

1000 11/91

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

272 UNITED STATES COURTHOUSE

ROCHESTER, NEW YORK 14614-1368

CHAMBERS OF

MICHAEL A. TELESKA

CHIEF JUDGE

(716) 263-5780

FTS 963-5780

October 26, 1990

Mr. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

I appreciate the opportunity to comment upon the Sentencing Guidelines. I feel, and have always felt, that as Judges, we are in the best position to assess whether they are indeed serving the purpose to which they were intended. By the time of sentencing, we have learned much about the defendant beyond that relating to the crimes for which he has been convicted. It is because of this peculiarly unique position that judges, including myself, have become frustrated with the Guidelines and their limiting effect on our discretion. In this regard, I feel that perhaps the provisions governing departure constitute the area most in need of revision.

First, those two portions of the Guidelines governing departures, Parts 4A and 5K, should be consolidated into one independent section for purposes of clarity. That section should have as its governing policy statement that judges have the discretion to depart outside a given Guidelines range as long as they clearly articulate their reasons for doing so and those reasons have not otherwise been taken into account by the Guidelines themselves. The policy statement should also make clear that any departure is to be reviewed on appeal under an abuse of discretion standard and that allowance must be made for the judge's assessment of the defendant's character as he perceives it given his experience with the defendant during the course of the proceedings before him.

Second, the specific offender characteristics in Part H of Chapter 5 should explicitly allow for departures based on age, family circumstances, and education or vocational experience that the defendant has acquired between the time of his arrest and the date of sentencing. From my experiences on the bench, I found that these factors often indicate the likelihood of rehabilitation as

Mr. William W. Wilkins, Jr.
October 26, 1990
Page Two

well as a defendant's feelings of contrition and remorse concerning his past illegal conduct. I recognize that this suggestion departs radically from your present policies under Part H but I feel that the potential for abuse of such a revised approach could be alleviated, if not eliminated, by strictly limiting the manner in which those characteristics can be taken into account. This could be accomplished by explicitly listing the factors that can be considered - such as the defendant's responsibility for the care and well-being of children (especially if the defendant is a female), stability of home life, etc. - and permitting only a certain degree of departure if they are found to be present. If nothing else, there should be some allowance for the Court to impose supervised probation based on these factors.

Third, since the advent of the Guidelines, I have noticed that its structure effectively permits the Government to determine the length of sentence either through the control of relevant sentencing information, or through its selection of the crimes with which the defendant is to be charged. See Federal Sentencing Reporter, Judicial Impressions of the Sentencing Guidelines, at 94 (Sept. 1989). I realize that you have been aware of this problem from the beginning and that attempts to alleviate it through a real offense system proved unworkable. Perhaps the better way to approach it, however, would be to develop a policy statement governing disclosure of material facts similar in content to § 6B1.4 pertaining to plea agreements. Such a statement should make clear that prosecutors are to fully reveal the facts and circumstances underlying the actual offense conduct and offender characteristics. Although the Department of Justice has already begun implementing this policy, see Thornburgh Memo: Plea Bargaining under the Sentencing Reform Act, at 5, making it more explicit in the Guidelines themselves would surely further discourage the U.S. Attorney's Officer from attempting to influence sentencing by inhibiting the informational flow. It would also presumably alleviate the tension that has developed under the Guidelines between the U.S. Attorney's Office and Probation.

Very truly yours,



Michael A. Telesca
Chief Judge
United States District Court

MAT/jc