
PUBLIC COMMENT

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United States Sentencing Commission

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Cooper & Associates

Attorneys at Law

Practice Limited to: Federal Parole, Post-Conviction Relief and Criminal Law

634 McDonough Boulevard • Post Office Drawer 150400 • Atlanta, Georgia 30315

Fax (404) 627-1216 Telephone (404) 627-7700

Toll Free 800-241-0670

J. Robert Cooper, Esquire

January 31, 1996

Mr. Richard P. Conaboy, Chairman
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue, N.W.,
Washington, D.C. 20004

Re; Section 2D1.1(b)(1)

Dear Mr. Chairman:

Historically, the courts, the office of the U.S. Attorney, the Probation, have enhanced the base offense level of all codefendants in cases of conviction under 21 U.S.C. 841(b)(1), etc. Even though only one member of a conspiracy, either knowingly or unknowingly, to the others, possessed a weapon, assuming such a weapon was found, then the two (2) points were added in the sentencing process.

With the December 6, 1995 decision of the Supreme Court in Bailey v. U.S.A., 116, Supreme Court, 501, new light has been added to the word "use" in applying this particular section.

While 18 U.S.C. 924(c)(1) includes "use" or "carry" as part of the offense, the case itself dealt only with the "use" part of the Code Section. Obviously, the courts now must address the "carry" issue. Hopefully, the courts will be as enlightened in defining "carry" as they have in the definition of "use". The evidence in Bailey reflects that the weapon that he was carrying was in the trunk of his vehicle. The weapon in the Robinson case reflected that her weapon was concealed in the home. Bailey may have some difficulty in its application in some jurisdictions, however, Robinson should be clear in all jurisdictions that she was, not for the purpose of this statute, "carrying" a weapon.

In each of these cases, the defendants were the persons in "possession of" a weapon as suggested by 2D1.1(b)(1).

January 31, 1996

I have a particular case, and I am sure that there are many, many others around the nation, where my defendant neither "used" or "carried" the weapon. The facts in my case show that my client was a mule who drove an automobile to a point where money was to be exchanged for drugs. This was a "sting" operation. The buy money was in the trunk of my client's vehicle. He had been instructed, upon arriving at the scene, to go into a restaurant and tell a particular individual that the money had arrived. Once that was done, my client went to another part of the restaurant, seated himself, and ordered a meal.

The individual, now knowing that the money was on the premises, gave a signal to an individual standing by a telephone booth outside the restaurant. This was done without knowledge of my client. Once the individual by the telephone booth got the signal, he made a telephone call to the undercover DEA number telling the agent who answered the phone, that the money was on the premises. As soon as this happened the surveillance agents arrested the two (2) individuals in the restaurant (including my client) and attempted to arrest the individual at the telephone booth. When the arrest, as to this individual, started down, the individual fled the scene. He was apprehended a short distance away. When taken into custody, he was brought back to the restaurant and there a search of his person was conducted. The agents found a number of bullets in his pocket. When interrogated, the individual admitted that this bullets were to a pistol which he had had in his possession, however, he hid the pistol in the woods, prior to being taken into custody. He agreed to take the agents back to the site where the pistol was hidden and they did in fact, seize the pistol. The bullets in his pocket were similar in nature to those in the pistol, and they were of the same caliber. All of this was done without the knowledge of my client.

In the Indictment that was brought against the codefendants, only the one codefendant who had possessed the weapon was charged with the substantive violation. All codefendants pled guilty to one or more counts of the indictment. My client pled guilty to a conspiracy count, involving 841(a)(1).

However, at sentencing, Probation recommended, and the District Court over the objections of trial counsel, enhanced the base level by two (2) levels due to the fact that the one (1) codefendant had "possessed" a weapon during the commission of the crime.

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Requested Application Change

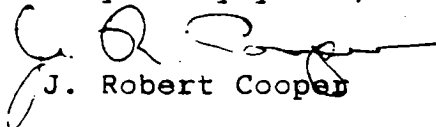
It is respectfully submitted, that the extension of 2D1.1(b)(1) to the facts of this case, is not warranted. It is further submitted that the Supreme Court, given the opportunity, will in all likelihood, determine that carrying and/or in this case, "possessing" is also subject to further definition and limitations. Foot Note 3, states that, the application should be applied, "unless it is clearly improbable that the weapon was connected with the offense". This present language should be broaden so as to instruct the District Court Judges that it is not to be applied in cases such as the one my client was convicted of. District Court Judges, as you well know, come under a lot of pressure to impose the "maximum possible" and those who do not do so, are singled out and criticized for their failure to give the maximum. It is very, very difficult if not impossible, to convince a District Court Judge to not apply 2D1.1(b)(1) under the circumstances described.

This is particularly true due to the fact that over the years, "case law" has developed on the subject in just about every circuit across the nation. Hypothetically, under these rulings, if there are 50 codefendants in a drug conspiracy case, and only one gun, then all codefendants could "literally" be held accountable for the two (2) point enhancement.

On behalf of my client, I would respectfully request the Commission to look at this situation and see if something can be done to give relief to my client. I understand that major changes to the guidelines must be considered to the Congress, however, it may not be necessary to submit the notes and commentary in a matter similar to this. This is particularly true, where the Commission has announced that it will only give two (2) matters to the Congress (crack cocaine and money laundering) in the year 1996.

I appreciate your thoughts and consideration.

Very truly yours,


J. Robert Cooper

JRC/mg

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January 31, 1996

Mr. Richard P. Conaboy, Chairman
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue, N.W.,
Washington, D.C. 20004

Re: 2S1.2 (Money Laundering)

Dear Mr. Chairman:

After a two year delay, the Commission, as part of its submission to Congress in May of 1995, submitted a change to the provisions of part S. The move by the Commission, was intended to relieve the strict application and enforcement of this Section to those persons not involved in drug transactions. The Section, as originally drafted, contemplated enforcement of the Organized Crime Act of 1984. However, in its application, many defendants are placed into the "Money Laundering Section" even though their offense of conviction was totally unrelated to drugs. This is particularly true in Section 2S1.2(b)(1)B.

Perhaps the recommendation of the Commission came in part from their review of several District Court cases which dealt with the issue of "heartland" misconduct.

I have a client who was a small town "sports betting" bookie. His gambling operation was conducted through a small business, and frequently, those placing bets gave him their pay checks, and/or checks on their own companies. The District Court cases in favor of the bookies, stated that the placing of the bets, or the payment, under these circumstances was the crime itself. I am sure that you are familiar with these Opinions and their discussions.

In any event, when the Commission attempted to perhaps correct this inequity, the recommended change was seen by the Attorney General, the Department of Justice, and the Congress as an effort to reduce penalties on "drug dealers". Accordingly, the Money Laundering Amendment was defeated, and the Congress has requested that you come back to them with a further suggested change.

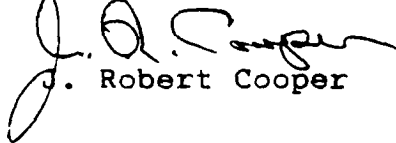
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This letter is to respectfully suggest, that the change to Section 2S1 be accomplished in such a fashion as to perhaps continue to strong penalties against drug dealing and give some relief to those who might warrant that their crimes be limited to, and considered under, the classified crimes of conviction, as was noted in the 1995 effort to modify this Section.

I appreciate your efforts and those of the Commission to continue to study this matter and perhaps carry forward with your good intentioned efforts.

Very truly yours,


J. Robert Cooper

JRC/mg