

037-95



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Retired

March 15, 1995

United States Sentencing Commission
One Columbus Circle NE Suite 2-500
South Lobby
Washington D. C. 20002-8002

Dear Sirs:

Enclosed please find comments to be considered in establishing new guidelines for sentencing federal offenders.

The comments enclosed have come to me through the diligent efforts of many of my past constituents. I have taken the time to study your proposals which are most progressive and timely.

I served on the Mississippi Legislative "Corrections" committee for four years and have a solid background and a good understanding of many of our problems.

I would certainly hope that these comments are timely and could prove useful to you.

Margaret Wootsie Tate
Sincerely yours,

Margaret "Wootsie" Tate
Senator - Retired

Years in office - eight
Retired Jan. 1 1992

[250]

United States Sentencing Commission
One Columbus Circle NE Suite 2-500
South Lobby
Washington DC 20002-8002
Attn: Public Lobby

Dear Sirs,

The proposals for this years amendments are long, and at times difficult to interpret. The complexity of such an undertaking is daunting to say the least. Because of the length and depth of the proposals comments will be somewhat limited; to attempt to address each individual proposal is too great a challenge for the average individual.

Before making specific comments it is noted that the Commission has attempted to place a greater emphasis on crimes involving violence and mitigate the impact of drug quantity. This is a step in the right direction. The Commission should be applauded for the courage to take this common sense step. These improvements need to be made on a retroactive basis in order to allow mistakes of the past to be corrected for individuals who have been previously affected.

Some specific comments as to proposals need to be expressed. It will be commented on by page number and proposal number where possible.

1. Page 2432, proposed amendment for 4A1.3 is quite good. There should be an upward departure for sexual offenses especially those in which force is used. Previous offenses in this area need to be considered heavily as this is a crime which affects individuals for years to come. The Commission does need to examine the wording on page 2433 because it appears possible to greatly enhance the sentence of someone with a prior controlled substance offense as if it were a crime of sexual violence. If that is the intention then further thought is required. Violent sexual offenses need to receive the attention of the Sentencing Commission because of the impact they have upon individuals, and society as a whole. To equate this behavior with controlled substance offenses is simply incorrect.

2. The Commission invites comments on the offense levels under 2P1.2 involving simple possession of controlled substances in a correctional setting. Most possessions in such a setting are minor in scope to begin with, an enhancement of 2 points would seem sufficient: if any enhancement is necessary at all. Correctional settings have a variety of administrative sanctions already available, which should be adequate.

[251]

3. Page 2434 seeks comments concerning the potential of amending the guidelines for offenses committed in a protected location if the location is selected by law enforcement. This is a good idea which should be expanded even further. To allow individuals who are supposed to enforce laws to create crimes seems a paradox at best. Nobody should be exposed to harsher punishment due to the manipulation of law enforcement officials.

4. Page 2435 provides an amendment which would give a three point downward departure where "the defendant.. (had no) actual knowledge or belief, that the equipment was to be used to manufacture a controlled substance." It is difficult that our system of justice would allow any prosecution of an individual who had no actual knowledge of a crime being committed. To charge individuals for a "reasonable cause to believe" should have no place in our society.

5. Page 2436 is more the type of amendment we should be having to supplement existing law. Under 3A1.1 to exploit an individual who is vulnerable do to age or diminished capacity should result in an upward departure. To prey on the weak is repulsive.

6. Page 2438 Issue for Comment #17 is overly broad. There are a sufficient number of enhancements for the USE of weapons as is. To keep adding categories for specific weapons is overcounting. Semiautomatic weapons could range from assault weapons to small hand guns. This needs rethinking. The potential for abuse in this issue is considerable. As written it could enhance an individual who has a small hand gun in his home while in possession of a controlled substance for personal use. Please utilize all the other enhancements for use of a weapon rather then create a category which is as all encompassing as this.

7. Page 2439 invites comment on counting prior crimes of violence and drug offenses. The Commission should attempt to separate the two categories as they represent two very different forms of behavior.

8. Page 2441 under section 2L1.1(b) the Commission has addressed correctly the concept of aggravating the guidelines in relationship to the degree of injury inflicted. This is a good beginning to address the impact that violent crime has on an individual, and society.

9. Page 2441 Issue for Comment Section 130009. To provide a 7 point upward departure under 2L2.1 for fraudulent issue of passports used to facilitate a drug offense is far too severe. The guidelines provide ample punishment for either crime. This allows the potential abuse of alleging drug involvement without meeting the burden of proof necessary to substantiate a drug charge.

10. Page 2442 and 2443 Issue 27(A) the Commission invites comment concerning the punishment for crimes of violence against the elderly. While we are all concerned about this particularly vicious type of offense the Commission has addressed this situation in previous amendments by adding guideline points for crimes against vulnerable individuals, and providing upward departures based on the degree of injury incurred. The only way to address this issue otherwise is to return discretion to judges who can evaluate individual cases.

11. Page 2443 invites comment on the "safety valve" provision. There needs to be a mechanism to allow a rational approach to treat minimally involved individuals in a manner which does not destroy their lives. Compression of the quantities used in the guidelines assists in this task, and is welcome. However a method to depart from minimum/mandatory sentences in case of minimal participation is also essential.

12. Page 2445 begins the debate on Drug Offense Guidelines. It is encouraging to know that the Commission is realistic about having previously "assigned too much weight in constructing its initial guidelines." Correction of this, and other factors, affecting sentencing are overdue.

There are such a multitude of proposals that to comment on each one individually would lengthen this reply excessively. That being the case comments will be limited to the most salient issue(s) for which comment is solicited.

Beginning on page 2446 the proposed revision for the guideline tables are welcome. Option C would seem to provide acceptable punishment levels, especially when role adjustments are included. The idea holding minimal participants to level 28 regardless of the quantity involved is excellent. This, in addition to a role departure downward is the proper approach to dealing with a multiplicity of individuals. It should be further that in an operation there can only be one overall leader/organizer. This has been a most abused area of the PSIR. If comment on levels are solicited for minimal participants it would be respectfully suggested that a level below 28 would be deemed proper. Minimal or Minor participants are simply that, and should not be subjected to severe punishment when they have no role in the determination of quantity.

In the Additional Issue for Comment on page 2447 it is suggested that the ceiling level for Minimal/Minor participants be separated by drug type. This is an excellent idea, however, there should be additional thought given as to which drugs should be separated out as less detrimental. Drugs which have no known, or very limited, hazard potential should not be grouped with the others. This would specifically be Marihuana. Minimal/Minor participants in an operation involving this substance should be considered for a low base offense level: perhaps level 20 prior to adjustments.

The examples given as to who deserves an adjustment are so broad as to allow anyone to be a manager. If the PSIR author decides to enhance everyone then role adjustment is non-existent. There needs to be a common sense standard applied here. There can only be one overall leader in an operation. This conforms not only to Military dogma, but to a reasonable view of how organizations are structured. When a determination of who is a manager becomes subjective it will not be applied in a rational manner. As a counter example if two individuals are transporting a substance in a car and one mentions to the other "slow down there is a curve on the road ahead", is this individual a manager? By applying the standard on page 2448 he is, because: "a manager is a person who managed or supervised another participant, whether directly or indirectly." This area is far too broad and needs attention to more reasonably reflect who is a true manager. Additionally the burden to determine a mitigating role should not be borne by the defendant, it should be incumbent upon the Government to prove an aggravating role, but not for a defendant to prove a mitigating one. The burden of proof must rest solely with the Government.

The amendments begin to return to more appropriate role when defining adjustments for firearms in the commission of a drug felony. There does need to be more clarification in this area however. On page 2450 it is stated that "If a dangerous weapon is found in the same location as the controlled substance... possession of the weapon facilitated, or was otherwise related to commission of the offense." This leaves open the potential for someone with a small amount of substance in their home to receive an upward departure by virtue of having a hunting rifle in their home. Increases in the offense level must be better defined to include the actual discharge or display of a weapon in a threatening manner. There are already proposals to enhance the guidelines if there is some bodily harm caused, this should be the ultimate standard. To provide an increase for simple possession of a weapon in a home setting would only foster disrespect for the guidelines.

Proposal 37 on page 2451 is excellent. This brings the realities of cultivation into focus. The proposal is well thought out and realistic, as well as a welcome change in an area which was quite inequitable.

Proposal 38 is a similar item. The present ratio of 100 to 1 is so disproportionate as to require a drastic revision. The chemical similarities between Cocaine and Cocaine Base are such that they should be treated as equivalent. If, however, the Commission wishes to create a higher offense level for this specialize form of Cocaine a 2 to 1 ratio would seem appropriate. This represents a degree of punishment which is twice as harsh as for the Hydrochloride form. Any punishment which is double the normal penalty is ample to provide deterrence. This is an area of priority which should be addressed.

Page 2452 considers options for the consideration as to amount of controlled substance involved in an offense. This is an area of concern because there is so much room for abuse. Perhaps the best option which is proposed is to use the greatest amount of substance for any single transaction. A single transaction will normally be a good indicator of an individual's ability to produce. While it figures that someone who can produce 100 units of a substance could also produce 10 units it does not indicate that a person who produces 10 units at a time is capable of producing 100 units at any one time. Single transaction quantity is many times the maximum capacity an individual is capable of producing. The Commission should also contemplate how to determine amount when the only indication of quantity is the unsupported word of someone who hopes to benefit from his testimony. The potential for abuse there is self evident. Far too many individuals have suffered from inaccurate and sometimes outright false statements concerning the quantity of substances from individuals who stood to benefit from such statements. Hopefully this issue will be addressed before long.

Page 2453 continues to address the difficult problem of determining quantity in controlled substances. The Commission has made an attempt to address the issue of diluted substances in a manner which is beneficial to all parties. There still remains the same difficulty of determining purity of theoretical substances, that is substances which exist only in the mind of an individual attempting to better his position at the expense of another. Perhaps the Commission should consider a ceiling on such theoretical substances.

Page 2454 requests input on how to compare methamphetamine to other substances. Being as how it is a stimulant perhaps it should be rated the same as cocaine. The Commission should solicit input from Medical Experts and then submit proposals for comment.

Page 2456 again visits the idea of weapons possession enhancement. This can be too easily used against individuals who simply have (legal) possession of a weapon in their homes at time of arrest. There needs to be clear distinction between the USE of a weapon, or it's brandishment, as opposed to simple possession.

Page 2457 poses two interesting questions. How to find the offense level in a theoretical production, and how to calculate the amount of personal possession vs distribution amount. In the first question the amount should be calculated by the MOST limiting factor. No matter how much of a precursor chemical that you have you can only produce as much substance as the LEAST available chemical will allow. For the second question option 3 which gives a downward departure from the total for personal use would seem reasonable.

Page 2458 returns once again to the weapons in association with another crime. Once again there must be mechanism to exclude individuals who merely had a weapon in their home at the time of arrest, or similar circumstances. The distinction between use of a weapon and proximity to one must be addressed.

Page 2459 addresses another approach to reducing the impact of drug quantities. The overall intent is heading in the right direction, but some of the specifics need further thought. When grouping drugs according to their potential for harm Marijuana needs to be placed with the least harmful substances; not with methamphetamine, PCP et.al. What the proposals for enhancement do to weapons is correct in general, especially in assigning points based on actual harm caused in the commission of another act. This second proposal adds too many departures in the upward direction to be as effective as proposal number 1. This proposal also creates penalties for individuals who use their skills to further an enterprise, this has the potential to go too far. Once again it also goes too far in assigning the term leader organize. In reality there is one true leader/organizer, everyone subordinate to this individual does not deserve the upward departure that comes with the title. While page 2461 tries to mitigate the application of manager and supervisor there still is far too much discretion given to the author of the PSIR to determine the upward departure for role assessment.

Page 2462 goes even further in penalizing an individual for use of their skills by either adding 2 points to the offense level, or by raising the offense level to 26 if it is lower. This could make a dramatic, and unwarranted increase to what would otherwise be a substantially lower offense level.

SUMMARY

This year's proposals have more positive steps than previous year's proposals. The proposals make an effort to address issues which concern everyone, and in many areas do an effective job of such. The Commission does need to remain vigilant to insure that its good intentions are not perverted by individuals who have been issued too much leeway by guideline changes. This is especially true in the determination of leader/organizer, and manager/supervisor. Most of us believe that an organization is run essentially by one individual, not a majority of the participants. The Commission has attempted to address concerns which we all have relating to violence in our society, and to preying on the less able in our population. For these changes sincere congratulations are due. The proposals to mitigate the impact of quantity in the area of controlled substances is also welcome. Attention should be focused primarily on violent behavior which affects all. Under the proposals for reducing the impact of quantity involved in controlled substances the first proposal seems more reasonable.

The task assigned to the Commission is not an easy one, yet it has been approached in a cogent fashion in general. We all look forward to further refinement in the future and appreciate your efforts this year..