful.

CHAPTER 4, GUIDELINES & COMMENTARY

As it relates to Amendment 24, I do not believe an additional criminal history point is necessary because I think those sentences that deal with time actually served of 5 years or more reflect serious offenses that are often times given consideration. In such instances as armed career criminal and career offender enhancement, or possibly they also might reflect themselves in enhancements to the instant offense, such as mandatory minimums for second convictions, etc.

Amendment 25, Parts A & B are both good ideas.

Amendment 28, Part A, is unnecessary.

Amendment 28, Part B, is also a good idea, and of the options offered, Option #3 seems to be more appropriate.

CHAPTER 5, GUIDELINES & COMMENTARY

Amendments 30, 31, & 32 all appear to be good amendment ideas.

Amendment 34 is unnecessary and would complicate the sentencing procedure. The most effective aspect of USSG 5K1.1 is that it can only occur when the government does make a motion. It has been my experience that those who have substantially assisted authorities have received credit for doing so. It appears this amendment would allow for input from other parties as it relates to the substantial assistance issue, and would in effect result in less substantial assistance being provided. It would allow people other than those receiving substantial assistance to in fact make some determination as to the quality and substance of this assistance. Those people are actually not in a position to evaluate that substantial assistance.

MISCELLANEOUS AMENDMENT #36

Part A, Part B, Part C, Part D, and Part F are all appropriate amendments.

Part D, Part E, & Part F are all appropriate amendments.

Part H, the market value should continue to be the retail value. It should make little difference where the product was embezzled or stolen from. The retail value is still a fair and logical way to deal with monetary loss. Such an amendment would only complicate the determination of such a factor.

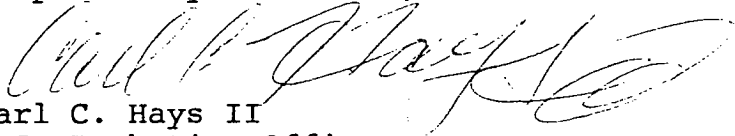
Part I is difficult to evaluate, but if one is to assume that the items were not intended for circulation because they were simply poor items is not sufficient reason for such a change. Quite frankly, had they been good items, they would have been circulated. I do not think this is a good amendment. It will cause arguments surrounding the intentions which will be difficult to resolve. If someone is counterfeiting something, one should be able to fairly state that they would intend to misrepresent its true value or status if they could.

Parts J, K, L, M, N, O, P & Q are all good amendments.

I do not understand enough about the proposed change in Part R to make any comment.

Parts S, T, U, V & Y are all good ideas.

Respectfully submitted,


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U.S. Probation Officer

CCH/smh