

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
1 COURTHOUSE WAY, SUITE 4130
BOSTON, MASSACHUSETTS 02210

NANCY GERTNER
DISTRICT JUDGE

March 10, 2000

BY FAX (202) 502-4788

Andy Purdy, Esq.
Chief Deputy General Counsel
United States Sentencing Commission
One Columbus Circle, N.E., Washington, DC.

Re: Proposed Guidelines Amendment

Dear Mr. Purdy:

Because of my heavy schedule (ironically, my heavy sentencing docket), I have not been able to spend as much time on these remarks as I would have liked. To a degree, this response derives from student papers; Professor Freed and I have suggested that the students send in their own submissions based on the research they have done.

Specifically, I would like to address two proposed areas in which the Commission is seeking comments. The Commission notes circuit conflicts on the aberrant behavior departure. As the issue has been described it is "whether downward departure for single act of aberrant behavior includes multiple acts occurring over a period of time; ii) whether an alternative approach should be provided to guide the courts in determining the appropriateness of a departure."

In addition, the Commission noted conflicts on the question of post conviction rehabilitation. The issue was framed in two ways: "whether sentencing courts may consider post conviction rehabilitation while in prison or on probation as a basis for downward departure at re-sentencing following an appeal," and "whether to distinguish between departure for post offense rehabilitation and post sentence rehabilitation."

First, I want to spell out my approach: Plainly, the aberrant conduct departure and the post offense rehabilitation departure derive from the same animus — the desire to have sentences reflect both concerns for uniformity and proportionality. According to Congress, fair sentencing policies and practices must "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or

[170]

aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C.A. § 991(b)(1)(B). The Introduction to the Guidelines recognizes that no set of guidelines can accomplish the task. See USSG Section 1A.4(b), *Departures*, Handbook at 6; USSG Section 1A.3, *the Basic Approach*, Handbook at 3. The Guidelines accommodated the competing concerns: In the interest of uniformity, it created sentences that took into account many factors relating to the offense, the offender's criminal history, and – to a much lesser extent – other offender characteristics. In the interest of proportionality, the Commission gave courts the discretion to depart from these guideline sentences when additional factors, unaccounted for in the Guidelines, existed that made the case unusual.

It should come as no surprise that the unaccounted for factors are those having to do with the offender's life and circumstances. One student, Joanna Schwartz, theorized that this result is built into the guideline structure. The Commission made no effort to accommodate each guideline to include complex information about an offender's life circumstances. The language of the Guidelines' introduction, suggests that each guideline, defining a "heartland" of "typical cases", necessarily included only offense and criminal history characteristics, not the offender characteristics which are wrapped up in the aberrant behavior departure or the post offense rehabilitation departure.

The observations of the Introduction, in short, are still true: that "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." USSC Guidelines Manual, Ch. 1, Pt. A (1998), that "circumstances that may warrant departure from the guideline range...cannot, by their very nature, be comprehensively listed and analyzed in advance." USSG section 5K2.0, *Grounds for Departure*, Handbook at 1047. In a sense, the Commission expressly recognized that judicial decisions would fill in the Guidelines' holes in specific cases.

There are, to be sure, limits to departures based on offense characteristics. First, is the Guidelines' express exhortation that such departures are, or should be, infrequent. Second, the Guidelines categorize certain departures as encouraged, discouraged or prohibited. Third, the district court was obliged to give reasons for any departure. Fourth, the Courts of Appeals was required to monitor the evolving district court common law of departures, essentially at the margins, determining when the district court went too far, when it "abused its discretion."

Given this framework my suggestion is that the Commission in fact make no amendment or policy statement with respect to either departure ground, aberrant conduct or post offense rehabilitation, *at this point*, letting the common law continue to evolve. The problem of generalizing, and categorizing offender characteristics is endemic. The aberrant behavior departure, for example, has existed for only twelve years, as one student, Mitch Bailin, has

March 10, 2000

suggested; the circuit split for only nine. This is a relatively short judicial experiment which has yielded a rich debate.

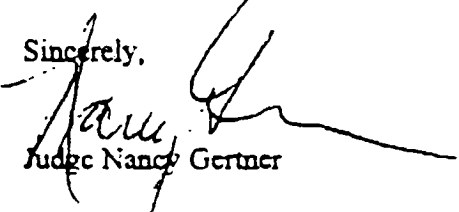
Moreover, the same problems which led the early Commission to step back from a deductive system of guidelines, embodying a certain philosophy of sentencing, with prescribed purposes, persist in this setting. While my students have attempted to come up with proposals on both issues, every proposal revolves around particular theories about sentencing— the significance of rehabilitation vs. deterrence, the extent to which the opportunistic nature of the crime should bear on the culpability of the offender. In short, it is difficult to resolve these narrow issues without considering the larger ones.

I am not suggesting that the Commission do nothing. Plainly, in the interim, the Commission could study aberrant behavior and post offense rehabilitation departures. It could encourage district courts to issue more detailed opinions so that it can monitor the area. It can evaluate the data from a number of perspectives: What percentage of cases involve these departures? Are there regional variations? Are there gender or race variations? To what degree is a coherent common law evolving or likely to evolve?

The Commission can publish the data it has generated as an aid to the evolving common law. If district court judges do not write opinions, then the Commission, with the help of probation, can circulate the fact patterns which have led to particular departures. (In a way, the analog is to the commentary to §1B1.3, which comprises what I call "sentencing stories," narratives not unlike the narratives of the case law.)

To be sure, I have specific suggestions about each area — aberrant conduct and post offense rehabilitation— but my overwhelming preference is to defer the amending process until more data can be gathered, and the common law of sentencing refined.

Sincerely,



Judge Nancy Gertner