

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

19613 UNITED STATES COURTHOUSE

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PHILADELPHIA, PA 19106

JUDGE EDWARD R. BECKER  
CHAIRMAN

8-897-8642 (FTE)  
213-897-8642 (COMM.)

**III. § 2X5.1. Other Offenses**

The proposed amendment adds language to this guideline and adds two application notes. The new text in the guideline and Application Note 1, which explains the new text, add important clarification to the guideline. However, Application Note 2 is problematic.

This guideline gives guidance when the court is sentencing a defendant for an offense for which no guideline has been expressly promulgated by advising that the court should apply the most analogous guideline. Where there is no analogous guideline, the provisions of 18 U.S.C. 3553(b) control. Proposed Application Note 2 introduces a new procedure. It provides that when there is no sufficiently analogous guideline:

the Court may find it helpful to estimate a Chapter Two offense level by comparing the seriousness of the instant offense with the offense levels that are listed. This estimated offense level may be used in conjunction with reference to Chapters Three, Four, and Five to provide guidance for the determination of the appropriate sentence.

This note suggests that the court should select an offense level when no analogous guideline exists. In essence, the court takes the responsibility to set the offense level, a procedure which may cause problems, produce anomalous and inconsistent results, and generate appellate issues. I think that it would be better to rest on § 3553(b) until, aided by the monitoring process, the Commission promulgates a guideline for the fact pattern at issue.

One example comes to mind. In the District of Maryland there are federal highways which generate numerous drunk driving offenses under the provisions of the assimilated crimes act. There are no analogous guidelines for drunk driving. If individual judges "estimated" an offense level, one judge may estimate the offense level at 12 and another estimate the level at 26.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#47. Pages 49-50 -- #2x5.1

We object to the proposed amendment and the application notes.

Where the Commission has failed to carefully craft a specific Guideline, after the many years of Guidelines, there is good reason to allow the district judges to return to the implementing statute. The "Reason for Amendment", that it is to "assist the court", is belied by the Application Note 1 that lists over 15 confusing areas that can be applied. We believe that when, as here, it is not critical to add more Amendments, the best resolution is, "When in doubt, leave it out."