

United States District Court
Northern District of West Virginia
Post Office Box 1275
Elkins, West Virginia 26241

#32

Robert E. Maxwell
Chief Judge

February 12, 1992

Honorable Vincent L. Broderick
United States District Judge
Chairman of the Committee on
Criminal Law of the Judicial
Conference of the United States
United States Courthouse
101 East Point Road
White Plains, New York 10601-5086

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

Attention: Guideline Comment

Dear Judge Broderick and Members of the United States
Sentencing Commission:

In response to Judge Broderick's correspondence of January 22, 1992, with enclosures, the opportunity to comment on amendment proposals, now being considered by the Sentencing Commission, is appreciated.

Rather than addressing the proposals on a one-to-one basis, I believe my comments can be helpful to the Judicial Conference's Committee on Criminal Law, and the Sentencing Commission, if I would address the overall results and effects of the Sentencing Guidelines as they now exist and, as we shall hope, will be improved with the proposed amendments. I will then address several specific proposed guideline amendments, but time constraints limit my ability to adequately comment on all proposed amendments.

My first observation is not particularly addressed directly to the Sentencing Guidelines; however, the guidelines are applicable to criminal actions, regardless of size and importance of the crimes alleged; therefore, the involvement of judicial time and effort is noticeable. In this regard, it is observed that prosecutors are bringing large numbers of small quantity drug cases which could and should be prosecuted in state courts. This action persists despite the Federal Court Study Committee's report of April 2, 1990; the year-end address of Chief Justice Rehnquist delivered at the conclusion of calendar year 1991; and the numerous complaints of trial and appellate judges as to the unnecessary volume of work being visited upon the federal court system.

Chief Justice Rehnquist's year-end report parallels many of my personal observations, particularly in cautioning Congress to "consider the serious implications" of passing legislation that would "unnecessarily expand the jurisdiction of the federal courts and intrude into areas of the law that have traditionally been reserved to state courts."

I am sure that you are aware of the commentaries set forth in Chapter 2 of the April 2, 1990 report of the Federal Courts Study Committee, particularly paragraph designated:

A. Federal and State Prosecution of
Narcotics Violations

Federal prosecuting authorities should limit federal prosecutions to charges that cannot or should not be prosecuted in the state courts and should forge federal-state partnerships to coordinate prosecution efforts. Congress should

direct additional funds to the states to help them to assume their proper share of the responsibilities for the war on drugs, including drug crime adjudication.

These pronouncements do not appear to be impacting the federal prosecution of drug cases, which could and should be prosecuted in State Court, in this the Northern District of West Virginia. A recent drug sweep in this District resulted in 31 arrests on federal drug charges which prompted a local county prosecutor to publicly comment that these individuals were being prosecuted in federal court because "they could get more time." The Court is advised from the Magistrate Judges before whom the individuals were brought for initial appearances that many of those arrested were street runners with no prior convictions and that a majority of these cases resulted from controlled buys involving small amounts of cocaine.

Also, in recent weeks, the Court received guilty pleas from approximately eight young men who had become involved in marijuana usage while first and second year students at West Virginia University. The facts revealed no interstate or international connections, with most of the drug sales being made to fraternity brothers, roommates, and other college students who may have been equally culpable.

The Court has seen a mass of similar examples which result in unnecessary prison terms under the Guidelines, in many instances because controlled buys are intentionally arranged to occur within a protected zone. These examples direct our professional attention

to seek greater flexibility in guideline sentencing, particularly for the youthful, first time offenders who are totally unaware of the seriousness of the matters with which they are charged.

I quite agree that these youthful offenders should be required to cooperate with prosecuting authorities in locating sources of supply and assisting as witnesses in the state prosecution of low-level offenders and in the federal prosecution of interstate and international traffickers in narcotics; however, I do not believe that young, impressionable individuals should be encouraged to participate in making undercover purchases of illegal substances in order to receive probation or alternative sentencing which would be the result only of a motion by the government for substantial assistance. The Courts must be given discretion to impose alternative sentencing in such instances.

As left in the sole discretion of federal prosecutors, the Court has observed what appears to be completely arbitrary application of substantial assistance motions. In some cases, motions are made and vehemently supported when the offender has made merely one phone call. In other cases, the prosecutor might refuse to make the motion even when it appears that the defendant has performed as much assistance as others who have benefitted from such a motion. In this District, the arbitrariness has resulted in disparity of sentencing for individuals of equal culpability and cooperation.

Perhaps most disturbing, the withholding of pertinent information from the Court, under the guise of § 1B1.8, continues

to persist in this District. Often, the Court learns of a defendant's greater culpability, after his sentencing, when reviewing pre-sentence reports of co-conspirators. It becomes readily apparent that this so-called incriminating evidence was known by investigators long before the defendant agreed to cooperate or was learned from other cooperating individuals. The Court welcomes any suggestions or revisions to § 1B1.8 which would require the Government to detail intelligence information known to them prior to the defendant's cooperation. At present, the Court perceives that the purpose of § 1B1.8 is being seriously undermined.

In applying these general observations to specific amendment proposals, I believe that the adoption of Options 1-5 to Amendment 29, which provide for the expanded availability of non-prison sentencing options, would alleviate some of the problems mounting in this and many other Districts. Adoption of all of these options would not compromise the purpose of the sentencing guidelines. It appears unnecessary to adopt an offense-by-offense approach; sentencing judges are in a unique position to exercise discretion appropriately, given individual circumstances. As many as possible additional alternative sentencing programs should be made available. The sentencing judge should be given complete discretion to determine the appropriate alternatives once it is determined that the defendant qualifies.

Consistent with my earlier general comments, I also support Amendment 33 (A-D) which covers departures based on offender

characteristics. With regard to 33-C, to the extent that a defendant's lack of youthful guidance or history of family violence contributed to the commission of the offense, the sentencing judge should be given the discretion to consider it as grounds for a departure.

In addition to my general concern of the misuse of § 1B1.8, I would oppose Amendment 2A to the extent it proposes to disallow the sentencing judge from using the information to determine where within the range the sentence can fall. This amendment presumes that such information would always compel the judge to sentence higher within the established range, when in fact, the so-called incriminating evidence may reveal mitigating circumstances which might compel sentencing at the lower end of the range. Of course, this might be the exception, but the amendment also seeks to limit sentencing discretion even further and is not justified. Sentencing judges should be given, at a minimum, full discretion to sentence anywhere within the range.

In considering Amendment 23, which covers the acceptance of responsibility guideline, I believe it would be beneficial for the Sentencing Commission to determine whether an individual must merely accept responsibility for the offense of conviction or for all relevant conduct. Although the Fourth Circuit has interpreted the guidelines to require the offender to accept responsibility for all relevant conduct, I believe that the better policy would be to require acceptance of responsibility for the count of conviction, keeping in mind that the individual will still be held accountable

for all relevant conduct, even conduct he may not be willing to acknowledge, if the sentencing judge finds by a preponderance of the evidence that he was involved in such conduct.

In applying the adjustment in this manner, guilty pleas will be encouraged where appropriate, and offenders will not be compelled to confess to conduct in which they may not have participated in order to receive the two-level adjustment. I oppose any further amendments to acceptance of responsibility, in that Option 2 appears unjustified, Option 3 appears to make the adjustment much too complicated and subjective, and Option 4 strips an individual of the right to trial and the presumption of innocence, to the extent that it prohibits a reduction for anyone who puts the government to its proof at trial.

Consistent with my earlier comments, I support the adoption of Amendment 28, Part A, which proposes to create a criminal history category 0.

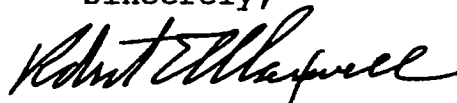
I believe the adoption of Amendment 34, which eliminates the requirement of a government motion under § 5K1.1, except where departure would go below a statutory minimum, would result in a vast improvement in the Sentencing Guidelines, particularly in light of my earlier comments regarding the arbitrary usage of substantial assistance motions. In several instances, individuals have been encouraged to enter into plea agreements without legal representation and have been refused substantial assistance motions because the plea agreements did not require them, despite their reported extensive undercover work performed prior to judicial

intervention and appointment of counsel. It is for such unjust circumstances that the Court encourages adoption of Amendment 34.

One final proposed amendment which it is believed deserves attention is Amendment 35, Part (C). The sentencing judge should be given complete discretion to determine whether conduct of which the defendant has been acquitted should be used to determine the offense level, to select a sentence within the guideline range, or as a basis for departure. During the trial, the sentencing judge has listened to the evidence as an objective observer and should be given complete authority to consider the acquittal, if he is convinced that punishment is deserved or not deserved despite the acquittal, keeping in mind that the defendant would not be before him for sentencing if the defendant had been tried only upon the counts of which he was acquitted.

The general concerns I have expressed and the amendments which I have attempted to address raise interesting questions which could be discussed in much more detail; however, I have attempted to remain as brief as possible, aware that the Committee on Criminal Law and the Sentencing Commission will be reviewing many, many comments. Once again, the opportunity to address these issues is most appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert E. Maxwell", written in a cursive style.

Robert E. Maxwell
United States District Judge

REM/lef