

PCRI-44/9,

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

PATRICK F. KELLY
JUDGE

UNITED STATES COURTHOUSE
WICHITA, KANSAS 67202

September 27, 1990

Mr. Paul Martin
Communications Director
United States Sentencing Commission
1331 Pennsylvania Ave. N.W., Suite 1400
Washington, D.C. 20004

Dear Mr. Martin:

This will acknowledge Chairman Wilkins' letter of September 21 inviting comments with regard to the sentencing guidelines.

As a prefacing note, you should know that I remain one who believes these guidelines are a product of political rhetoric wherein the sentencing judge is Congress' scapegoat. If disparity among judges' sentencing is a root cause for these guidelines, having compared notes with my colleagues I am satisfied at least that there is more disparity in sentencing now than there was before. Given a range within the guidelines, the sentence is predictable depending on the judge. For sure, some can be counted on to sentence at the top of the range while others sentence at the bottom. This can, and often does, represent the difference of a year or so. One judge will routinely add on the defendant's cost of care, even to the extent of \$100,000; others -- myself included -- ignore this provision entirely.

It is probably true that on balance the rate of guilty pleas has remained essentially unchanged. This is not to say, however, that the guidelines have not impacted our dockets. Motions and trial settings are up. Presently, many of these cases are eventually settled because the United States has come to agreement on a workable and sensible plea bargain which the defendant can accept. Moreover, if the government does not come to grips with plea bargaining and reach some reasonable solution, our dockets will be inundated. If you do not understand this to be a fact, then you are entirely naive.

Momentarily, my biggest problem is the Probation Office, which, for all purposes, sets the sentence. Much discretion lies with this person as he assesses the points. In my view, some of them approach the task as if it is their responsibility to assess as much punishment as can possibly be supported. To be sure, I carefully review the presentence report, ask many questions of the probation officer, and often often reassess and reevaluate the

Paul Martin
September 27, 1990
Page Two

report. In sum, the question is not whether I will depart, but is how I interpret probation's findings, i.e., is this more than the minimal planning, has defendant cooperated, am I sentencing the defendant for an offense for which he is not charged and stands innocent, etc.? I often find disparity between what the defendant and the government have agreed upon at the time of the plea and what the probation officer has recommended. By example, it may be understood that I will sentence at the low end of the guidelines but everyone has overlooked the defendant's criminal history, etc. I seriously doubt if anything can be done about these situations, but since you ask I am pleased to express my views.

Respectfully,

A handwritten signature in cursive script, appearing to read "Patrick F. Kelly", with a horizontal line drawn above it.

Patrick F. Kelly

PFK:br