



COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
Post Office Box 1060
Laredo, Texas 78042

Honorable Richard J. Arcara
Honorable Richard H. Battey
Honorable Thomas R. Brett
Honorable Morton A. Brody
Honorable Charles R. Butler, Jr.
Honorable Robert E. Cowen
Honorable J. Phil Gilbert
Honorable David D. Noce
Honorable Gerald E. Rosen
Honorable William W. Wilkins, Jr.
Honorable Stephen V. Wilson

(956) 726-2237

FACSIMILE
(956) 726-2349

Honorable George P. Kazen
Chair

March 9, 1998

Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South
Washington, D.C. 2002-8002

Dear Judge Conaboy:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, I submit the following comments in response to various proposals and issues published by the Sentencing Commission for comment during the 1998 amendment cycle.

I. Circuit Conflict Resolutions

The Commission published nine circuit conflicts, along with various options for resolving those conflicts, and asked for comment on which option, if any, the Commission should adopt to resolve each conflict. Our Committee discussed the nine conflicts at its December 1997 meeting, and was able to arrive at a consensus for a recommended resolution for most of the conflicts. We strongly believe, however, that even if the Commission disagrees with our proposed resolutions, it is still important that the Commission resolve the conflicts. The Supreme Court has affirmed that the Commission is statutorily mandated to "periodically review the work of the courts, and ...make whatever clarifying revisions to the guidelines conflicting judicial decisions might suggest." United States v. Braxton, 111 S.Ct. 1854, 1858 (1991) (citing 28 U.S.C. § 994(o)). Because the

Commission has this role, the Court said it would be more “restrained and circumspect” in using its certiorari power to resolve circuit conflicts on sentencing matters. Id

This Commission is in an excellent position to resolve these particular conflicts now, given the extensive staff work and public consideration of them since last July. It is especially important for the Commission to resolve conflicts over what the Commission itself intended by its own drafted language. Action by the Commission would not only avoid unnecessary litigation, but also unwarranted disparity in the application of its guidelines, which was one of the primary goals of the Sentencing Reform Act. Our comments are as follows:

Issue 1: Whether filing fraudulent forms with bankruptcy and probate courts violates a judicial order or process. (§2F1.1(b)(3)(B))

The Committee does not have a specific recommendation for this conflict.

Issue 2: Whether an actual employee of a charity or government agency who misapplies funds misrepresents that he/she was acting on behalf of the agency. (§2F1.1(b)(3)(A))

The Committee recommends that the Commission resolve this conflict in favor of the broader view, consistent with the Fourth Circuit approach. That is, we recommend that this adjustment be applicable to actual employees or agents of such agencies, as well as to persons who fabricate their association with such agencies. This is the more victim-friendly view, and one that is consistent with the background commentary to §2F1.1, which emphasizes the victim's susceptibility to charitable causes or trust in governmental agencies.

Issue 3: Whether the Position of Trust adjustment applies to an impostor. (§3B1.3)

The Committee continues to recommend that this conflict be resolved in favor of the majority view, which is a victim-friendly, broader view. For the victim, the abuse of trust is even more egregious if the abuser is also an impostor. Three circuits have endorsed this view. The most recent case involved a pharmacist fraudulently claiming to be a physician. In United States v. Barnes, 125 F.3d 1287 (9th Cir. 1997), the court held that an impostor physician's “abuse of the fundamental trust between doctor and patient is precisely the sort of behavior to which section 3B1.3 is directed.” Id. at 1292.

Issue 4: Whether a departure for “aberrant behavior” is limited to only spontaneous and thoughtless acts. (Introduction to Guidelines Manual)

The Committee recommends that the Commission resolve this conflict in accord with the majority of the circuits, by defining the scope of this departure narrowly to focus on spontaneous and thoughtless acts. The current language is ambiguous and misplaced in the manual. Its ambiguity has generated, and will continue to generate, much litigation. Clarification by the Commission would provide more useful guidance to courts, would result in more consistent application, and would

assure more protection for the court's exercise of its discretion within the parameters provided. This departure also should be placed in Chapter Five, along with other suggested departures.

We have carefully considered various recommended resolutions for this departure, and we recommend the following language for your consideration:

If the conduct comprising the offense of conviction, including its relevant conduct, represents a single act of aberrant behavior by the defendant, the court may decrease the sentence below the applicable guideline range. In addition, because the Sentencing Commission designed the guidelines to produce an appropriate sentence for a first offender, aberrant behavior means something more than merely a first offense. Aberrant behavior is a spontaneous and seemingly thoughtless act rather than one which was the result of planning or deliberation. This is so because an act that occurs suddenly and is not the result of a continuous reflective process is one for which the defendant arguably may be held less accountable.¹

Issue 5: Obstruction of Justice Guideline: Meaning of the Term "Instant Offense." (§3C1.1)

The Committee recommends that the Commission resolve this circuit conflict by defining the scope of the obstruction adjustment broadly to apply to obstructions of justice in closely related cases. This is the majority view and would allow consistent application among the circuits where the issue arises.

Issue 6: Obstruction of Justice Guideline: Failure to Admit Drug Use While on Pretrial Release. (§3C1.1)

The Committee recommends that the Commission resolve this conflict in favor of the majority view. The Commission should clarify that failure to admit drug use while on pretrial release is not ordinarily relevant to obstruction of justice, although it may be relevant to acceptance of responsibility.

Issue 7: Failure to Appear Guideline (§2J1.6, note 3)

The Committee does not recommend a specific resolution for this conflict, but requests that the Commission make clear that the defendant should not receive both an obstruction adjustment and a consecutive separate sentence for failing to appear. Ideally, the sentencing court should have maximum discretion to treat a failure to appear either way, depending on which is most appropriate

¹A minority of the Committee would substitute the last two sentences quoted above with the following:

Aberrant behavior is usually spontaneous rather than the result of significant planning or deliberation. It is conduct completely out of character for the accused, coupled with extraordinary extenuation or mitigation.

for the particular case.

Issue 8: Criminal History: Meaning of the Term "Incarceration." (§§4A1.1, 4A1.2)

This conflict primarily involves whether a halfway house commitment is "incarceration" for criminal history purposes, particularly with regard to whether the defendant was "incarcerated" during a certain time prior to the instant offense. This issue often arises where the defendant was revoked from supervision in the past and served the revocation time in a halfway house. The Committee asked the Commission to resolve this circuit conflict in the 1997 amendment cycle. We again ask the Commission to resolve it, with the same recommendation for resolution. Specifically, the Commission should endorse the Sixth Circuit view, which focuses on the purpose and function of the sentence, rather than the type of facility. Hence, a direct commitment to detention in a halfway house, or prison designation for service of time at such a facility, would be "incarceration" for these purposes. However, time spent in a halfway house as a condition of release or bond would not be "incarceration" for these purposes. This approach not only preserves the Commission's stated policy for specific punishment for revocation of release, pursuant to §4A1.2(k)(2), but it is also consistent with the Bureau of Prisons' policy of when it credits time spent in a halfway house as pretrial detention credit.

Issue 9: Diminished Capacity Departure: Definition of "nonviolent Offense" (§52.13)

The Committee recommends that the Commission resolve this conflict in a way that combines published options 2 and 3. That is, we suggest that the Commission define the scope of this departure broadly, to include consideration of the facts and circumstances surrounding the commission of the crime, but, at the same time, specify that such a departure is not available where the offense involved actual violence or a serious threat of violence.

II. Codification of Koon v. United States in the Guidelines Manual

The Commission invited comment on whether Policy Statement 5K2.0 ("Grounds for Departure") should be amended to incorporate the analysis and holding of the United States Supreme Court decision in Koon v. United States, 116 S.Ct. 2035 (1996). It also asked for suggestions on how to accomplish this objective.

The Committee asked the Commission to publish this issue for comment because we believe that a recitation of the main holding and some key findings from this landmark Supreme Court decision on guideline departures would make the guidelines manual more helpful and complete, especially since the manual already contains references to other key cases. Moreover, there are many practitioners who do not frequently use the federal guidelines, and a reference to Koon would enhance their level of advocacy in federal courts. Such a reference would also provide a reminder of the sentencing court's discretion to consider appropriate bases for departure, applying the criteria set out in Koon.

We therefore recommend that the Commission include in Chapter Five the following language:

"A departure decision is highly dependent upon the facts and circumstances of the particular case, and a court's decision to depart should be reviewed for an abuse of discretion . . . A district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." Koon v. United States, 116 S.Ct. 2035, 2046 (1996) (citing Mistretta v. United States, 488 U.S. 361, 367 (1989)).

III. Recommendations Regarding Manslaughter

The Committee is very pleased to learn of the Commission's letter to Congress, requesting an increase in the statutory penalty for voluntary manslaughter. We also complement your staff's Manslaughter Working Group Report to the Commission, dated December 15, 1997, for its thorough analysis of the issues regarding federal manslaughter penalties. In addition, we appreciate the Commission's having extended the opportunity to one of our members, Chief United States District Judge Richard H. Battey, District of South Dakota, to testify at the Commission's hearing on manslaughter penalties last fall.

Judge Battey has, at our request, shared with us his comments in response to the Commission's published issues for comment. Attached are his two letters to us, dated January 8 and February 4, 1998, and one letter to the Commission, dated February 26, 1998. Judge Battey has had extensive experience with manslaughter cases, as you know. In the February 4 letter, Judge Battey relates a case in which the penalties for voluntary manslaughter would be little more than that for aggravated assault, illustrating how the current manslaughter guidelines do not sufficiently reflect the relatively more serious factor of a death resulting from the offense.

We endorse his written comments, and add other recommendations for your consideration. We believe these recommendations would better ensure that manslaughter sentences reflect the seriousness of the conduct, and would more appropriately reflect varying degrees of culpability according to offense characteristics. We urge the Commission to make the needed changes to the manslaughter guidelines while the work of its staff and the comments of the public are before it. Our recommendations are the following:

1. The base offense level of involuntary manslaughter should be increased significantly above its current level. The Commission's staff's report clearly indicates the relatively low level of involuntary manslaughter sentences, whether compared to other federal penalties or to similar state penalties. The Commission should also decide whether an increase in the base offense level of voluntary manslaughter is needed, in order to achieve the appropriate proportionality between manslaughter and such offenses as second degree murder, aggravated assault, and assault with intent to kill.

2. Specific Offense Characteristics should be added to the guidelines for both voluntary

manslaughter (§2A1.3) and involuntary manslaughter (§2A1.4), to reflect frequently occurring factors of “heartland” manslaughter cases. We suggest that the Commission consider adding specified upward adjustments for the following factors to the indicated guidelines, in order to avoid very dissimilar cases being sentenced alike:

1. *If the offense involved a victim who is a spouse or member of the defendant's immediate family.* (voluntary manslaughter)
2. *If the offense was in violation of a protection order.* (voluntary manslaughter)
3. *If the offense was conducted while the defendant was under the influence of an alcoholic beverage or illegal drug (whether or not the conduct is reflected separately in criminal history).* (both voluntary and involuntary manslaughter)
4. *If the offense was committed as a pattern of prior violent conduct, with the same or different victims, such as a pattern of domestic abuse.* (both)
5. *If multiple deaths resulted from the offense conduct.* (both)
6. *If the offense involved the intentional or reckless use of a dangerous weapon, including an automobile.* (both)

Other potential adjustments (or suggested departures) might be based on whether the defendant was driving with a revoked or suspended license (involuntary manslaughter), and whether the offense conduct caused a substantial risk of harm to other motorists, pedestrians, witnesses, or other innocent “bystanders.” (both involuntary and voluntary manslaughter)

Because these cases are extremely fact-specific, the commentary should make clear that the listing of specific offense characteristics is not all-inclusive, and that departures based on the criteria found at §5K2.0 and 18 U.S.C. § 3553(b) are possible if justified by the peculiar facts of the case.

It may also be appropriate for the Commission to consider adding some of the above listed special offense characteristics to §2A1.2 (Second Degree Murder), to ensure a proportionately greater sentence for that offense than for voluntary manslaughter.

3. Finally, we hope the Commission will continue to urge Congress to increase the statutory penalty of voluntary manslaughter, if Congress fails to do so in this congressional session.

IV. Fraud, Theft, and Loss Tables

The Commission and its respondents have done much work, over two amendment cycles, on proposals for simplifying and significantly raising the loss tables in the guidelines. We again endorse the proposal we submitted last year, along with the Department of Justice, to raise fraud, theft, and tax offense levels. All available data indicate that cases involving losses in the medium and high ranges are under-punished, relative to other offenses.

All the table proposals before the Commission accomplish several additional and worthwhile simplification goals. They combine several loss tables, they utilize two-level increments, and they save much fact-finding by incorporating the element of "more than minimal planning." The proposals would also add a narrow adjustment for use of sophisticated means, which we support. We urge the Commission to take this step in reforming the fraud, theft, and tax guideline's this year, in order to allow the next Commission to focus completely on the loss definitional reform, as we discuss below.

There is one published amendment regarding the loss table and guideline reforms which merits a specific response. We strongly oppose published amendment 5(B), proposed by the practitioners as part of the reform of the fraud guideline. It would provide for a two-level reduction in cases which involve only "limited or insignificant planning, or simple efforts at concealment," as an offset for incorporating more than minimal planning into the new tables. We believe that such a provision would produce litigation in nearly every case, and would eliminate the benefit of having removed the "more than minimal planning" adjustment. Moreover, the new language of "limited or insignificant planning" would invite litigation over the meaning of that phrase.

V. Definition and Commentary on Loss

We received the recent loss proposal on February 24, 1998, and our Guidelines Subcommittee has been carefully considering it. We appreciate the effort that the Commissioners and staff have put into the proposal, and it is a very good start for the much-needed reform of the definition and determination of loss in the guidelines. The loss determination is a fundamentally important computation, involved in at least one out of every four federal cases.² The Federal Judicial Center Survey of 1996 indicated that District Judges and Chief Probation Officers believe that determining monetary loss in fraud cases is the second most difficult process in the guidelines,³ and that fraud, money laundering, and tax are the three least clear guideline computations (out of 12 listed).⁴

The recent proposal is in several ways a marked improvement over the current definition.

2 The 1996 Sourcebook of Federal Sentencing Statistics, Figure A, indicates that at least 25.5% of federal cases involve the loss determination (Fraud 14.2%, Larceny 5.7%, Embezzlement 1.9%, Forgery and Counterfeiting 1.7%, and Money Laundering 2.0).

3 The U.S. Sentencing Guidelines: Results of the FJC's 1996 Survey, figure 21, p. 98.

4 *Id.* at figure 36a, p. 111.

However, we believe the issue is so important that it requires study to ensure that it is the best it can be. We are unable to take a specific position on it at this time. We would like to discuss it with other judges in our respective courthouses, experiment with it in cases that we encounter in the next few months, hear from the defenders and the probation officers' group, and perhaps generate other suggested provisions to complement or supplement the proposal. We pledge to begin that process immediately, but it cannot be accomplished during the next few weeks.

While the latest proposal addresses, to some extent, most of the points mentioned in Judge Phil Gilbert's statement last fall, it also removes much of the current commentary, including examples and explanations, some of which may be necessary or helpful. It introduces new concepts, none of which are defined. It does indeed resolve some circuit conflicts, but potentially generates many others. While the proposal may be shorter and contain fewer rules, definitions, examples, or explanations, it is not necessarily "simpler" unless it provides sufficient guidance, not only to ease its application but also to protect courts from appellate reversal. Fewer rules and guidance can sometimes result in more litigation and more disparity, unless there is a "threshold level" of explanation and guidance. The absence of basic rules written in the guideline will mean that the void is filled by appellate court rulings over a period of time, with possible circuit conflicts.

The following is a non-exhaustive list of the issues that we believe need full discussion and analysis before such a reform is enacted:

1. Should there be a definition of "reasonably foreseeable," given its new use in this context?
2. When should loss be measured? Should it be at the time of sentencing, at the time of the offense, or at the time of detection?
3. What credits should be counted and how should those various forms of credit be measured? The proposal's credit measurement provision is confusing and potentially overbroad. For example, if time of detection is used, is the reference to detection by the victim, law enforcement, or defendant?
4. Crediting the defendant for all "economic benefit" to the victims, even in theft cases, is potentially problematic and, at a minimum, presents a significant ideological shift from preceding and current criminal law. Should the rule of allowing no credits for theft be retained? What are the implications of this change in different scenarios?
5. How are "economic benefits" to be determined, since this is a new concept in this context.
6. What is the best way to handle gain? Should it be part of the core definition, such as "Loss is the greater of actual loss, intended loss, or gain"? Or, if it is one of a list of factors, under what circumstances should it be considered? It is not clear whether the proposal would allow consideration of gain when it is less than loss, so long as loss is "difficult to

determine." Is this the best result?

7. The current commentary provides guidance on when to use market value or replacement cost, but the proposal lists each as co-equal considerations. Is this loss of guidance merited?

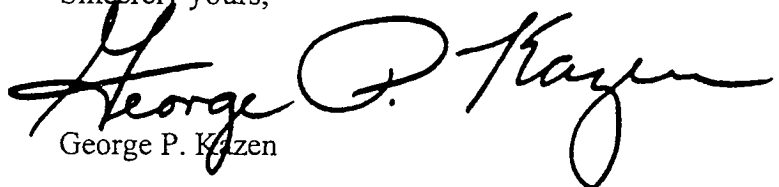
8. Suggested departures must be adopted with great care, given the importance placed on them under Koon departure standards. The proposal lists several new downward departure suggestions which deserve further study. One such suggestion [G(iii)] apparently overlaps the Credits (C) portion of the proposal.

In sum, we are not able to provide meaningful response from our Committee on this fundamentally important guideline proposal in time to help the Commission complete the task this year. We believe the proposal is too important to rush to adoption without more careful study. We ask that action on the proposal be deferred this year. We pledge to intensify our efforts to study the proposal during the remainder of the year and provide a comprehensive, thoughtful response later this year. I would expect to devote significant time to it at our June meeting, and we hope to maintain regular contact during the year with the Commission and its staff.

VI. Conclusion

We appreciate the hard work that the Commission has done over the past few years, and appreciate your continued solicitation and consideration of our views. We think this amendment cycle can be a very productive one with the resolution of circuit conflicts, needed reform to the manslaughter guidelines, and the reform of the loss tables. We look forward to our conference call with you on March 25, 1998.

Sincerely yours,


George P. Kazen

GPk/gsh

xc: Commissioner Michael S. Gelacak
Commissioner Michael Goldsmith
Honorable Deanell R. Tacha
Mary Frances Harkenrider, ex-officio
Michael Gaines, ex-officio
John Kramer, Staff director
John Steer, General Counsel
Members of the Committee on Criminal Law
Chief Judges, U.S. Courts of Appeals
Leonidas Ralph Mecham
Karen K. Siegel

Attachments
March 9, 1998 letter to
Honorable Richard P. Conaboy

UNITED STATES DISTRICT COURT

District of South Dakota
515 Ninth Street, Room 318
Rapid City, South Dakota 57701
(605) 343-7784

RICHARD H. BATTEY

Chief Judge

January 8, 1998

Catherine M. Goodwin
Assistant General Counsel
Administrative Office of the U.S. Courts
One Columbus Circle N.E., Suite 7-290
Washington, D.C. 20544

Dear Catherine:

I appreciated receiving your letter of January 5, 1998, and the Manslaughter Working Group Report to the [Sentencing] Commission.

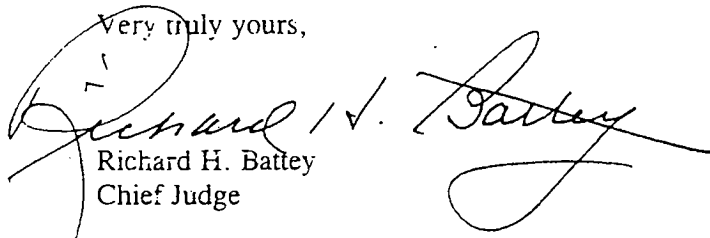
My interest continues in attempting to provide more appropriate guidelines for these manslaughter offenses. To this end, I believe that (1) Congress should be urged to increase the statutory sentence; (2) appropriate base offense levels should be increased; and (3) specific offense characteristics should be approved in the 1998 amendment cycle.

Regarding the adoption of specific offense characteristics, I realize that these should be limited to the "heartland" cases. Appropriate commentary should be added to point out the fact that the specific offense characteristics are not meant to be all inclusive. This would leave room for departures consistent with the Policy Statement found at § 5K2.0 and 18 U.S.C. § 3553(b). Specific offense characteristics should not be used to provide a departure where otherwise a departure would not be permitted under the guidelines.

In the final analysis, these suggested changes would decrease and not increase disparate sentences. At the time of my appearance before the Commission, I fear that perhaps I did not make this point clear.

Shortly I will follow with my comments and perhaps the committee may want to adopt all or part or maybe just consider and reject them. At any rate, I do appreciate the opportunity to be of assistance.

Very truly yours,



Richard H. Battey
Chief Judge

RHB:kc

cc: Honorable J. Phil Gilbert
Honorable George P. Kazen

UNITED STATES DISTRICT COURT

District of South Dakota
515 Ninth Street, Room 318
Rapid City, South Dakota 57701
(605) 343-7784

RICHARD H. BATTEY
Chief Judge

February 4, 1998

Catherine M. Goodwin
Assistant General Counsel
Administrative Office of the U.S. Courts
One Columbus Circle N.E., Suite 7-290
Washington, D.C. 20544

Dear Catherine:

I am pleased to offer these supplemental comments to the Manslaughter Working Group Report to the Commission. The report was most thorough and should provide detailed guidelines to the Commission.

Last week I conducted a sentencing hearing for a violation of 18 U.S.C. §§ 113(a)(3) and 1153, assault with a dangerous weapon. The offense conduct as set forth in the presentence report indicated that the defendant and his family had a running off again-on again feud with the victim's family. On the day of the offense, the defendant was advised by his brother that the victim had harassed him early that morning. Feeling aggrieved, the defendant went looking for the victim. He found him on the school yard. The defendant approached the victim armed with a golf club. During the course of the argument the victim attempted to walk away in order to avoid further confrontation. The defendant struck the victim on the back with the club. The victim raised his hand to ward off a second blow and was struck on the hand. A minor injury consisting only of bruises occurred.

The base offense level under U.S.S.G. § 2A2.2(a) was 15. Adding 4 levels under U.S.S.G. § 2A2.2(b)(2)(B) for use of a dangerous weapon, the adjusted offense level was 19. A 3-level adjustment for acceptance of responsibility resulted in a total offense level of 16. Applying the criminal history of Category I (two points), the guideline range was 21-27 months. The victim was treated and released at the emergency room. Since the victim sought medical attention, it is arguable that an additional two levels should have been added raising the offense level to 18 for a presumptive sentence of 27-33 months.

Had the victim been killed by a blow to the head, a voluntary manslaughter charge would have resulted in a base offense level of 25 under § 2A1.3. Again, reducing for acceptance of responsibility, the total offense level would be 22. Applying the Criminal History of Category I would result in a presumptive sentence of 46-57 months. The result is that defendant could have received a sentence of 13 months longer by causing death.

I set forth this rather detailed example of how the guidelines actually work in Indian country. Absent the guidelines, I believe judgment would have required a sentence of 12 months at the very most. The case was actually overcharged. The conduct more closely fits 18 U.S.C.

Catherine Goodwin
February 4, 1998
Page 2

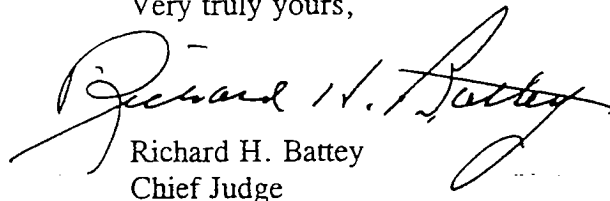
§ 113(4), assault by striking, beating, or wounding (six months statutory penalty). I believe that there were no grounds for a departure under Part K. Since the victim did not precipitate the defendant's conduct, a 5K departure for victim's conduct would not have been applicable.

I conclude where I began with my testimony on November 12, 1997, before the Commission and my letter of January 8, 1998. The answer is to (1) increase the base offense levels of manslaughter to near the statutory maximum; and (2) provide appropriate specific offense characteristics addressing the many disparate fact situations occurring in Indian country. The specific offense characteristics for the assault crimes contain such specific offense characteristics. As to voluntary and involuntary manslaughter under sections 2A1.3 and 2A1.4 I would add to those listed for the assault guidelines the following:

1. An adjustment for crime against a spouse or member of the immediate family.
2. A crime committed in violation of a protection order.
3. A crime committed while under the influence of an alcoholic beverage or illegal drugs.
4. A crime committed as a pattern of conduct or prior violent acts.
5. A crime committed by driving under the influence not included in the criminal history category.
6. A multiple death adjustment.
7. A crime committed by reckless driving of a motor vehicle.
8. A crime committed by use of a dangerous weapon.

Finally, in order to avoid needless appeal issues, I recommend that a departure under these particular guidelines should be given due deference at the appellate level. These cases are extremely "fact sensitive" and as such are not amenable to a strict application of the guidelines.

Very truly yours,



Richard H. Battey
Chief Judge

RHB:kc

UNITED STATES DISTRICT COURT

District of South Dakota
515 Ninth Street, Room 318
Rapid City, South Dakota 57701
(605) 343-7784

RICHARD H. BATTEY
Chief Judge

February 26, 1998

Catherine M. Goodwin
Assistant General Counsel
Administrative Office of the U.S. Courts
One Columbus Circle N.E., Suite 7-290
Washington, D.C. 20544

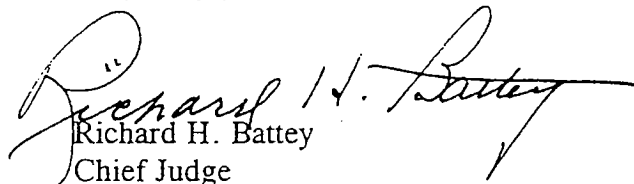
Dear Cathy:

I have reviewed your letter of February 25, 1998. The draft of the recommendations regarding the manslaughter offense is very well done.

I'm somewhat troubled by the SOC found at paragraph 5 of page 2 regarding multiple deaths resulting from the offense conduct involving involuntary manslaughter. You will recall we discussed this point on the phone. Upon rethinking this SOC, I believe it probably should apply to both voluntary and involuntary manslaughter. My thinking is that while I cannot envision multiple deaths in the case of offense conduct involving involuntary manslaughter, that does not necessarily mean that it could not happen. If it does occur, perhaps it should be considered as outside of the "heartland" of voluntary manslaughter, and therefore, the subject of a departure. I think the safe thing to do would be to perhaps either have it apply to both voluntary and involuntary manslaughter, or provide a special sentence commentary encouraging a departure in such cases. I otherwise endorse your letter completely. It is well done.

Finally, enclosed is a copy of the letter I have sent to Judge Conaboy concerning the manslaughter working group report and his letter of February 18, 1998, to the chairman and ranking member of the Senate Judiciary Committee.

Very truly yours,


Richard H. Battey
Chief Judge

RHB:kc
Enclosure