

EXECUTIVE SUMMARY

A. INTRODUCTION

The United States Sentencing Commission submits this report in direct response to section 401(m) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 [the “PROTECT Act”], and as part of its overall fifteen year review of the federal sentencing guidelines. The PROTECT Act was enacted on April 30, 2003, and directed the Commission, not later than 180 days after the enactment of the Act, to promulgate appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure, among other things, that the incidence of downward departures is substantially reduced.

B. FINDINGS

In preparing this report, the Commission: (1) considered the legislative history of the Sentencing Reform Act of 1984 and other sentencing legislation, with particular emphasis on the role of departures (*see* Appendix B); (2) identified particular concerns regarding downward departures as raised by Congress in the PROTECT Act; (3) conducted an extensive empirical study of frequently cited reasons for downward departures during fiscal year 2001; (4) reviewed departure case law and literature; (5) solicited and weighed public comment; and (6) held two public hearings at which the Commission received testimony from the Department of Justice, judges, federal defenders and prosecutors, and experts in the criminal law on downward departures generally and early disposition or “fast track” programs specifically.

Using this information and data, the Commission: (1) considered the general purposes of sentencing identified by Congress in the Sentencing Reform Act (*see* 18 U.S.C. § 3553(a)(2)); (2) identified specific congressional concerns regarding departure decisions; and (3) evaluated departure provisions throughout the *Guidelines Manual* in light of those general and specific concerns.

1. Departures Perform Important Functions in the Guideline System

The balance that the Sentencing Reform Act sought to strike between the goals of certainty and uniformity in sentencing and the need to retain sufficient flexibility to individualize sentences is reflected in part by 18 U.S.C. § 3553(b) (Application of guidelines in imposing a sentence), which codifies the limited authority of sentencing courts to impose a sentence outside the sentencing guideline range:

The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or

mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

Departures play an important role in the federal sentencing guidelines system for several reasons. There may be offense guidelines that do not specify a sentence adjustment for a particular circumstance because either it occurs infrequently in connection with a particular offense, is difficult to quantify, or is truly unique. When such a circumstance does occur, however, it may be important and could be accounted for only by permitting the court to depart from the guidelines.

Departure decisions also provide the Commission with important feedback from courts regarding the operation of the guidelines and improve its ability to make ongoing refinements to the sentencing guidelines. Frequent or increasing use of departures for a particular offense, for example, might indicate that the guideline for that offense does not adequately take into account a particular recurring circumstance.

2. Statutory Requirements Enacted by the PROTECT Act Are Expected to Have a Broad Impact on Departure Practices

The PROTECT Act enacted several procedural requirements that should have a broad and substantial impact on departure practices.

First, the PROTECT Act amended 18 U.S.C. § 3553(c) (Imposition of a sentence) to require the court to include specific *written* reasons for departures in the judgment and commitment order (unless the court relied on *in camera* evidence under Fed. R. Crim. P. 32).

Second, the PROTECT Act amended 28 U.S.C. § 994(w) to require the Chief Judge of each district court to ensure that, within 30 days following entry of judgment, the sentencing court submits to the Commission certain sentencing documents, including the Statement of Reasons for the sentence imposed, which must include, in the case of a departure, the reason for departure. The potential effect of these documentation requirements on the Commission's data collection and reporting is discussed in Chapter 2 of this report.

Third, by amending 18 U.S.C. § 3742 (Review of a sentence), the PROTECT Act specifically requires sentencing courts to base departures on a factor that advances the statutory purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

Fourth, the PROTECT Act modifies appellate review for departure decisions. The PROTECT Act now generally requires *de novo* review of a district court's departure decision.

Fifth, the PROTECT Act adds restrictions to limit the district courts' discretion when sentencing upon remand. Newly enacted 18 U.S.C. § 3742(g) prohibits the district court, upon remand, from sentencing outside the applicable guideline range, except upon a ground that was

(i) “specifically and affirmatively” included in the written statement of reasons given by the district court pursuant to section 3553(c) in connection with sentencing of the defendant prior to the appeal *and* (ii) was held by the court of appeals, in remanding the case, to be a permissible ground for departure.

The implications of these statutory changes are discussed in more detail in Chapter 4. The noticeable increase in documentation submissions to the Commission since enactment of the PROTECT Act and comments received by the Commission in recent months suggest that the impact of these new statutory requirements on the incidence of downward departures will be significant.

3. Newly Implemented Policies by the Department of Justice Are Expected to Impact Departure Practices Significantly

The PROTECT Act directed the Department of Justice to adopt policies that, among other things, ensure prosecutors oppose unjustified downward departures and vigorously pursue appropriate appeals of adverse departure decisions. In response, the Department of Justice has adopted several policies that could significantly impact departure practices.

First, Attorney General John Ashcroft issued a memorandum to all federal prosecutors underscoring prosecutors’ “affirmative obligation to oppose any sentencing adjustments, including downward departures, that are not supported by the facts and the law.” The memo further directs prosecutors to “take all steps necessary to ensure that the district court record is sufficient to permit the possibility of an appeal” of an improper departure. The Department of Justice also set in place mandatory procedural mechanisms to facilitate appeals of departure decisions.

Second, the Attorney General issued a revised policy concerning charging and plea bargaining practices. The policy generally requires that prosecutors charge and pursue “the most serious, readily provable offense or offenses that are supported by the facts of the case” and provides that any sentencing recommendation contained in a plea agreement “must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant’s history and conduct.”

With respect to departures specifically, the policy states that the circumstances in which prosecutors will request or accede to downward departures in the future will be “properly circumscribed” and “rare.” The Department of Justice also seeks to make those instances in which departures are agreed to by prosecutors more transparent, providing that “[i]n those cases where federal prosecutors agree to support departures, they are expected to identify departures for the courts.”

Third, the Attorney General issued a memorandum outlining the criteria for authorization of early disposition or “fast track” programs. The memorandum provides that fast track

programs are “reserved for exceptional circumstances” and are “not to be used simply to avoid the ordinary application of the Guidelines to a particular class of cases.” The policy sets forth specific criteria that must be met in order for a fast track program to be approved. With the exception of certain minimum requirements, however, the policy leaves discretion to the United States Attorney to decide whether the benefit to the defendant under a fast track program is granted by departure or by agreeing not to charge or pursue the most serious readily provable offense.

The implications of these newly implemented Department of Justice policies and specific concerns regarding fast track programs are discussed in more detail in Chapter 4.

4. Missing and Unclear Sentencing Documentation Limits the Ability to Draw Conclusions from Commission Departure Data

In preparing this report, the Commission became more acutely aware of the need for greater specificity and standardization in departure documentation. The Commission is concerned that historically it has not received a significant percentage of sentencing documents from a handful of judicial districts. Furthermore, with respect to departures, Statements of Reasons submitted by sentencing courts often provide only general categorical reasons for departure (*e.g.*, plea agreement) with insufficient specificity to enable the Commission to understand fully the sentencing court’s underlying substantive reason for departure.

To emphasize the importance of written specificity regarding departure decisions, the Commission added specific documentation requirements in the *Guidelines Manual* to three policy statements, §5K2.0 (Grounds for Departure), §4A1.3 (Departures Based on Inadequacy of Criminal History Category), and §6B1.2 (Standards for Acceptance of Plea Agreements). Requiring sentencing courts to document reasons for departure with greater specificity will complement the findings and documentation required of sentencing courts by the PROTECT Act, facilitate appellate review of departure decisions, and improve the Commission’s future ability to monitor departure decisions and refine the guidelines as necessary.

The Commission’s data collection process is discussed in more detail in Chapter 2.

5. Government Initiated Departures and Southwest Border Districts Comprise a Significant Portion of Downward Departures

During consideration of the PROTECT Act, members of Congress expressed concern regarding the increasing incidence of downward departures as reported in Commission data sources. The downward departure rate for reasons other than substantial assistance to the government (the “nonsubstantial assistance departure rate”) has increased from 5.8 percent in fiscal year 1991 to 18.1 percent in fiscal year 2001.

Based on analyses conducted for this report, the Commission estimates that the government initiated approximately 40 percent of the nonsubstantial assistance downward

departures granted in fiscal year 2001. *See* Chapter 3. If all the government initiated downward departures are excluded, the remaining downward departure rate is estimated to be about 10.9 percent.

The Commission believes that fast track programs account for a substantial proportion of government initiated downward departures. Fast track programs were established in judicial districts along the southwest border to accommodate burgeoning immigration related caseloads, and sentencing data confirm that the number of federal immigration offenses increased dramatically from 2,300 in fiscal year 1991 to 10,458 in fiscal year 2001.

The Commission is unable to estimate from its sentencing data the full impact of fast track programs on the departure rate for several reasons. Most important, the Commission cannot isolate fast track departures from downward departures generally because sentencing courts do not report this information in a uniform manner.

The Commission's sentencing data, however, do indicate that the combined departure rate for judicial districts along the southwest border has increased almost four-fold, from 10.2 percent in fiscal year 1991 to 38.2 percent in fiscal year 2001. *See* Chapter 3. Furthermore, southwest border districts account for a disproportionate number of departures. Although the national departure rate was 18.1 percent in fiscal year 2001, if southwest border districts are excluded, the national departure rate was 10.4 percent in fiscal year 2001. Therefore, circumstances unique to the southwest border appear to be driving the overall national departure rate significantly higher than it otherwise would be.

Even excluding the southwest border from consideration due to its unique circumstances, the Commission is concerned about the unmistakable steady increase in the departure rate for the rest of the nation, from 5.8 percent in fiscal year 1991 to 10.4 percent in fiscal year 2001. In recent years, the Commission has had a heightened awareness about the increasing incidence of downward departures and has taken action to address several specific areas of concern, including specifying minimum requirements for departures based on "aberrant behavior," prohibiting departures for post-sentencing rehabilitative efforts, and extensively revising the illegal reentry guidelines.

C. COMMISSION IMPLEMENTATION OF THE PROTECT ACT

The PROTECT Act made direct congressional amendments to the sentencing guidelines to restrict the availability of departures for certain child crimes and sex offenses. The Commission implemented those changes and, as directed, distributed those guideline amendments on April 30, 2003.

On October 8, 2003, the Commission unanimously adopted an emergency amendment effective October 27, 2003, implementing the PROTECT Act directives. The emergency amendment is discussed in more detail in Chapter 5 and is set forth in its entirety in Appendix A

of this report. The amendment prohibits several factors as grounds for departure, restricts the availability of certain other departures, clarifies when certain departures are appropriate, and limits the extent of departure permissible for certain offenders.

Among the newly forbidden grounds for departure are:

- the defendant’s acceptance of responsibility for the offense;
- the defendant’s aggravating or mitigating role in the offense;
- the defendant’s decision, by itself, to plead guilty to the offense or to enter into a plea agreement with respect to the offense;
- the defendant’s fulfillment of restitution obligations only to the extent required by law, including the guidelines;
- the defendant’s addiction to gambling;
- the defendant’s aberrant behavior if the defendant has any significant prior criminal behavior, even if the prior conduct was not a federal or state felony conviction;
- the defendant’s aberrant behavior if the defendant is subject to a mandatory minimum term of imprisonment of five years or more for a drug trafficking offense, regardless of whether the defendant meets the “safety valve” criteria at §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases);
- the overrepresentation by the defendant’s criminal history category of the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, if the defendant is an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and
- the overrepresentation by the defendant’s criminal history category of the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, if the defendant is a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

The amendment also imposes increased restrictions on the availability of departures based on:

- multiple circumstances (previously referred to as a combination of factors);

- the defendant’s family ties and responsibilities, particularly if the basis for consideration is financial or caretaking responsibilities;
- victim’s conduct;
- coercion and duress; and
- diminished capacity.

In addition, the amendment impacts sentencing courts’ authority in more general ways by restructuring departure authority throughout the *Guidelines Manual*, particularly in §5K2.0 (Grounds for Departure), to track more closely both the statutory criteria for imposing a sentence outside the guideline sentencing range and the newly enacted statutory requirement that reasons for departure be stated with specificity in the written order of judgment and commitment.

The Commission also added a new policy statement regarding early disposition programs, §5K3.1 (Early Disposition Programs), that restates the language contained in the directive at section 401(m)(2)(B) of the PROTECT Act. The new policy statement provides that, upon motion of the Government, the court may depart downward not more than four offense levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides. The Commission determined that implementing the directive in this unfettered manner is appropriate at this time, notwithstanding several concerns discussed in Chapter 4 and pending further study and monitoring of the implementation of such programs.

The Commission believes that the actions taken in this amendment will complement the many statutory and guideline changes enacted by the PROTECT Act, and the recent policies regarding appeals, fast track, and plea bargaining implemented by the Department of Justice, to substantially reduce the incidence of downward departures. The Commission worked diligently within the 180 day time frame established by the PROTECT Act to implement the directive, but its efforts in this area will continue.

The Commission is continuing to work on several specific areas that affect the incidence of departures, including potential refinements to the criminal history calculations to take into account data now becoming available from the Commission’s multi-year recidivism study, possible elimination of aberrant behavior departures, consideration of general collateral consequences of incarceration, and amendments to immigration guidelines. More generally, the Commission continues to review departure provisions throughout the *Guidelines Manual* and to consider whether circumstances warranting departure should be incorporated as guideline adjustments.