

COMMISSION ACTIONS TO REDUCE THE INCIDENCE OF DOWNWARD DEPARTURES

A. RECENT COMMISSION ACTIONS PRIOR TO ENACTMENT OF THE PROTECT ACT

The Commission has been aware of and concerned about the increasing incidence of downward departures. Prior to enactment of the PROTECT Act, the Commission took several actions to address specific areas of concern.

The Commission, as reconstituted in November 1999, promulgated two amendments during its initial amendment cycle aimed at reducing the incidence of certain types of departures. The Commission created a new policy statement, §5K2.19 (Post-Sentencing Rehabilitative Efforts), that prohibits departures based on a defendant's post-sentencing rehabilitative efforts, even if exceptional, upon resentencing. This amendment, effective November 1, 2000, was prompted by a circuit conflict regarding whether the sentencing court may consider an offender's post-offense rehabilitative efforts while in prison or on probation as a basis for downward departure at resentencing following an appeal. The Commission determined that departures based on such post-sentencing rehabilitative measures are inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person, and inequitably benefit only those offenders who gain the opportunity to be resentenced *de novo*.¹⁶³ The Commission strictly prohibited departures on this basis.

Also during that initial amendment cycle, the Commission addressed another specific departure of concern, aberrant behavior. The Commission resolved a circuit conflict regarding when a departure based on aberrant behavior may be warranted by creating a new policy statement, §5K2.20 (Aberrant Behavior). The Commission rejected the "totality of circumstances approach" endorsed by some circuits at the time, concluding that it was overly broad and vague, and instead structured the new policy statement to restrict consideration of aberrant behavior to cases in which the offense (1) was committed without significant planning; (2) was of limited duration; and (3) represented a marked deviation by the defendant from an otherwise law-abiding life.¹⁶⁴

Furthermore, the Commission categorically prohibited aberrant behavior departures for several types of offenses and offenders. Specifically, an aberrant behavior departure was forbidden if (1) the offense involved serious bodily injury or death; (2) the defendant discharged

¹⁶³ See USSG App. C, amend. 602.

¹⁶⁴ See *id.* at amend. 603.

a firearm or otherwise used a firearm or a dangerous weapon; (3) the offense of conviction was a serious drug trafficking offense; (4) the defendant had more than one criminal history point, as determined under *Guidelines Manual* Chapter Four (Criminal History and Criminal Livelihood); or (5) the defendant had a prior federal or state felony conviction, regardless of whether the conviction is countable under Chapter Four.¹⁶⁵

In 2001, the Commission took action to reduce departures in another category of concern, illegal reentry offenses. Judges, probation officers, and defense attorneys, particularly in judicial districts along the southwest border, had raised concerns that the guideline for illegal reentry offenses, §2L1.2 (Unlawfully Entering or Remaining in the United States), sometimes resulted in disproportionate penalties because of a 16 level enhancement that was triggered by any prior conviction for an aggravated felony.

The Commission was concerned that sentencing courts appeared to be addressing this problem on an *ad hoc* basis by increased use of downward departures in illegal reentry cases, often pursuant to a departure provision in an application note accompanying the guideline.¹⁶⁶ In fiscal year 2001, 40.6 percent (2,371 cases) sentenced under section 2L1.2 received a downward departure. The Commission also was aware of congressional concerns regarding the departure rate raised at a recent Senate oversight hearing.¹⁶⁷

The Commission acted to reduce departures in illegal reentry cases by making comprehensive revisions to section 2L1.2, particularly by providing a more graduated enhancement for prior convictions that varies depending on the seriousness of the prior aggravated felony and the dangerousness of the defendant. Equally important, the Commission deleted the application note that had invited downward departures based on the seriousness of the prior aggravated felony.¹⁶⁸ Significantly, one percent of all cases receiving a nonsubstantial assistance departure in fiscal year 2001 cited this application note on the Statement of Reasons, but the note should not be cited in subsequent years. The revised guideline became effective November 1, 2001, and data are not yet available to determine the extent to which the incidence of departure may have been reduced for illegal reentry offenses.

B. IMPLEMENTATION OF THE PROTECT ACT WITHIN 180 DAYS OF ENACTMENT

On October 8, 2003, the Commission unanimously approved an emergency amendment implementing the congressional directives in section 401(m) of the PROTECT Act. The

¹⁶⁵ *Id.*

¹⁶⁶ *See id.* at amend. 632.

¹⁶⁷ *See infra* Appendix B, at pp. B-22 to B-25 (discussing 2000 Senate hearing and subsequent action.)

¹⁶⁸ *See* USSC, App. C, amend. 602

amendment, effective October 27, 2003,¹⁶⁹ is based on the legislative history, empirical analysis, public comment, hearing testimony, case law, and literature that the Commission reviewed and analyzed in preparing this report. 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 established by the Department of Justice, to reduce substantially the incidence of downward departures.

With this emergency amendment, the Commission continues its ongoing work in the area of departures. The Commission previously implemented congressional amendments to the sentencing guidelines that restrict the availability of departures for defendants convicted of certain child crimes and sex offenses. As directed in the PROTECT Act, the Commission distributed those amendments to the federal criminal justice community on April 30, 2003.

1. General Features of the Emergency Amendment

The emergency amendment prohibits several factors as grounds for departure, restricts the availability of certain departures, clarifies when certain departures are appropriate, and limits the extent of departure permissible for certain offenders. The amendment also generally restructures departure provisions throughout the *Guidelines Manual* 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.¹⁷⁰

To emphasize the critical importance of specific written reasons for departure decisions as contemplated by the PROTECT Act, the Commission added specific documentation requirements in 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). The Commission determined that 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 downward departures, and improve the Commission's ability to monitor departure decisions and refine the guidelines as necessary. The need for greater specificity and standardization in sentencing documentation was underscored by data limitations encountered in preparing this report, which are discussed in Chapter 2.

2. Revisions to §5K2.0 (Grounds for Departure)

¹⁶⁹ See *infra* Appendix A.

¹⁷⁰ See 18 U.S.C. §§ 3553 (Imposition of a sentence) and 3742(e) (Review of a sentence) (West Supp. 2003).

The Commission made several significant modifications to the policy statement that provides the general grounds for departure, §5K2.0 (Grounds for Departure). These modifications limit and, in certain circumstances, prohibit downward departures. The Commission generally restructured section 5K2.0 to clarify the standards governing departures in order to facilitate and emphasize the analysis required of the court. The amendment does so by: (1) integrating throughout the policy statement the statutory language of 18 U.S.C. §§ 3553(b) and 3742(e), as amended by the PROTECT Act, which provide the statutory criteria for sentencing outside the guideline range; (2) adopting where provided a single qualitative description of the type of case in which a departure may be warranted, the “exceptional case;” (3) restating in application notes and background commentary to section 5K2.0 longstanding commentary in the *Guidelines Manual*, which was reaffirmed by the PROTECT Act, that the frequency of departures under section 5K2.0 generally should be rare, and that certain types of departures under section 5K2.0 should be extremely rare.

Section 5K2.0(a) now includes the general governing principle that, in cases other than child crimes and sexual offenses, the sentencing court may depart if 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 pursuant to 18 U.S.C. § 3553(b)(1) and that should result in a sentence different than the applicable guideline range in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2).

The Commission amended section 5K2.0 to prohibit several grounds for departure, to the departure prohibitions in section 5K2.0 for child crimes and sexual offenses enacted by the PROTECT Act, and other prohibitions elsewhere in the *Guidelines Manual*. A new subsection, section 5K2.0(d), clearly lists the forbidden departure grounds. This list of forbidden grounds includes longstanding prohibitions as well as new prohibitions added by the amendment, specifically: (1) the defendant’s acceptance of responsibility; (2) the defendant’s aggravating or mitigating role in the offense; (3) the defendant’s decision, in itself, to plead guilty to the offense or to enter into a plea agreement with respect to the offense; and (4) the defendant’s fulfillment of restitution only to the extent required by law, including the guidelines. The Commission determined that these circumstances are never appropriate grounds for departure.

The Commission also revised section 5K2.0 to restrict the availability of departures based on multiple circumstances, often referred to as a “combination of factors.” The Commission determined that heightened criteria are appropriate for cases in which no single offender characteristic or other circumstance independently is sufficient to provide a basis for departure. Under new section 5K2.0(c), a departure based on multiple circumstances can be based only on offender characteristics or other circumstances that are identified in the guidelines as permissible grounds for departure. Circumstances unmentioned in the guidelines, therefore, can no longer be used for a departure based on multiple circumstances pursuant to section 5K2.0(c). In addition, in order to support a departure based on a combination of circumstances, each offender characteristic or other circumstance must be present individually to a substantial degree and must make the case exceptional when considered together. The accompanying

application note states that departures under section 5K2.0(c) based on a combination of not ordinarily relevant circumstances should occur extremely rarely and only in exceptional cases.

The Commission also clarified when a departure may be based on a circumstance present to a degree not adequately taken into consideration. New section 5K2.0(a)(3) provides that a departure may be warranted in an exceptional case even though the circumstance that forms the basis for the departure is accounted for in the guidelines, but only if the court determines that such circumstance is present to a degree substantially different than that which ordinarily is involved in that kind of offense.

The Commission modified section 5K2.0 in two additional ways to underscore the need for courts to state reasons for departure with specificity. First, new section 5K2.0(e) provides that if the court departs, it shall state, pursuant to 18 U.S.C. § 3553(c) as amended by the PROTECT Act, its specific reasons for departure. Second, a new application note provides that in a case in which the court departs based on reasons contained in a plea agreement, the court must state the underlying substantive reasons for departure with specificity in the written judgment and commitment order.

3. Revisions to Chapter Five, Part H (Specific Offense Characteristics)

The Commission also limited several departure provisions in Chapter Five, Part H (Specific Offender Characteristics).

a. §5H1.4 (Gambling Addiction)

First, the Commission added a prohibition to §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction) against departures based on addiction to gambling. The Commission determined that a departure based on addiction to gambling is never warranted.

b. §5H1.6 (Family Ties and Responsibilities)

The Commission limited the availability of departures based on family ties and responsibilities by requiring the court to conduct certain analyses under §5H1.6 (Family Ties and Responsibilities). In determining whether a departure is warranted under this policy statement, a new application note instructs the court to consider the seriousness of the offense; the involvement in the offense, if any, of members of the defendant's family; and the danger, if any, to members of the defendant's immediate family as a result of the offense.

In addition to considering those factors, the Commission further restricted family ties departures based on loss of caretaking or financial support. In order for a departure based on loss of caretaking or financial support to be warranted, the court must find the presence of all four of the following circumstances: (1) the defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential

caretaking or essential financial support to the defendant's family; (2) such loss exceeds the harm ordinarily incident to incarceration; (3) there are no effective remedial or ameliorative programs reasonably available, making the defendant's caretaking or financial support irreplaceable to the defendant's family, and (4) the departure effectively will address the loss of caretaking or financial support. The Commission determined that these heightened criteria are appropriate and necessary in order to distinguish hardship or suffering that is ordinarily incident to incarceration from that which is exceptional.

The Commission also deleted community ties from section 5H1.6.

4. Revisions to Chapter Five, Part K (Departures)

The Commission also limited several departure provisions in Chapter Five, Part K (Departures).

a. §5K2.10 (Victim's Conduct)

First, the Commission added a factor to §5K2.10 (Victim's Conduct) that the court should consider when determining whether a departure is warranted based on victim's conduct. In addition to five previously existing factors, the court now should consider the proportionality and reasonableness of the defendant's response to the victim's provocation.

b. §5K2.12 (Coercion and Duress)

The Commission added a factor to §5K2.12 (Coercion and Duress), providing that the extent of a departure based on coercion and duress ordinarily should depend on the proportionality of the defendant's actions to the seriousness of the coercion, blackmail, or duress involved, in addition to several other factors previously listed in the policy statement.

c. §5K2.13 (Diminished Capacity)

The Commission limited the availability of departures pursuant to §5K2.13 (Diminished Capacity) by adding a causation element. To receive a departure for diminished capacity, the significantly reduced mental capacity now must have contributed substantially to the commission of the offense. The Commission similarly limited the extent of departure by stating that the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

d. §5K2.20 (Aberrant Behavior)

The Commission significantly restructured §5K2.20 (Aberrant Behavior) to make further restrictions on the availability of departures based on aberrant behavior. As discussed above, the Commission promulgated section 5K2.20 effective November 1, 2000, in order to resolve a longstanding circuit conflict and more appropriately define when a departure based on aberrant behavior may be warranted. A departure based on aberrant behavior may be warranted only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represented a marked deviation by the defendant from an otherwise law-abiding life.

The amendment provided greater emphasis to these strict requirements by moving them from an application note to the body of the policy statement. The Commission also provided greater guidance in applying these requirements with a new application note that makes clear that repetitious or significant planned behavior does not meet the requirements for receiving a departure under section 5K2.20. A defendant involved in a fraud scheme, for example, generally would be prohibited from receiving a departure pursuant to section 5K2.20 because such a scheme usually involves repetitive acts, rather than a single occurrence or single criminal transaction, as well as significant planning.

The Commission further restricted the availability of departures based on aberrant behavior by adding several strict prohibitions to the list that has existed in section 5K2.20 since its initial promulgation. As described above, prior to this amendment, section 5K2.20 prohibited the court from departing based on aberrant behavior if (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point; or (5) the defendant has a prior federal or state felony conviction.

The amendment gave greater prominence to those previously existing prohibitions and expanded them in significant ways. The amendment eliminated defendants who have any significant prior criminal behavior from consideration for a departure pursuant to section 5K2.20, regardless of whether such behavior is countable under Chapter Four, and even if such behavior is not a state or federal felony. The amendment also expanded the class of drug trafficking defendants prohibited from consideration for a departure pursuant to section 5K2.20 by expanding the definition of “serious drug trafficking offense.” Specifically, the amendment expanded the definition of “serious drug trafficking offense” in the accompanying application note to include any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that provides a mandatory minimum term of imprisonment of five years or greater, regardless of whether the defendant meets the criteria of §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases). Prior to this amendment, only drug trafficking defendants who were subject to such mandatory minimum penalties and who did not meet the criteria set forth in section 5C1.2 were precluded categorically from consideration for a departure under section 5K2.20.

5. Revisions to Chapter Four (Criminal History)

The Commission substantially restructured §4A1.3 (Departures Based on Inadequacy of Criminal History Category) to set forth more clearly the standards governing departures based on criminal history, to prohibit and limit the extent of departures based on criminal history for certain offenders with significant criminal history, and to require written specification of the basis for a departure based on criminal history.

Section 4A1.3(a) provides that an upward departure may be warranted if reliable information indicates that the defendant's criminal history category substantially underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes. Section 4A1.3(a) more clearly states previously existing guidance regarding determination of the extent of an upward departure based on criminal history. Similarly, section 4A1.3(b) provides that a downward departure may be warranted if reliable information indicates that the defendant's criminal history category substantially overrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

The Commission added several prohibitions and limitations on the availability of downward departures based on criminal history. Downward departures based on criminal history are now prohibited if the defendant is an armed career criminal within the meaning of §4B1.3 (Armed Career Criminal) or a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors). The Commission determined that such offenders should never receive a criminal history departure.

Section 4A1.3(b) reiterates the longstanding prohibition against a departure below the lower limit of the applicable guideline range for criminal history Category I.

Section 4A1.3(b) also added certain limitations on the extent of departure available under this provision. Specifically, a downward departure pursuant to this section for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

In addition, the amendment provides that a defendant whose criminal history category is Category I after receipt of a downward departure under section 4A1.3(b) does not meet the criterion of subsection (a)(1) of section 5C1.2 if, before receipt of the departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category). Thus, a departure to Category I cannot qualify an otherwise ineligible defendant for relief from an applicable mandatory minimum sentence under section 5C1.2.

The Commission added a new subsection, section 4A1.3(c), that requires the court, in departing based on criminal history, to state in writing the specific reasons why the applicable criminal history category underrepresents or overrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes. This specificity

requirement is consistent with the PROTECT Act and is intended both to facilitate the necessary departure analysis and to improve the Commission's ability to refine the criminal history guidelines.

6. Revisions to Chapter Six (Sentencing Procedures and Plea Agreements)

The Commission revised §6B1.2 (Standards for Acceptance of Plea Agreements) to require greater specificity in the sentencing documentation in a case involving a departure either recommended or agreed to in a Rule 11(c)(1)(B) or Rule 11(c)(1)(C) plea agreement. Specifically, if the court accepts such a plea agreement, and the recommended or agreed to sentence departs from the applicable guideline range for justifiable reasons, the court now is required to provide specific written reasons in the Statement of Reasons or judgment and commitment order. This specificity requirement also is consistent with the PROTECT Act and is intended to facilitate the necessary statutory and guideline departure analysis, as well as to improve the Commission's ability to understand the underlying reasons for departures in cases involving plea agreements.

7. Revisions to Chapter One (Introduction and General Application Principles)

The Commission created a new guideline, §1A1.1 (Authority), that clearly sets forth the Commission's authority to promulgate guidelines, policy statements, and commentary. The amendment moved *in toto* Chapter One, Part A, as in effect on November 1, 1987, to the commentary as a historical note. Section 401(m)(2) of the PROTECT Act directed the Commission to make conforming amendments to Part A, paragraph 4(b) of the introduction. Chapter One, Part A was an introduction to the *Guidelines Manual* that explained a number of policy decisions made by the Commission when promulgating the initial set of guidelines. This introduction was amended occasionally between 1987 and 2003. The Commission determined that the introduction should be returned to its original form and placed in a historical note in order to preserve its historical context without outdated commentary. Relevant portions regarding departures were incorporated into the background commentary to section 5K2.0.

8. Creation of §5K3.1 (Early Disposition Programs)

The Commission implemented the directive at section 401(m)(2)(B) of the PROTECT Act regarding early disposition programs by adding a new policy statement at §5K3.1 (Early Disposition Programs). The provision restates the language contained in the directive and 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 that are discussed in Chapter 4, specifically the potential for unwarranted sentencing disparity based on geography.

As more fully discussed in Chapter 4, the Commission cannot determine the full impact

of fast track programs on the departure rate because fast track departures are documented in various ways by the judicial districts that have such programs. Based on information received from the Department of Justice, hearing testimony, public comment, and sentencing data, the Commission believes the impact of these programs on the departure rate is significant.

The Commission estimates that the government initiated approximately 40 percent of all nonsubstantial assistance downward departures in fiscal year 2001. The Commission is unable to isolate which government initiated departures were pursuant to fast track programs, however, because sentencing courts do not report this information in a uniform manner. When government initiated departures as a whole are excluded, the downward departure rate is 10.9 percent, significantly lower than the overall reported downward departure rate of 18.1 percent.¹⁷¹

An alternative method to estimate the impact of fast track programs is to exclude from the departure analysis the southwest border districts, many of which have implemented fast track programs to cope with increased caseloads of immigration and immigration related offenses. In fiscal year 2001, the southwest border districts had a combined departure rate of 38.2 percent. In contrast, the departure rate for the rest of the nation was 10.4 percent, significantly lower than the overall departure rate of 18.1 percent. Therefore, circumstances unique to the southwest border districts appear to be skewing the overall national departure rate to some degree.

C. COMMISSION ACTIONS TO REDUCE INCIDENCE OF DEPARTURES BEYOND 180 DAY TIME FRAME OF THE PROTECT ACT

The Commission worked diligently to implement the directive within the time frame prescribed by the PROTECT Act, but its efforts in the area of departures are ongoing in nature.

The Commission is continuing its work on several specific areas that affect the incidence of departures. In particular, possible refinements to the criminal history calculations may be made to take into account data that is now becoming available from the Commission's multi-year comprehensive recidivism study. Refinements to the criminal history calculations could further reduce criminal history departures and eliminate aberrant behavior departures. The Commission has furthered this process by voting to publish an issue for comment in the *Federal Register* on this point.

The Commission also has identified addressing immigration offenses further as a priority for the current amendment cycle.¹⁷² Immigration offenses account for a substantial proportion (33.3%) of all downward departure cases, and data regarding the impact of the Commission's

¹⁷¹ See *supra* ch. 4, fig. 14, at p. 55.

¹⁷² Sentencing Guidelines for the United States Courts, 68 Fed. Reg. 52264–65 (Sep. 2, 2003).

illegal reentry amendment on the departure rate for such offenses will be available soon. Additional refinements to the guidelines for immigration offenses may reduce further the incidence of departures.

Related to immigration, the Commission intends to monitor closely the implementation and operation of fast track programs and the new policy statement providing departures for such programs. As discussed in Chapter 4, the Commission is concerned that fast track programs and the new policy statement may cause increased sentencing disparity. In addition, sentencing courts in judicial districts without fast track programs may be pressured to provide similar sentencing outcomes for similarly-situated defendants by employing other methods such as downward departures, which would undermine the PROTECT Act's goal of reducing the incidence of departures.

In addition, the Commission intends to study whether collateral consequences should be prohibited as grounds for departure. Such collateral consequences could include such things as inmate classification and facility designation decisions, policies crediting for previous time served and satisfactory behavior, correctional employment and other program opportunities or policies, furlough and work release policies, post-release incarceration policies, and similar factors relating to the place and manner in which a sentence is to be served and the defendant's eligibility for release thereafter, should be prohibited grounds for departure.

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.

In sum, the Commission has taken decisive and significant action to reduce the incidence of departures, but this is an ongoing process that will continue beyond the 180 day time frame established in the PROTECT Act. The Commission has identified several specific areas on which it will continue to work that may further impact the incidence of departures and advance the goals of the Sentencing Reform Act.