

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

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WILMINGTON, NORTH CAROLINA 28402

JAMES C. FOX
CHIEF JUDGE

TELEPHONE: (919) 343-4738

October 17, 1990

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

Dear Mr. Martin:

In response to Judge Wilkins' letter of September 12, 1990, soliciting comments on the top three guideline sections or policy statements needing review, amendment or verification, I offer the following comments.

1. Guideline § 4A1.2, Note 6, should be amended to preclude a defendant's collateral attack on the constitutional validity of convictions in state and federal courts. The defendant has had his day in court in regard thereto. Pragmatically, the existent commentary encourages debate of little or no value. Legally, it is of questionable foundation. See Judge Wilkinson's dissent, U.S.A. v. Jones, 907 F.2d 456 (4th Cir. 1990).

2. A long period of time between the date the offense was concluded and the date of conviction, coupled with the court's determination that during such period the defendant has exhibited self-rehabilitation, should be a recognized basis for either a reduction of offense level or a downward departure.

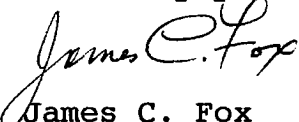
3. The commentary applicable to downward departures for substantial assistance to authorities (§ 5K1.1) should contain a norm, or, alternatively, a suggested maximum. The judge's discretion should remain unfettered in order to properly respond to each individual situation. Nevertheless, some guidance would be appropriate.

4. § 5K2.13, downward departure by reason of diminished capacity, is too vague (except in isolated cases) to be of rational application. For example, diminished mental capacity may arise by reason of a combination of congenital, emotional (stressful situations) and physical (pain or legal depressant) reasons. It is a judgment call the reasons for which often cannot be adequately articulated.

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I hope the foregoing comments are of some value.

Sincerely yours,


James C. Fox

JCF:jy