

102-2591

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September 27, 1990

Ms. Phyllis J. Newton
Staff Director, U.S. Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, DC 20004

Re: **Guideline Suggestions**

Dear Phyllis:

In response to your request for guideline suggestions, I wish to comment on the following issues.

Chapter Two

Under Appendix A, a conviction of 26 USC 5861(a) refers to 2K2.3 only. It appears that a reference to 2K2.2 should be added as it would be the most often used guideline for this type of violation. I note that 26 USC 5861(a) is already one of the statutory provisions under the commentary to 2K2.2.

Also under Appendix A, 26 USC 5861(b)-(l) refers to guideline 2K2.2 only. It appears that violations of 5861(b), (c), (d), (h), (i), (j), and (k), are better suited to guideline 2K2.1, receipt and possession type offenses. The statutory provisions correctly note these violations under the commentary to 2K2.1.

Further, it seems that 2K2.1 and 2K2.2 are so closely related, why not incorporate the two into one guideline?

Under 2Q2.1(b)(3)(A), an enhancement is necessary if the specially protected fish, wildlife, or plants exceed \$2,000 market value. I understand that it is the Commission's position that this enhancement should apply even if the violations involved smuggling plants or animals that are not otherwise protected under the law. If that is the case, it is recommended that the term "specially protected" be removed.

Chapter Three

Under 3B1.2, mitigating role, I rarely see probation officers using the minor participant adjustment but have seen some situations where I felt it would be appropriate. I suggest

some commentary as to the definition of minor participant. I think it would result in probation officers being more comfortable with the adjustment.

Chapter Four

I would like to resubmit my earlier recommendation pertaining to the reorganization of Chapter Four. I feel that from a training point of view it would be easier for probation officers to assess criminal history points under 4A1.1(a)-(e) if the time frames of 4A1.2(e) were included in the 4A1.1 guidelines. This would eliminate the need for 4A1.2(e). Also, by making this change, all of the time frame commentary in 4A1.1 could be eliminated. Further, it appears that much of the application notes for 4A1.1 are found in the guidelines of 4A1.2. Examples are juvenile offenses, offenses never counted, and foreign convictions. I think that if much of these two guidelines were consolidated, the section would be much easier to understand for the new probation officer.

Under 4A1.2, application notes, I would suggest adding some commentary as to the Commissions position on the assessing of points in bond forfeitures when applying 4A1.2.

Under 4A1.2(a)(2) in Application Note 3, the cases are related when consolidated for trial or sentencing. I have seen a number of instances where cases, although not consolidated, have been treated as if they were. The cases sentenced on different days by different judges to concurrent terms in effect receive the consolidated treatment. Some commentary in the application note pertaining to this issue would, in my opinion, result in a more consistent and fair application of the guidelines.

Chapter Five

Please eliminate the requirement that restitution be figured into the fine range. Most defendants can't pay and probation officers continue to have difficulty in computing fine ranges where the pecuniary gain to the defendant makes a difference. Even if a defendant has the ability to pay, I suggest that the judge be allowed to resort simply to a fine table, and if that is not enough, depart up to the statutory maximum in those instances where restitution exceeds the table.

Finally, I would suggest as a training measure that the Commission compile a heartland of caselaw, much as was done with the guidelines. The guidelines have created an abundance of sentencing law with respect to practically every guideline issue. There is no question that this caselaw is as important to each circuit as the guidelines themselves. Many districts are leaving it to the individual probation officers to track cases, and I can only see this as a source of frustration for the officers in those districts. Further, I feel that future training should address the issue of caselaw.

Ms. Phyllis J. Newton
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September 27, 1990

I am happy to say that, for the most part, the guidelines are working well here in the District of South Carolina. Our probation officers have adjusted well to them, and our judges are very supportive. It all makes for a smooth operation.

I hope that you are getting along well and enjoying your job as Staff Director of the Sentencing Commission.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tommy", written in black ink.

Thomas N. Whiteside
Deputy Chief U.S. Probation Officer

TNW/bl

cc CUSPO James W. Duckett, Jr.

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October 4, 1990

Mr. Thomas N. Whiteside
Deputy Chief Probation Officer
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1835 Assembly St.
Columbia, SC 29201

Dear Tommy:

On behalf of the Commission, I thank you for your recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

We appreciate you taking the time to write and share your insightful comments.

Regards,

A handwritten signature in black ink, appearing to be "PK" or "P. K.", written in a stylized, cursive manner.

Paul K. Martin
Communications Director

I HOPE ALL IS WELL WITH YOU AND
YOUR FAMILY IN COLUMBIA

A handwritten signature in black ink, appearing to be "PK" or "P. K.", written in a stylized, cursive manner.