

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAMBERS OF
DAVID A. NELSON
CIRCUIT JUDGE

October 15, 1990

TELEPHONE
(513) 684-3162

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

Dear Mr. Martin:

This is in response to Chairman Wilkins' recent call for comments on guideline sections or policy statements that may need review, amendment or clarification. As requested, I shall identify three areas where I think review might be appropriate. In addition, I should like to offer a thought about instructing defendants on pre-sentence investigations.

1. *Departures Based on Specific Offender Characteristics.* The Introductory Commentary on Chapter Four of the *Guidelines Manual* makes this statement: "To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered." The Commentary goes on to state, however, that for unspecified policy reasons some factors most indicative of the likelihood of recidivism -- age, e.g. -- are not included "at this time." In Part H of Chapter Five, accordingly, such specific offender characteristics as age, education, vocational skills, employment record, family ties and responsibilities, and sex, among other things, are said to be either irrelevant in the determination of a sentence, or not ordinarily relevant.

Perhaps it is time to re-examine the policy of ignoring characteristics that could be indicative of the likelihood that a particular defendant will engage in future criminal behavior. To illustrate the sort of thing that concerns me, suppose that a judge is called upon to sentence a woman of mature years who has strong family ties and responsibilities and whose offense seems to have been a one-shot affair. I should have thought, in such a case, that it would be appropriate for the sentencing judge to consider the defendant's age, sex, and family situation in deciding whether to depart from the guideline range. Under the current version of the guidelines, however, these factors appear to be either irrelevant or presumptively irrelevant. Would it not be desirable to give the sentencing judge a little more room for the exercise of judgment as to the likelihood that the individual who is being sentenced will repeat her mistake?

2. U.S.S.G. §4A1.3. *Adequacy of Criminal History Category* (Policy Statement). Under certain circumstances, as I read this policy statement, sentencing courts are invited to consider upward departures on the basis of such factors as "prior similar adult criminal conduct not resulting in a criminal conviction." The guidelines do

not say what standard of proof is to be used here, but many courts, I suspect, would use a preponderance of the evidence standard. Would it not be appropriate for the guidelines to require the use of a "clear and convincing" standard instead? Courts should not be encouraged, I think, to increase a person's sentence on the basis of a crime of which the person cannot be said to be clearly guilty.

3. U.S.S.G. § 2Q1.2(b)(1)(B). *Mishandling of Hazardous or Toxic Substances*. This sub-section mandates a four level increase in the base offense level "if the offense . . . involved a discharge, release, or emission of a hazardous or toxic substance or pesticide." Application Note 5, however, says that the sub-section "assumes a discharge or emission into the environment resulting in actual environmental contamination." The note goes on to suggest that a two level departure, up or down, may be appropriate depending on, among other things, the degree of harm resulting from the discharge.

It is not entirely clear to me what the sentencing judge is supposed to do if the offense in question involved a hazardous substance discharge not resulting in any actual environmental contamination. It might make sense to revise § 2Q1.2(b)(1)(B) to require a four level increase "if the offense . . . involved a discharge, release, or emission of a hazardous or toxic substance or pesticide resulting in actual environmental contamination." Application Note 5 could then be revised to suggest consideration of a downward departure where the actual environmental contamination is minimal, and an upward departure where it is severe.

Now for my thought on the pre-sentence investigation. I have been somewhat concerned, as have others, about the fact that defendants are occasionally encouraged to bare their souls to probation officers without having been told of their right to counsel at this stage and without having been told how statements given to the probation officer will be used in the pre-sentence report and in the calculation of the guideline range. Perhaps some suggested language could be developed for district courts to use in instructing defendants before their pre-sentence interviews. This may be outside the Commission's bailiwick, but I think there is a problem here that the courts need to address.

I appreciate your consideration of these random comments, and I applaud the Commission for its initiative in soliciting suggestions for possible improvements in the sentencing system.

Very truly yours,

A handwritten signature in dark ink, appearing to read "David A. Nelson", written in a cursive style.

David A. Nelson

DAN:llb