

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CLARENCE C. NEWCOMER
JUDGE

13TH FLOOR, UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PENNSYLVANIA 19106-1778

July 23, 2003

Honorable Sim Lake, Chair
Committee on Criminal Law of the
Judicial Conference of the United States
9535 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, Texas 77002

Re: United States Sentencing Commission Request for Public Comment

Dear Judge Lake:

Pursuant to your request of July 18th, the following is my response to the questions proposed by the United States Sentencing Commission in the general order in which they were presented.

Personal Comment

1. There should be no revision of §5K2.0. Furthermore, the Commission should not provide additional or more restrictive guidance for mitigating factors that may warrant a downward departure, but instead, this guidance should arise from judicial opinions decided over the course of time.
2. The Commission has not attached excessive right to the departure factors. That should be an Article III judicial function not an Article I or Article II function.
3. Chapter 5, Part H, should be rescinded and the matter left to judicial discretion. Additional or more restrictive guidance on offender characteristics is not warranted.

4. Additional guidance as to offender characteristics is not warranted and this matter should be left to judicial discretion.

5. Guideline provisions governing downward departures for criminal history should not be made more restrictive but more leeway should be provided in the guidelines for judicial discretion.

Additional or more restrictive guidance in §4A1.3 regarding departure for the over-representation of the defendant's criminal history are not warranted.

6. While it is unclear what the Sentencing Commission is asking in its inquiry regarding the "downward departure adjustment in lieu of a downward departure for any factor or downward departure basis or for a combination of such basis or for any other mitigating factors..." I feel that any changes to the guidelines which restrict judges from imposing a sentence within judicial discretion is not warranted.

7. No additional prohibitions for a downward departure basis would be appropriate.

8. The sentencing function as encompassed by the United States Constitution is vested solely within the authority of Article III judges. The legislature is encroaching upon the judicial functions both in establishing sentencing guidelines and in imposing mandatory restrictions upon judges in the sentencing function. The guidelines themselves are a constructive effort to achieve greater uniformity and less disparity in sentencing throughout the United States. If they were made voluntary for the guidance of the judge instead of mandatory they would serve a very useful purpose.

I always have been and remain convinced that the establishment of the United States Sentencing Commission for the purposes of establishing guidelines, subject to the approval of the legislature, is a clear violation of the Separation of Powers provisions of the United States Constitution.

My response reflects that conviction.

As suggested in my opinion, the Guidelines could serve a very useful purpose in our attempt to avoid disparities in sentencing and at the same time to make present the administration of justice in a fair and even handed way if, instead of being mandatory they were made to be voluntary.

This would enable judges to perform their time-honored function of administering justice to all with mercy.

Thank you for the opportunity of expressing the above views based upon my 31 years as a United States District Judge.

Sincerely,

A handwritten signature in black ink, appearing to read "CCN", with a horizontal line extending to the right and a vertical line extending downwards from the end.

Clarence C. Newcomer

CCN:szq

cc: Honorable William Moore, Jr.

Unites States Sentencing Commission