

Federal Bar Council

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President

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United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs-Public Comment

Re: Comments on Implementing Section 401(m) of the PROTECT Act

To Whom This May Concern:

This letter is submitted in response to the request for comment on the implementation of Section 401(m) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ("PROTECT Act").

Introduction

The Federal Bar Council is a not-for-profit organization of over 2,000 lawyers and federal judges who practice and administer the law in the United States courts for the Second Circuit. Formed in 1932, the Council includes, as members, both prosecutors and criminal defense attorneys as well as other distinguished members of the bench and bar. We welcome the opportunity to submit comments on the United States Sentencing Commission's responsibility for implementing the Congressional directive to reform the existing permissible grounds for downward departures from the Sentencing Guidelines.

As a general matter, we believe that it is essential that any effort to reduce the incidence of downward departures not undermine the critical role that individualized circumstances play in fashioning appropriate sentences for criminal defendants. We believe that there are several ways in which the Commission can provide additional guidance to courts and practitioners that will eliminate inappropriate departures but preserve the panoply of departure grounds for cases in which they are truly warranted.

Specifically, we wish to address two particular issues identified in the Commission's request for comment: potential revisions to Section 5K2.0, and potential revisions

to Chapter 5, Part H -- two of the principal sources of downward departure authority. We address each of these in turn.

(1) How should subsection (a) of § 5K2.0 (Grounds for Departure) and/or the commentary to § 5K2.0 (and/or Part A of Chapter One) be revised?

Section 5K2.0 reflects the congressional mandate (expressed in 18 U.S.C. § 3553(b)) that federal judges applying the guidelines retain the ability to impose individualized sentences by departing downward in cases presenting a mitigating factor not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. Subsection (a) of § 5K2.0 correctly notes that the range of possible circumstances warranting a downward departure cannot be comprehensively listed in advance. Thus, while the Commission has attempted to anticipate and provide guidance on a number of possible departure factors (in Parts H and K of Chapter Five), § 5K2.0 makes clear that courts have authority to depart in atypical cases that fall outside the "heartland" of cases considered by the Commission. At the same time, the Commission (in Chapter One, Part A, Paragraph 4(b)) has stated that it believes the guidelines have been formulated in such a manner that courts will not need to depart very often. The Commission has further stated (again in Chapter One, Part A, Paragraph 4(b)) that departures on grounds not specifically discussed in Part K of Chapter 5 -- i.e., those authorized by the general grant of authority in § 5K2.0 -- or departures outside suggested levels will be "highly infrequent."

These precepts from the existing guidelines, which together make clear that departures should be granted infrequently and only when necessary to deal appropriately with a case presenting circumstances not adequately accounted for in the guidelines, are consistent with congressional sentencing statutes, including the PROTECT Act. Accordingly, substantial reform of Section 5K2.0 is unnecessary and, to the extent it would hinder courts' ability to fashion appropriately individualized sentences, undesirable. The Commission might, however, consider importing into the commentary to § 5K2.0 the above-referenced language from Part A of Chapter One, which makes clear that departures based on factors not discussed in the guidelines are envisioned to be "highly infrequent." Such an amendment would further emphasize the Commission's view on this point and place a reminder of the limited nature of the departure power in the same place where that power is granted. We respectfully submit that any further modification of § 5K2.0 be considered only after the Commission has reviewed empirical data about the factual bases of departures granted pursuant to § 5K2.0 to determine whether there exists any incidence of particular departures that warrant targeted attention, rather than a wholesale restriction of § 5K2.0.

There is likewise no need to amend the commentary to § 5K2.0 to address the case of a departure due to the presence of a combination of factors that the Commission has stated are individually not sufficient to warrant a departure. The commentary appropriately notes the possibility that such cases will, in fact, exist, while also recognizing that they will be "extremely rare." Courts are, thereby, placed on notice to be particularly careful in granting such combination-of-factors departures. There is, therefore, no need to instruct courts not to grant combination departures at all -- which would run counter to the mandate that departures be

granted in unusual cases outside the heartland covered by the guidelines. In short, we respectfully suggest that no further restriction of this departure authority is warranted.

We also urge the Commission to examine carefully the types of cases in which downward departures are most frequently granted. To the extent that departure decisions are rendered that do not fully comport with the standards set forth in the guidelines, this may well be the result of well-meaning efforts to ameliorate the harshness of guideline sentences in particular types of cases - for example, fraud cases involving large amounts of actual or intended loss; narcotics cases involving cocaine base, or certain immigration cases. Further refinements to the base and adjusted offense levels for such offenses would likely reduce the incidence of downward departures.

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

Congress has directed that the Sentencing Commission recognize "the general inappropriateness of considering the defendant's education, vocational skills, employment record, family ties and responsibilities, and community ties in" fashioning a just sentence. U.S.S.G. Ch. 5, Pt. H, Introductory Commentary; see 28 U.S.C. § 994(e). Originally, the guidelines created 10 separate offender characteristic provisions, all but three of which (role in the offense, criminal history and criminal livelihood, §§ 5H1.7-5H1.9) were deemed to be ordinarily not relevant to the decision whether to downwardly depart. Since then, two additional groups of offender characteristics have been added: § 5H1.11, dealing with military, civic, charitable or other public service activities, employment-related contributions, and similar good works; and § 5H1.12, covering lack of guidance as a youth and similar circumstances. Thus, there has already been, overall, considerable restrictive guidance on the use of these offender characteristics in downward departures.

Nevertheless, a review of the individual sections within Part H reflects that, in many instances, these provisions contain little more than a bare-bones recitation of the disfavored offender characteristic, without the benefit of much clarifying commentary and illustration. Section 5H1.5 (employment record), for example, indicates only that an offender's employment record is not usually relevant for departure purposes, but may be relevant as to the conditions of probation or supervised release. This illustration sheds no light on when employment history properly may be the basis of a downward departure. Compare United States v. Rutana, 932 F.2d 1155, 1158 (6th Cir. 1991) (downward departure improper in Clean Water Act case where effect of defendant's imprisonment would be merely that people he employed would be out of work) with United States v. Milikowsky, 65 F.3d 4, 8 (2d Cir. 1995) (downward departure proper in Sherman Act antitrust case where company could be forced into bankruptcy, with consequent loss of jobs, if defendant was imprisoned and unavailable to run the company). If the basis for placing little weight on employment history is that most adults work and many have impressive employment histories, the Commission might consider adding a sentence setting out a standard, such as specifying that an employment record may not be the basis of a downward departure if it does not distinguish the defendant from other workers in a highly distinctive and unusual way. An addition of this sort will provide added guidance on when not to depart while preserving the ability to depart in appropriate cases. See, e.g., United States v. Big Crow, 898 F.2d 1326, 1331

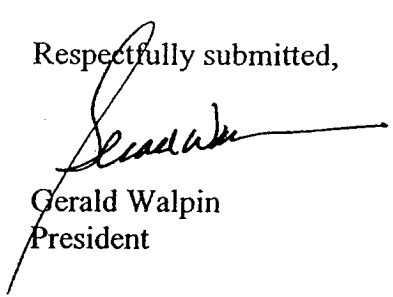
(8th Cir. 1990) (defendant's excellent employment record against backdrop of "adverse environment" of Indian reservation justified downward departure). Other provisions that currently provide no specific guidance are § 5H1.6 (family ties and responsibilities and community ties) and § 5H1.11 (military, civic, charitable or public service; employment-related contributions, and record of prior good works).

Other provisions in the guidelines provide a degree of specificity that may be usefully employed in giving additional guidance on 5H departures. For example, Section 3C1.1 (obstructing or impeding the administration of justice) contains 14 separately-lettered examples of situations in which the obstruction enhancement is either appropriate (such as threatening a witness, escaping from custody or providing materially false information that goes into a presentence report) or inappropriate (such as resisting arrest or making unsworn false statements to law enforcement officers). These examples, while understood to be "a non-exhaustive list," provide a sensible framework for judges to impose (or not impose) an adjustment under this section. Such a framework -- with examples of both appropriate and inappropriate departures -- would be equally valuable in delineating when downward departures under Sections 5H1.5, .6 and .11 are (and are not) warranted.

Conclusion

We respectfully request that the Commission take the foregoing comments into consideration in formulating measures to reduce the incidence of downward departures while preserving the judicial discretion and individualized consideration necessary for a fair criminal sentencing system.

Respectfully submitted,



Gerald Walpin
President