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March 10, 1993

United States Sentencing Commission
ATTN: PUBLIC INFORMATION
One Columbus Circle North East
Suite 2-500 - South Lobby
Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments

To The Honorable United States Sentencing Commission:

I write to you, in as brief a form as possible, to express my comments on the proposed amendments in the sentencing guidelines. The fact that I am an assistant federal public defender for approximately 13 years makes me both a well informed and biased source, of which I am sure you are cognizant.

I applaud and encourage the thought and effort made to amend the loss tables and deal with the problem of more "than minimal planning" insofar as it has resulted in disparate treatments and a considerable amount of litigation. With respect to the additional issues for comment in this section, I definitely believe that the loss tables should have fewer and larger ranges in the lower ends. The loss tables at the higher ends are so large as to be beyond my experience and have no opinion as to whether they need adjustment.

Although more work would need to be done, I would encourage the Commission to modify the definition and approach to a more than minimal planning enhancement as opposed to building it into the loss table or, alternatively, building it into the loss table further from the bottom ranges, maintaining the lesser enhancement as long as possible and perhaps adding a third and additional level increase at the far end.

With respect to redefining more than minimal planning, I do have some suggestions:

1. Build in a two level decrease for spur of the moment or sudden temptation conduct;

2. Do not provide for multiple victim enhancement until the number of victims has reached an appreciably large level i.e. 15 or 20 and perhaps make this enhancement an additional one or two levels at an additionally large number such as 40 or 50;
3. Require, by example, truly more than the ordinary conduct to commit the offense before an enhancement is added. Few if any types of fraud or theft escape the current definition.

The proposal with respect to U.S.S.G. § 3B1.2 (role in the offense) is also an improvement. I would suggest option one is the most preferable of the options under Note 7 reading as follows: Option 1 is preferred because it affords the sentencing judge the most flexibility in determining whether or not to apply the two level adjustment for minor role and, unlike option 2, does not repeat the Application Note position contained in Note 8 concerning burden of persuasion.

The firearms amendments are mostly technical and it would be useful for the Commission to have a period where it does not amend the firearms guideline. I do believe that an appropriate differentiation can be made between different weapons including weapons that fall within 26 U.S.C. § 5845 and its various subdivisions. Whether the differentiation should be made by different offense levels, by placement of the sentence within a the guideline range, or by a Commission-guided departure, depends on the weapon involved. It would seem that a fully automatic machine gun is different from a sawed-off shotgun which is different from a sawed-off rifle which is different from other weapons such as tear gas "pen guns," all of which are prohibited in Title 26.

I have no great criticism of the proposed amendment § 3B1.3 abuse of position of special trust or use of special skill. However, perhaps the time has come to separate these two concepts into separate adjustment sections. It would seem to me be best to leave special trust as a Chapter 3 adjustment with appropriate illustrations in the application notes rather than adding it as a specific offense characteristic in a hit or miss fashion to various guidelines relating to fraud or embezzlement or in general to the embezzlement guideline. Certainly the proposed amendment is superior to the additional issue for comment, particularly as it relates to deleting the example regarding "ordinary bank tellers".

The proposal relating to 5K1.1 - issue 24 - will apply to very few cases if it is intended to exclude "crimes of violence" where that concept includes drug offenses. It also has limited usefulness because of the exclusion of anyone who is not a "first offender".

At least it should include all category I offenders and perhaps all category I and category II offenders. The injustice which it is intended to address is not related or necessarily related to whether the defendant is category I or category VI, but the proposal is at least some improvement over the current requirement for a government motion.

I should add with respect to § 5K that I have, as have other attorneys, experienced cases in which this proposed amendment could well have made a difference.

With respect to the proposal number 25 relating to § 6B1.2 the idea is commendable. Perhaps a stronger word than "encourages" should be utilized. I would suggest a policy statement that requires the government to make such the disclosures at either option point and provides as a ground for downward departure the intentional failure of the government to do so. Experiences has taught that toothless platitudes rarely modify prosecutorial behavior in an adversary system.

The Commission should act on issue for comment number 40 relating to the mandatory minimum and distinction between cocaine and cocaine base. Significant support exists not only from the interjection of the Commissions expertise, but also other sectors of the criminal justice system for the elimination of this distinction.

Proposed numbers 44, 45 and 46 are all poor ideas, poor policy, and should not result in favorable action. They would increase unwarranted disparities and would not further the purposes of sentencing indicated by Congress.

* Proposal number 57 submitted by the Department of Justice should not be acted upon. It is an attempt to accomplish exactly the opposite of what it purports to do. The Department of Justice obviously intends to utilize its proposed amendment, if it becomes the guideline, as the Commission's position which ought to be followed by the Courts in prohibiting attacks on prior convictions. It is my understanding that the Commission wishes to take no position and allow the courts to develop their own procedures. If the Commission does intend to take a position on this procedural question, it should study the matter, invite additional comment, and it is hoped, ultimately recommended that the courts permit collateral attacks on prior convictions utilized to enhance sentences.

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I had promised to make this letter brief. There are many other things I could or should say, but will not. I will say that the last two cycles of amendments have been encouraging insofar as they have addressed problems of harshness and not simply been "fixes" of guidelines which appear to be too low to some other components of the criminal justice system.

Sincerely,



SCOTT F. TILSEN
Assistant Federal Defender

SFT/tmw

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January 26, 1993

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

Dear Judge Wilkins:

Bill Osteen, Jr., has discussed with me his letter to you regarding the Section 4B1.1 career offender enhancement. I would like to second his proposal that the Government give notice that such an enhancement may be applied.

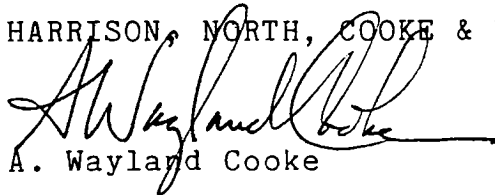
This would facilitate frank discussion between attorneys and their clients and between attorneys and U.S. Attorneys seeking to resolve cases.

As Bill notes, the Government has better and easier access to a defendant's record and this disclosure would not be an undue burden.

Sentences fashioned under the Guidelines are sufficiently stunning without the surprise application of this enhancement. Anything the Commission might do to alleviate this situation would be helpful to all parties concerned.

Very truly yours,

HARRISON, NORTH, COOKE & LANDRETH



A. Wayland Cooke

AWC:cak

United States District Court
Middle District of North Carolina
Post Office Box 3485
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Chambers of
William L. Osteen, Sr.
Judge

January 15, 1993

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

Dear Judge Wilkins:

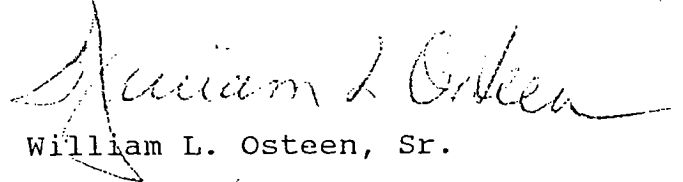
Not too long ago while I was still engaged in defense practice I realized that the "career offender guideline" posed a real difficulty in dealing with my clients. I should have mentioned it to the Sentencing Commission at the time, but for some reason failed to do so.

It was interesting recently to find that my son, Bill, has run into the same difficulty. I asked him to write for your consideration. He has done so and after reading his letter, I have no additional comments except that I concur completely with his analysis of the problem and suggested solution. This should not impose an additional effort upon the U. S. Attorney, but even if it does, when compared to the tremendous adverse effect on the defendant under the system, it seems that such effort could be justified.

Please give the enclosed letter the consideration which it richly deserves.

Thanks for all the good efforts your Commission brings to the sentencing process.

Sincerely,


William L. Osteen, Sr.

WLO,sr:ajv

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January 13, 1993

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

Dear Judge Wilkins:

I am writing to request that the Sentencing Commission consider amending the guidelines to correct what I believe is a difficult, if not unfair, situation under the career offender guideline.

Section 4B1.1 of the guidelines deals with the career offender. The penalties pursuant to that section result in greatly increased guideline ranges for certain defendants. It is my belief that a defendant should be given notice by the government prior to entry of plea or trial if such penalties may be imposed. This could be done pursuant to a framework similar to that required under 21 U.S.C. §841 and §851 for enhanced penalties.

I bring this to the Commission because of a recent difficulty encountered in one of my own cases. My client was charged with bank robbery. My preliminary calculations led me to believe a sentencing range of six to eight years was possible, unless the career offender enhancement applied. If applicable, my defendant's sentence could be in the 17 to 20 year range, close to the maximum possible. I was unable to advise my client effectively with respect to his alternatives.

Knowledge of a defendant's prior criminal record is a matter almost exclusively within the government's control prior to trial or plea. Neither a criminal defendant nor his counsel have access to resources such as the NCIC or other records of criminal convictions. Most defendants, as a practical matter, do not have a clear recollection of prior convictions. There is not sufficient time, prior to trial or plea, for a defense attorney to accurately investigate prior records particularly if a defendant has lived in another jurisdiction.

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I recognize that the guidelines treat a defendant that accepts responsibility favorably. Nevertheless, acceptance is a factor determined following entry of a plea; a defendant is not assured of that reduction. Realistically, most defendants want to understand their maximum exposure in making a decision as to whether to plead or go to trial. Defense counsel wants to inform the defendant of his alternatives to the fullest extent possible.

Although the enhanced penalties pursuant to 21 U.S.C. §841 increase the minimum and maximum sentences applicable, I believe the notice theory contained therein should apply to §4B1.1 as well. There is no practical distinction between §841 and §4B1.1.

One of the problems defense attorneys run into if they recognize that the career offender provisions apply is that often a defendant cannot believe or accept their applicability after being so advised. Notice by the government prior to entry of a plea would alleviate that problem, at least in part.

Second, when a defendant is caught by surprise at the career offender adjustment in the presentence report, he is often antagonistic to both his lawyer and the system, and will subsequently seek appellate or other relief. I believe a notice requirement would alleviate this problem by giving a defendant advance notice of the stricter penalty.

Rather than cause more cases to go to trial, I believe prior notice of a career offender enhancement will induce more defendants to cooperate. It would give a defendant a tangible reason to believe he will receive such a sentence.

Even in cases in which the government failed to notify a defendant, criminal history points would be assessed to take into account the convictions; a trial court could depart upward if the career offender guideline was not noticed based on the trial court's discretion. I believe the trial court should have some discretion in dealing with these sentences.

It is my belief that such a provision of notification would promote more fairness in the criminal process, and lead to more informed pleas.

I further believe that such notice could be given with relatively little 'extra work' by the United States. Usually government agents will make some effort to ascertain a defendant's

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record during the investigation. Following indictment, the probation office investigates a defendant's record for purposes of pretrial release. These probation records may or may not be disclosed to the defendant; if disclosed, they have to be returned to that office immediately following the detention hearing. The United States Attorney can order an NCIC check; any information contained therein which is unclear can be checked out quickly through law enforcement resources.

I realize courts have generally held that application of the career offender guidelines is not a basis for the defendant to withdraw his plea. I do not believe that such a holding means the current system cannot be changed to promote additional fairness.

My bank robbery case is awaiting resolution. I am still uncertain as to whether the career offender adjustment will apply. Before entry of the plea, the government ordered an NCIC check, but would not voice an opinion on the applicability of the career offender adjustment. One conviction noted a burglary arrest but said "adj. wth." I contacted an attorney in Florida; their investigator could only find four adult convictions which did not give rise to the career offender adjustment. My client assures me he only has one adult felony conviction for a crime of violence or drug offense. I remain uncertain. We will wait and see.

Thank you for your time and consideration.

Sincerely,

William L. Osteen, Jr.

William L. Osteen, Jr.

WLO:cam