

because they are not satisfied that the disability contributed to the offense in any manner that the court believes warrants a departure. Other departures are rejected because the defendant's criminal history includes categorical crimes of violence or because the defendant is also addicted to controlled substance. The Commission has amended this guideline, most recently in 1998 to clarify issues with respect to the definition of diminished capacity that generated circuit conflicts. If anything, the departure is applied too strictly to deny downward departures to persons who are indeed suffering from diminished capacity, which in many ways does contribute to the commission of the offense.

This is a departure that is particularly appropriate because persons who suffer from mental disabilities are less deserving of punishment and less likely to be deterred by the a lengthier sentence. For these reasons, also it is a departure that is consistent with at least three of the purposes of sentencing -- just punishment, adequate deterrence, the need for rehabilitation. *See* 18 U.S.C. § 3553(a)(2)(A), (B)& (D).

Again, this is not a departure that is being overused. The incidence of downward departures based on diminished capacity have decreased from nearly 5.5% (153/3110 cases) of all departures in 1991 to approximately 2.6 % (286/10,026 cases) in 2001. It is difficult to see how it could be suggested that district courts are abusing or improperly granting departures on this ground.

5. Substantial Assistance Departures

The rate of substantial assistance departures as a percentage of all departures has decreased slightly. The number of safety valve cases has increased. The safety valve applies to persons with no serious criminal history and no managerial role. It stands to reason that such persons are less likely to possess information about higher ups in the drug organization and thus less likely to qualify for substantial assistance departures. The increase in safety valve cases may also explain the increased rate of downward departures as safety valve defendants, by definition are less culpable than other drug defendants and thus may warrant additional downward departures.

The Commission really needs the government to disclose its reasons for granting and denying departures before any rational inferences can be drawn from this trend.

6. Increased Rate and Number of Departures in Drug Cases

The increased rate of non-substantial assistance departures in drug cases is also directly related to factors controlled by the government. For example, the increase in the rate of downward departures since 1996 can be attributed for the most part to the increased number of MJ cases prosecuted, which have nearly doubled from 4,147 cases in 1996 to 7,723 cases in 2001. We believe that these increases are primarily in the Southwestern border districts.

The rate of other downward departures granted in marijuana cases nearly doubled from a rate

of 15.0% to 29.5% during that same period. We believe that this increase is due in large part to the marijuana importation cases prosecuted in the Southwestern border districts. Those cases often involve couriers. For purposes of managing the increased caseload in these districts, the government agrees to downward departures on grounds other than substantial assistance.

We believe that a large percentage of the increase in non-substantial assistance departures the types of cases the government conduct. Data shows that in marijuana cases, 5K1.1 departures are granted at a lower rate than for other drug types. At the same time, downward departures for grounds other than substantial assistance are granted at a higher rate in marijuana cases. Lastly, there has been an increase in marijuana prosecutions, which tends to spike the downward departures in drug cases.

These trends can be illustrated by reference to statistics, from the Commission's annual publication, which reflect a four-fold increase in downward departures in marijuana cases although the number of cases has only doubled.

Departure Statistics in Drug Cases						
	1996	1997	1998	1999	2000	2001
MJ -- Other Downward	620	973	1,294	1,950	1,800	2,281
MJ -- Total # of Cases	4,147	5,085	5,967	6,933	7,100	7,723
All Drugs -- Total	16,735					23,197
All Drugs -- Other Downward	1,523					3,929
MJ -- Departure Rate Other	15.0%	19.1%	21.7%	28.1%	25.0%	29.5%
All Drugs -- Rate of Other Downward Departure	9.1%					16.9%
All Drugs Excluding MJ -- Rate of Other Departures	7.2%					10.6%

a. **The Need for Refining Adjustments to Reflect Range of Culpability in Drug Cases**

In general also, the drug guideline which is driven by quantity does not sufficiently differentiate among the great range of culpability of persons engaged in drug trafficking, from the kingpin who controls a murderous cartel in Colombia to the street dealer who is selling nickel bags and snorting half his profits, to the look-out, courier, packager, cook, middle-man, manager, organizer, leader, enforcer, and the girlfriend, in love with one of the actors who gets caught in the trafficking web when she accepts a package at the door. The only provision for differentiating for this broad range of activity and culpability is the role in the offense adjustment, with range of 2 to 4-level downward adjustment. This adjustment is not often used, particularly with respect to some street-level sales of crack cocaine. The Commission's recent drug cap may reduce the incidence of

downward departures in these cases.

7. **Unmentioned Factors.** These departures are at the heart of the judicial flexibility and the parsimony principle codified in §§ 3553(a) and (b) and implicate the core judicial power, wherein federal judges consider each person as an individual. The nondelegation separation of powers doctrine would certainly be implicated were the Commission to restrict departures in this area without reference to the “intelligible principle” laid out by Congress. Furthermore, as the departure statistics reflect, this does not seem to be a ground that is overly used or abused by district courts.

8. **Departures in White Collar Cases.** The fact that the government may want higher sentences in such cases does not justify restricting judicial discretion in the absence of some showing of systemic abuse or need to guide discretion. The departure rate for white collar offenses stood at a reasonable 10.8% in the most recently published Commission statistics.²⁷ This is a rather modest rate given that this guideline is quantity-driven and thus may often tend to overstate the culpability of offenders who are merely carrying out the scheme formulated by more culpable defendants, such as the clerk, secretary or mid-level manager who knowingly participates in a scheme to defraud without receiving any personal benefit.²⁸

D. Need to Explain Commission Action in Official Commentary

The Commission would do well to be explicit in explaining its actions in response to this directive and in general. It is clear that part of the firestorm over departures results from a failure to understand fully the integral function that departures play in the guidelines, the reasons why the Commission has identified certain encouraged and discouraged grounds for departure, and the reasons why departures are granted. The Commission has a great responsibility in the process of explaining to courts and the Congress the reason for its policy judgments. For this reason, we recommend to the Commission that it include more explicit explanations for its policy choices in the official commentary. In that manner, it may become clearer to Congress that its concerns are being addressed.

²⁷ USSC *Sourcebook* at Table 28 (2001) (offenders sentenced under U.S.S.G. § 2F1.1 received 629 departures in 5,778 cases).

²⁸ *E.g.*, *United States v. Dominguez*, 296 F.3d 192(3d Cir. 2003) (granting family ties departure to a bank branch manager, an unmarried woman in her mid-forties with no prior contact with the criminal justice system, who was the primary caretaker of her elderly, disabled parents in a case where she was guilty of conspiracy to structure financial transactions for helping a customer open several accounts under different names apparently out of some misguided attempt to increase customer base for the bank although she received no personal gain from the offense).

Conclusion

The Commission has before it a daunting task to preserve the integrity of the guideline system under a very tight schedule in the midst of intense political rhetoric. As we stated at the start, Federal and Community Defenders recommend that the Commission act by scrupulously adhering to the central or "intelligible principles" of the Sentencing Reform Act, the only principled way to proceed. We also ask the Commission to be mindful of the persons we represent, whose actions prove that they are human and fallible and who, in most cases, also have innocent loved ones who are affected by the sentence.

Thank you for your consideration. We are ready and willing to assist the Commission with this task. If the Commission desires additional information, we welcome the opportunity to provide it.

Very truly yours,

JON M. SANDS
Asst. Federal Public Defender
Chair, Federal Sentencing Guidelines Committee
of the Federal Public and Community Defenders

cc: US Sentencing Commissioners
Carmen Hernandez
Timothy McGrath
Kathleen Williams

Cases Decided Since April 30, 2003, referring to the PATRIOT Act

U.S. v. Thurston, 2003 WL 21782339, *23, No. 02-1966 (1st Cir. Aug 4, 2003) (vacating sentence, reversing downward departure based on good works and purported disparity, and remanding for imposition of the statutory maximum sentence of sixty months in prison and for imposition of an appropriate fine in case involving conspiracy to defraud medicare of over \$5 million).

U.S. v. Carter, 2003 WL 21760511, No. 02-5001 (4th Cir. Jul 21, 2003) (affirming upward departure to fifty-four months imprisonment for uttering forged securities on the ground that defendant's conduct resulted in "reasonably foreseeable, substantial non-monetary harm" to her former employer, an encouraged departure under U.S.S.G. § 2F1.1, comment. (n.11(a)).

U.S. v. Gendraw, 2003 WL 21730594, No. 02-2099 (1st Cir. Jul 28, 2003) (affirming denial of defendant's motion for a downward departure because designation as a career criminal did not overstate defendant's criminal history).

U.S. v. Semsak, 2003 WL 21730615, No. 02-30153 (9th Cir. Jul 28, 2003) (affirming four-level upward departure in case where defendant, who drove a tractor-trailer drunk and collided with a car, killing its driver, pleaded guilty to involuntary manslaughter because of defendant's extraordinarily reckless conduct).

U.S. v. Flores, 2003 WL 21673619, No. 02-3380 (8th Cir. Jul 18, 2003) (LSD trafficking offense, affirming upward departure to career offender designation from a mandatory 10-year sentence to 235 months based on fact that criminal history category IV for 18-year old defendant underrepresented the severity of past conduct and likelihood of recidivism).

U.S. v. Swick, 334 F.3d 784, 789 (8th Cir. 2003) (case involved conviction for tampering with consumer products where defendant had placed needles in food products, committed perjury at trial; court reversed 17-month downward departure for post-offense rehabilitation based on defendant's decision to stop abusing alcohol and his successful completion of alcohol treatment and aftercare, where defendant's conduct "by refraining from alcohol and subjecting himself to periodic drug/alcohol testing," was merely complying with the conditions of his pretrial release).

U.S. v. Dyck, 334 F.3d 736 (8th Cir. 2003) (vacating and remanding for resentencing downward departure granted to defendant who had illegally reentered the country after having been deported with an aggravated felony because defendant's criminal history category did not significantly overrepresent the seriousness of his criminal history, as fact that defendant's prior drug-trafficking conviction could be used both to enhance his base offense level and to compute his criminal history category did not create special circumstance which would warrant downward sentencing departure; sentencing court could not consider extent of defendant's role in prior offense in granting downward sentencing departure; and defendant's purported lack of criminal intent in reentering country was

invalid basis for granting downward departure).

U.S. v. Guerrero, 333 F.3d 1078 (9th Cir. 2003) (remanding downward departure for aberrant behavior in MJ conspiracy case where district court did not make finding that defendant's case was both extraordinary and aberrant)

U.S. v. Camejo, 333 F.3d 669 (6th Cir. 2003) (in assault case, affirming upward departure for underrepresentation of criminal history and remanding for consideration of downward departure for defendant who had been detained for two years as an immigration detainee where court believed it did not have authority to depart on this ground).

U.S. v. Chesborough, 333 F.3d 872 (8th Cir. 2003) (affirming upward departure where defendant's criminal history score failed to reflect the seriousness of defendant's past criminal conduct, warranting an upward departure from the sentencing guidelines for defendant's conviction of being felon in possession of a firearm; presentence report (PSR) reflected the fact that defendant was a recidivist criminal, who, during the last 45 years, had been convicted of approximately 20 crimes).

U.S. v. Agee, 333 F.3d 864, 865- 866 (8th Cir. 2003) (affirming upward criminal history departure for defendant convicted of being a felon in possession of a firearm).

U.S. v. Orchard, 332 F.3d 1133 (8th Cir. 2003) (seriousness of psychological harm to victim, defendant's abuse of relationship of trust, and his facilitation of further criminal act were all factors supporting upward departure from sentencing guidelines).

U.S. v. Jones, 332 F.3d 1294 (10th Cir. 2003) (affirmed seven-level upward departure, defendant had pleaded guilty to three counts of involuntary manslaughter; district court satisfied statutory requirement that it set forth with specificity, in written order of judgment, its reasons for departing from Sentencing Guidelines range; (2) district court did not rely on impermissible factors in making "heartland" determination for upward departure; (3) factors underlying upward departure were authorized by statute and justified by facts of case; and (4) seven-level upward departure was appropriate).

U.S. v. Tarantola, 332 F.3d 498, 500 (8th Cir. 2003) (affirmed upward departure for criminal history in felon-in-possession case).

U.S. v. Aguilar-Lopez, 329 F.3d 960 (8th Cir. 2003) (affirmed upward departure in reentry after deportation case on basis of criminal history underrepresented)

U.S. v. Payne, 66 Fed.Appx. 805, 2003 WL 21259748 (10th Cir. 2003) (remanded for reconsideration of extent of departure where district court departed down 24 levels based on post-

Federal Defenders' Comments re PROTECT Act
August 2003
Page 23

offense rehab in case involving possession of an unregistered firearm)

U.S. v. VanLeer, 2003 WL 21545099, No. 2:03-CR-00137 PGC (D. Utah July 17, 2003) (Cassell, J.) (granted downward departure under lesser harms grounds for felon in possession case).

U.S. v. Lester, 2003 WL 21489720, No. CRIM.A.03-0033 (E.D. PA June 20, 2003) (denying diminished capacity departure for defendant, convicted of two counts of transporting child pornography in interstate commerce, on basis of an obsessive-compulsive personality disorder and a sexual addiction, even though defendant had engaged in substance abuse, which did not contribute to the offense conduct, no actual violence or serious threat of violence was involved, and defendant did not present so severe a threat that any sentence below the Guidelines would endanger the public)

PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

Cathy A. Battistelli
Chair, 1st Circuit

U.S. Probation Office
Warren Rudman Courthouse
55 Pleasant St.
Concord, NH 03301

Phone # 603-225-1428
Fax # 603-225-1482



David Wolfe, Vice Chair
Colleen Rahill-Beuler, 2nd Circuit
Joan Leiby, 3rd Circuit
Elisabeth F. Ervin, 4th Circuit
Barry C. Case, 5th Circuit
Mary Jo Arflack, 6th Circuit
Lisa Wirick, 7th Circuit
Jim P. Mitzel, 8th Circuit
Felipe A. Ortiz, 9th Circuit
Ken Ramsdell, 9th Circuit
Debra J. Marshall, 10th Circuit
Suzanne Ferreira, 11th Circuit
P. Douglas Mathis, Jr., 11th Circuit
Theresa Brown, DC Circuit
Cynthia Easley, FPPOA Ex-Officio
John Fitzgerald, OPSP Ex-Officio

August 1, 2003

The Honorable Diana E. Murphy, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Murphy:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on July 23 and 24, 2003 to discuss the directives in the PROTECT Act, issues pertaining to the Commission's "Notice of Proposed Priorities," and other areas of concern from probation officers around the country.

The primary focus of our meeting addressed the PROTECT Act directives and the Commission's request for public comment. In a general discussion, POAG noted that downward departures are appropriate when valid reasons exist and officers do not want to lose the ability to recommend departures to the courts. While Commission staff presented information regarding rates of downward departure, POAG believes that significant data found only in sentencing transcripts is missing. The group believes this information would allow staff to conduct a more detailed analysis regarding the departure rate.

One downward departure area that surprised members involved the category marked as "plea agreement." The group does not believe this is a valid reason for departure. POAG discussed whether Chapter 6 should be a guideline and not a policy statement to ensure that the departures agreed upon are factually and legally based. It was noted that the Courts were perhaps stating more specific departure findings on the record, however, since sentencing transcripts are not provided to the Commission, the reasons specified can not be determined. The group suspects that binding stipulations for drug weight or other factors were cited in the plea agreement which if accepted by the Court, would cause the Judgment in a Criminal Case to reflect a downward departure pursuant to the plea agreement. It is thought that the new proposed Statement of Reasons might help Commission staff gather more accurate departure information. The new form includes blocks to be checked for specific departures and adds a

section titled "Additional Supporting Explanation." The form should make Sentencing Commission coding more accurate. It was also noted that this downward departure category involved either the explicit or implicit approval of the Department of Justice. Therefore, while it appears this is a "judicial departure" perhaps it should be categorized as a downward departure which involves the government's participation, similar to §5K1.1.

POAG discussed the appropriateness of a standard downward departure in immigration cases. The group recognizes in districts with a high volume of immigration cases that departures are prevalent, while defendants in districts with few immigration cases will likely not be privy to these benefits, thus creating sentencing disparity. The possibility of a specific offense characteristic for defendants subject to deportation was considered but concerns were raised that not all deportation cases are for simple re-entry offenses. As many are serious drug offenses, POAG realized a specific offense characteristic would be difficult to draft. That being said, POAG recognizes that if this departure was added to Chapter 5 and addressed separately from "judicial departures," similar to §5K1.1, then the rate of other "judicial departures" would be significantly reduced as the authority for this departure would rest with the government.

Issue for Comment #1 How should subsection (a) of §5K2.0 be revised?

Once again POAG wishes to emphasize that downward departures under this guideline are appropriate and should not be more restrictive. However, we recognize the PROTECT Act mandates a reduction in downward departures. POAG believes as to §5K2.0, additional wording could be added to strengthen the application instructions of this guideline or perhaps some clarifying examples of appropriate and inappropriate departures could be included.

Issue for Comment #2 – How, if at all, should Chapter Five, Part H be revised?

POAG recommends clarifying the purpose of §5H as to whether it addresses departures or guideline sentences within the applicable range. The group requests guidance and examples as to what is outside the heartland as it relates to departures for a combination of factors involving §5H. POAG notes the specificity of the guideline instructions for Aberrant Behavior and Diminished Capacity and suggests similar language in §5H would be beneficial in reducing the number of inappropriate departures.

Issue for Comment #3 – How, if at all, should guideline provisions governing downward departures for criminal history be revised?

While commission data preliminarily indicates that the over-representation of the defendant's criminal history is a frequent basis for downward departure, there is insufficient data at the present time to determine what specific factors the courts are relying on in making these departures. POAG hypothesized several possible reasons for this event, including §4A1.2 offenses, the recency factors, as well as related cases. Simply adding up criminal history points does not necessarily provide the court with an idea of whether an individual is a violent recidivist who needs to be treated more severely than another defendant with the same number of points. For example, ten years prior to the instant offense, a

defendant is convicted of theft (for failure to return a videotape); six months later he is convicted of Operating After Suspension and receives a one year probation sentence, and within that one year period, the defendant is convicted of DWI and fined \$500. The defendant's probation for the Operating After Suspension charge is violated and he receives a sixty-day sentence. As a result, this defendant is a criminal history category of III. Since that time period, the defendant has no other countable convictions. Compare that individual with another defendant who is convicted of three separate assaults for assaulting different women over a two-year period within five years of the commission of the instant offense and receives sentences ranging from a fine to twelve months imprisonment. These individuals are both a criminal history category III but represent a different picture to the court. The court needs the flexibility to make departure considerations regarding an individual's criminal history. POAG believes the Commission should continue to pursue a detailed analysis of the reasons behind the downward departures before making any decisions in restricting these departures. In addition, POAG strongly believes the Commission needs to review Chapter 4 in its entirety. Specifically reviewing the concept of "related cases," §4A1.2 issues, recency points, revocations, and the staleness factor should be addressed.

Issue for Comment #4 --Should the Commission provide additional and/or more restrictive guidance for any downward departure authorized in Chapter Two (Offense Conduct) for specific offenses?

POAG does not think the guidelines require any more restrictive guidance, however, the group believes specific examples in those sections suggesting a downward departure could be helpful to the practitioner in applying these departures correctly.

POAG declines to comment on Question #5. The group does not believe that any of the aforementioned downward departure issues should be prohibited.

Notice of Proposed Priorities

Of the thirteen proposed priorities published by the Commission, POAG selected three issues on which the group wishes to provide comment.

Involuntary Manslaughter

POAG believes this guideline warrants change as the conduct for this type of crime can vary substantially. The guideline does not provide for any specific offense characteristics. Consideration should be given as to whether the defendant has a prior history of assaultive behavior, whether a weapon was used, or the number of victims injured in the offense.

Immigration

There was a suggestion by the group that the ambiguous language in the Immigration guidelines needs to be corrected. It appears this is a question frequently asked on the Help Line and Commission staff are aware of the problem. Due to the large number of immigration cases, POAG suggests this language be corrected.

In addition, a suggestion was also made that if a defendant agreed to waive deportation, there could be a two to four level reduction as a specific offense characteristic, which could impact the downward departure rate. However, if a defendant was eligible for the Early Disposition Program, then this specific offense characteristic should not be applied.

Review of the Limitation on the Base Offense Level

The mitigating role cap was discussed by the group and no application difficulties with applying this specific offense characteristic in the drug guideline were noted, however, POAG has an ongoing concern with the definition of mitigating role. The group believes more examples or guidance are needed in Chapter Three regarding this issue and notes that this is a circuit conflict which the group wishes the Commission to address.

Other Issues

POAG suggests that the Commission consider adding a two level reduction in the §2D1.11 guideline if an offender meets the criteria for the safety valve. Defendants who are similarly situated as defendants sentenced pursuant to §2D1.1, are not receiving the benefit of the safety valve. POAG believes this sentencing disparity should be corrected.

The group believes an index to Appendix C should be created to ease application of research regarding amendments

There was discussion by the group about 18 U.S.C. § 545 violations and whether a violation of this statutory provision should be listed in the commentary at §2D1.11.

Closing

We hope you will find our comments beneficial. Please do not hesitate to contact us if you have any questions or need clarification of any issue. We appreciate the opportunity to participate with the Commission in this process.

Respectfully,



Cathy A. Battistelli
Chair

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
JOHN W. BISSELL
CHIEF JUDGE

U.S.P.O. & COURTHOUSE
P.O. BOX 899
NEWARK, NJ 07101
(973) 645-2517

*8/7/03
Copy to Judge Murray
AND Kim Whalley
[Signature]*

July 31, 2003

Honorable William T. Moore, Jr.
United States District Court
Old Federal Building
125 Bull Street
Savannah, Georgia 31401

Re: U.S. Sentencing Commission
Request for Public Comment

Dear Judge Moore:

I am writing to you as the Chair of the Committee on Criminal Law's subcommittee on sentencing issues, as requested in Judge Sim Lake's letter of July 18, 2003. I enclose a copy of that letter, assigning numbers to his questions in order to facilitate my answers. I have chosen to make my observations "through the committee". You will note that some of my comments are rather candid (although hardly unique), to assist your subcommittee in evaluating this response. Should you choose to do so, please feel free to incorporate any of my remarks into any presentation from the Committee on Criminal Law responding to the Sentencing Commission's call for public comment.

(1.) The Commentary will have to be revised in light of the Protect Act's general thesis to neutralize Koon v. United States, 581 U.S. 82 (1996), and the enactment of a de novo standard of review for the Court of Appeals reviewing a departure decision.

(2.) None other than is necessary to make sure that the bases for downward departure do not conflict with the Protect Act.

(3.) I have a few suggestions regarding in Chapters Two, Three and Four, although there surely are many others to be considered. Conceptually, it makes inherent sense that if provisions in the Guidelines themselves permit the sentencing judge to reach a just sentencing range, he or she will not have to employ a downward departure in order to do so. Some general adjustments that might be explored are the number of criminal history points needed to fall into a particular category and adjustments in drug quantities needed to trigger certain base offense levels. Mitigating role adjustments ranging from 3-5 under § 3B1.2, rather than 2-4, could also be explored. Also consistent with the approach that modification of the Guidelines themselves to promote fair sentencing can diminish the need for Judges to resort to downward departure, I suggest an examination of Guidelines § 4A1.1(d) and (e). These provide for enhancements of 2-to-3 points based upon whether the defendant "committed the instant offense" while still under a prior sentence or within two years after release from imprisonment on a prior sentence. Of course, those prior convictions themselves are counted in calculating the defendant's criminal history under subpart (a), (b) or (c) of § 4A1.1. Accordingly, a sentencing Judge may, from time-to-time, reach a conclusion that points added under subparts (d) and/or (e) generate an overstated criminal history. If the numerical impact of those subparts could be lowered, or if they could be applied only to higher criminal history categories, that might reduce the need for downward departures due to criminal history overstatements. By way of example, perhaps those aggravating factors would be triggered only in situations where at least 4 criminal history points were accumulated under § 4A1.1(a), (b) or (c). One must remember, however, that these (and any) Guideline adjustments will have to be acceptable to Congress, and much of that depends upon the extent of congressional commitment (as a whole) to the Protect Act's assault on moderate sentencing.

(4.-6.) Because most of the factors listed in Chapter Five Part H describe circumstances "not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range," I would leave that format in place because it seems consistent with current congressional thinking. However, with that opening as a general premise, added exceptions to it (if well-defined and clearly justified) would aid sentencing judges and might get through Congress.

(7.-8.) The Commission should be encouraged to expand the provision in § 4A1.3 dealing with the situation where "a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes." A focus on the likelihood of recidivism (or lack thereof) in a given case or class of cases could be productive.

(9.-10.) As stated in response to question No. 3, to the extent that considerations heretofore used in supporting downward departures can be incorporated into the Guidelines themselves, with point values assigned to them, leading to a direct reduction of either the offense level or criminal history classification, the need to employ downward departures is reduced.

(11.) That question requires intensive study across the board before it can be answered with any authority.

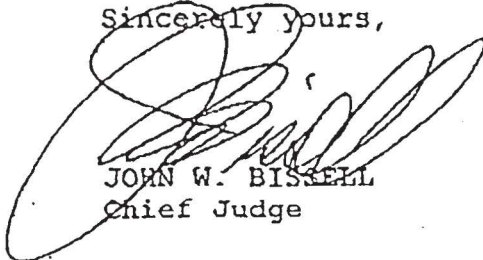
(12.) Chapter 1, Part A of the Guidelines is entitled "Introduction and General Application Principles." Subsection 4(b) of that Chapter addresses the subject of departures. The statements in that Subsection may have to be revisited in light of the focus of the Protect Act and its impact upon the continuing viability of Koon v. United States, 581 U.S. 82 (1996). The revisiting of this Subsection could result in an elaboration and clarification of the heartland/non-heartland population of cases.

(13.) If this is something other than a motion under § 5K1.1 of the Guidelines, I am not familiar with it. However, any such new downward departure should be structured in such a way that it is clearly non-exclusive of others in the instances when it is applied.

Finally, we should all maintain a sense of perspective here. We are dealing with statutory provisions, hastily enacted, that flew under the radar screen when attached to a bill with heavy support. They may not withstand the bright light of congressional debate, should it ensue, regarding the Commission's forthcoming Guideline amendments. Furthermore, most of us over time have granted very few downward departures other than those presented by a government motion under § 5K1.1. While the "Feeney amendments" are an affront to us as District Judges, trained and experienced in imposing just, appropriate sentences tailored as much as possible to a given case, their actual impact may be modest.

Thank you for your attention to my observations. I am at your disposal, should you have any further inquiries.

Sincerely yours,



JOHN W. BISSELL
Chief Judge

cc: Honorable Sim Lake, Chair
Committee on Criminal Law
Judicial Conference of the United States
9353 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, Texas 77002



COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
9535 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, Texas 77002

Honorable Dennis W. Ambrose
Honorable William M. Catao, Jr.
Honorable William F. Dawnes
Honorable Richard A. Eagles
Honorable David F. Hamilton
Honorable Henry M. Herlong, Jr.
Honorable James B. Loken
Honorable John S. Martin
Honorable A. David Muzzone
Honorable William T. Moore, Jr.
Honorable Wm. Fremming Nielsen
Honorable Emmet G. Sullivan

TELEPHONE
(713) 250-5177

FACSIMILE
(713) 250-5018

Honorable Sim Lake, Chair

July 18, 2003

MEMORANDUM TO ALL UNITED STATES JUDGES

SUBJECT: United States Sentencing Commission Request for Public Comment
(URGENT INFORMATION)

RESPONSE DUE DATE: August 1, 2003

The United States Sentencing Commission is seeking public comment in connection with the implementation of Section 401(m) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 or "PROTECT Act" (Pub. Law No. 108-21, 117 Stat. 650 (April 30, 2003)). The Act directs the Commission to review the grounds for downward departure that are authorized by the guidelines; amend the guidelines to ensure that the incidence of downward departures is "substantially reduced"; promulgate a policy statement authorizing a downward departure of not more than four levels if the government files a motion pursuant to an early disposition program; and make other conforming amendments, including a revision of Chapter I, Part A, and Policy Statement 5K2.0 of the sentencing guidelines. The request for comments can be found on the United States Sentencing Commission website at <http://www.ussc.gov>. Comments are due to the Commission by August 1, 2003.

The Criminal Law Committee encourages all judges to carefully review several specific questions that have been posed by the Commission and to forward written comments directly to the United States Sentencing Commission, One Columbus Circle, NE, Suite 2-500, Washington, DC 20002-8002. In addition, the Committee expects to submit comments to the Commission on behalf of the judiciary. The Committee would appreciate receiving copies of any comments you make to the Sentencing Commission, or if you prefer you may make your comments through the Committee. Judge William T. Moore, Jr. serves as the Committee's chair of the subcommittee on sentencing issues. Please address any comments to his attention at United States District Court, Old Federal Building, 125 Bull Street, Savannah, Georgia 31401, telephone number 912/650-4172.

United States Sentencing Commission Request for Public Comment

2

The Sentencing Commission notice poses the following questions.

(1.) How should §5K2.0 and/or the commentary to §5K2.0 be revised?

(2.) Should the Commission provide additional and/or more restrictive guidance on mitigating factors, particularly those described in other provisions of Chapter 5, Part K, that may warrant a downward departure?

(3.) Are there factors in Chapter Two (Offense Conduct), Chapter Three (Adjustments), or Chapter Four (Criminal History) to which the Commission has attached excessive weight, and if so, should the Commission change the weight attached to those factors, thereby reducing the likelihood that a departure is warranted in a particular case?

(4.) How, if at all, should Chapter Five, Part H be revised?

(5.) Should the Commission provide additional and/or more restrictive guidance on the offender characteristics described in provisions of Chapter Five, Part H, that may warrant a downward departure?

(6.) Should, for example, the Commission provide additional guidance on the circumstances under which an offender characteristic may become relevant that is ordinarily not relevant in sentencing?

(7.) How, if at all, should guideline provisions governing downward departures for criminal history be revised?

(8.) Should the Commission provide additional and/or more restrictive guidance in §4A1.3 regarding the circumstances under which the court may depart for the over-representation of the defendant's criminal history?

(9.) Should the Commission provide for a downward departure adjustment (or, in the case of criminal history, a reduction in criminal history points) in lieu of a downward departure for any factor or downward departure basis, or for a combination of factors and/or downward departure bases described above, or for any other mitigating factors the Commission should more fully take into account in the guidelines?

(10.) If so, how should such a downward adjustment or reduction be structured, and what should be the extent of the downward departure or reduction?

(11.) Should any of the downward departure bases described above be prohibited as a basis for downward departure?

United States Sentencing Commission Request for Public Comment

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(12.) Are there other specific suggestions that the Commission might consider in responding to the directive?

(13.) How should the Commission structure the downward departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney?

On behalf of the Criminal Law Committee, thank you in advance for your input on these very important issues.



Sim Lake

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA
POST OFFICE BOX 2143
WILMINGTON, NORTH CAROLINA 28402

JAMES C. FOX
SENIOR JUDGE

TELEPHONE: (910) 815-4738
FAX: (910) 815-4628

August 1, 2003

*5/21/03
Copy to Judge MURPHY
AND Jim Whitley
WJH*

Honorable William T. Moore, Jr., Chair
Subcommittee on Sentencing Issues
United States Sentencing Commission
United States District Court
Old Federal Building 125 Bull Street
Savannah, GA 31401

Re: United States Sentencing Commission Request
for Public Comment -- PROTECT Act

Dear Judge Moore:

With the encouragement of the Judicial Conference's Criminal Law Committee, and the advice and assistance of Senior United States Probation Officer (E.D.N.C.), Steven E. Horne, I wish to take this opportunity to respond to the Sentencing Commission's request for public comment in connection with the implementation of the "PROTECT Act," Pub. Law No. 108-21, 117 Stat. 650 (April 30, 2003).

As you know, the Criminal Law Committee has forwarded to all the district judges a list of questions posed by the Sentencing Commission. Please find my responses below.

Thank you for the opportunity to participate in the public comment process.

Q. How should § 5K2.0 and/or the commentary to § 5K2.0 be revised?

A. *It would be very helpful if § 5K2.0 and the Commentary thereto were amended to provide hypothetical situations that might warrant a departure thereunder.*

Q. Should the Commission provide additional and/or more restrictive guidelines on mitigating factors, particularly those described in other provisions of Chapter 5, Part K, that may warrant a downward departure?

Hon. William T. Moore
August 1, 2003
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A. Yes.

Q. Are there factors in Chapter Two (Offense Conduct), Chapter Three (Adjustments), or Chapter Four (Criminal History) to which the Commission has attached excessive weight, and if so, should the Commission change the weight attached to those factors, thereby reducing the likelihood that a departure is warranted in a particular case?

A. *Yes. The penalties for crack cocaine are disproportionate. All other base offense levels, specific offense characteristics, and Chapter Three adjustments appear to be fair.*

Q. How, if at all, should Chapter Five, Part H, be revised?

A. *Chapter Five, Part H seems adequate as written.*

Q. Should the Commission provide additional and/or more restrictive guidance on the offender characteristics described in provisions of Chapter Five, Part H, that may warrant a downward departure?

A. *Yes, it always is helpful when specific circumstances are included.*

Q. Should, for example, the Commission provide additional guidance on the circumstances under which an offender characteristic may become relevant that is ordinarily not relevant in sentencing?

A. *Yes, it always is helpful when specific circumstances are included.*

Q. How, if at all, should guideline provisions governing downward departures for criminal history be revised?

A. *The guidelines should offer more detailed suggestions as to how the court should structure the departure.*

Q. Should the Commission provide additional and/or more restrictive guidance in § 4A1.3 regarding the circumstances under which the court may depart for the over-representation of the defendant's criminal history?

A. Yes.

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page 3

Q. Should the Commission provide for a downward departure adjustment (or, in the case of criminal history, a reduction in criminal history points) in lieu of a downward departure for any factor or downward departure basis, or for a combination of factors and/or downward departure bases described above, or for any other mitigating factors the Commission should more fully take into account in the guidelines?

A. Yes.

Q. If so, how should such a downward adjustment or reduction be structured, and what should be the extent of the downward departure or reduction?

A. *A defendant should receive a two-offense level downward adjustment if he has no prior scorable convictions.*

Q. Should any of the downward departure bases described above be prohibited as a basis for downward departure?

A. No.

Q. Are there specific suggestions that the Commission might consider in responding to the directive?

A. *I am not familiar with the Commission's criteria for responding to Congress's directives.*

Q. How should the Commission structure the downward departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney?

A. *I am not familiar enough with the program to offer suggestions.*

Thank you again for the opportunity to comment.

Sincerely,

James C. Fox

James C. Fox
Senior United States District Judge

*w/permission by
ejj*

JCF/ejj

cc: Hon. Sim Lake, Chair
Committee on Criminal Law, Judicial Conf. of the U.S.

[37]

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

COPY

MAX ROSENN
SENIOR CIRCUIT JUDGE

MAX ROSENN UNITED STATES COURTHOUSE
157 SOUTH MAIN STREET, ROOM 235
WILKES BARRE, PENNSYLVANIA 18701

July 31, 2003

Honorable Sim Lake, Chair
Committee On Criminal Law
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

8/7/03
COPY TO JUDGE ALBERT
AND LIAISON W/PROSEC
W/T

Dear Judge Lake,

I am writing in response to your July 18, 2003 letter regarding implementation of § 401(m) of the PROTECT Act, Pub. L. 108-21. Thank you very much for soliciting judicial input.

The protection of children from exploitation and mistreatment is an important goal of law enforcement and the criminal justice system. I heartily agree that efforts must be undertaken to deter and punish offenders. However, I am concerned that § 401(m) may go about this the wrong way. For a long time, I have believed that we should increase rather than decrease the discretion of judges to sentence according to the individual facts before them. The PROTECT Act, that has the explicit purpose of "ensur[ing] that the incidence of downward departures are substantially reduced" implies that judges are incapable of competently evaluating mitigating factors as well as exacerbating factors in determining the appropriate sentence. Although I am an appellate judge, my experience in reviewing trial judge sentencing has been to the contrary. In my view, § 401(m), as drafted, runs the serious risk of undermining judicial autonomy and encouraging one-size-fits-all sentencing. A case-by-case approach to sentencing would be more effective in protecting children and in upholding the rights of criminal defendants and society as a whole.

Sincerely,

MAX ROSENN

MR:vkt

✓ cc: Hon. William T. Moore, Jr.