

UNITED STATES SENTENCING COMMISSION
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July 18, 2005

Hon. Joseph P. Stadtmueller
United States District Court
471 United States Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202

Dear Judge Stadtmueller,

It was good seeing you at the Sentencing Institute in D.C. and conversing with you on the phone last week. Thanks for sending me the Washington Post article on the Border Patrol's release policy. I gave copies to the co-chairs of the Commission's staff working group on immigration issues.

I have thought further about the concerns you raised regarding §5K1.1 substantial assistance motions in cases that do not meet the criteria, and your suggestion that §3E1.1 (Acceptance of Responsibility) might be expanded to a maximum of 5 levels as a remedy. I recall a few previous guideline amendments that warrant consideration regarding this issue, specifically the amendment to §3E1.1 in November 1992 (Amendment #459), the amendment to §5K1.1 in November 1989 (Amendment #290), and the PROTECT Act amendment to §3E1.1 in April 2003 (Amendment #649).

The §3E1.1 amendment of 1992 expanded the acceptance of responsibility adjustment to add the possibility of a third level off if the defendant either timely gave complete information to the government concerning his own involvement in the offense or timely notified authorities of his intention to plead guilty. The Reasons for Amendment states, "This amendment provides an additional reduction of one level for certain defendants whose acceptance of responsibility includes assistance to the government in the investigation or prosecution of their own misconduct." This seems to have been intended to cover one of the issues that you are now suggesting be addressed by additional levels for acceptance of responsibility.

Note, however, that the PROTECT Act amendment to §3E1.1 on April 30, 2003, struck "timely providing complete information to the government concerning his own involvement in

the offense" and restricted the third level to a defendant timely notifying authorities of his intention to plead guilty. This seems to have removed a consideration that you think should be available for the additional levels.

The §5K1.1 amendment of 1989 removed the previous language of §5K1.1, which stated, "[u]pon motion of the government that the defendant has made a GOOD FAITH EFFORT to provide substantial assistance in the investigation or prosecution of another person...", and replaced it with "[u]pon motion of the government that the defendant has provided substantial assistance in the investigation or prosecution of another person..."

The Reason for Amendment for #290 states, "The purpose of this amendment is to clarify the Commission's intent that departures under this policy statement be based upon the provision of substantial assistance. The existing policy statement could be interpreted as requiring only a willingness to provide such assistance."

As you can see, both the Commission and the Congress have previously made amendments in the areas in which you have concern.

The Commissioners have a planning session scheduled for their August meeting. To ensure that they have your issue for consideration, I will note your concern and route this letter to their attention.

I will be "on the road" doing training programs for the next week and a half, but should you need to contact me, I generally check my voicemail (202-502-4542) on a daily basis and can return a call.

All the best to you,

A handwritten signature in black ink, appearing to read "L. Russell Burrell". The signature is fluid and cursive, with a large initial "L" and a stylized "B".

L. Russell Burrell
Principal Training Advisor