

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
500 CAMP STREET, ROOM C-556
NEW ORLEANS, LA 70130

CHAMBERS OF
HELEN G. BERRIGAN
CHIEF JUDGE

(504) 589-7515

Memorandum

To: United States Sentencing Commission

From: Chief Judge Helen G. Berrigan
U.S. District Court, Eastern District/Louisiana

Date: July 30, 2003

Subject: Comment regarding PROTECT Act

This memo is written on behalf of myself, not on behalf of my Court or any other judge.

As a prelude comment, I do not think the Sentencing Guidelines themselves need any alteration with regard to downward departures. In my own experience, virtually all the downward departures are initiated by the prosecution for 5K1.1 cooperation and are case-specific. Our judges, myself included, also frequently sit along the U.S./Mexican border where substantial reductions are offered defendants to plead guilty in order to process what is an overwhelmingly heavy criminal docket. If downward departures are to be "substantially reduced," then it is the 5K1.1 departures initiated by the government and the "fast track" departures along the U.S./Mexican border, also initiated by the government, that would have to be reduced.

Having said that, I do think the guidelines need some internal changes for downward adjustments within the guideline range, which are incorporated below.

These are my comments regarding the specific questions:

1. 5K2.0 Grounds for departure and commentary: I recommend no change other than that the Koon case has presumably been

overruled.

2. Chapter Five, Part H: To the extent they are not statutorily required, I think some of the offender characteristics listed as ordinarily not relevant should be legitimate grounds for a lower level adjustment within the guidelines or a downward departure. "Youth" for example. A younger person, not surprisingly, is less mature than an older one and hence arguably less able to make sound judgments, particularly when combined with poverty, and the temptation of easily making a "quick buck" through taking part in a drug deal. Borderline mental retardation and learning disabilities likewise impact both a person's opportunities and their judgment. We're sending legions of young people to prison in lieu of dealing with the adverse family, socio-economic, educational and racial circumstances in which they were raised. Downward adjustments would at least allow us to consider them in terms of sentence length.

With respect to the characteristics themselves, it would be helpful if there were some commentary beneath them to give specific examples of when the Commission would consider the fact not relevant and when they would consider it relevant. I have found the commentary very helpful in other sections of the guidelines to flesh out the details of the factors.

3. Departures based on criminal history: While I generally don't quarrel with the offense severity ratings (with some glaring exceptions, i.e. crack cocaine) I do have objections to aspects of the criminal history calculations. For example, relatively minor prior transgressions are counted. Section 4A1.1 provides for 2 points for imprisonments exceeding sixty days. As a practical matter, many offenders may be arrested on relatively insignificant offenses, misdemeanors or felonies, and remain in custody unable to make bond for more than 60 days prior to having a trial date and then "plead out" to "time served" just to be done with the matter. Misdemeanors and felonies for which imprisonment of 6 months or less is served should be counted as one point, at most. I also think the added two points for someone who is on probation, parole, etc. is unnecessary. As a practical matter, the person's probation/parole will be revoked and he will have to serve that time, usually consecutively. While I don't downward depart on that basis, I do sometimes run the new sentence concurrently to offset the added guideline range caused by the 2 point enhancement of the criminal history score. At a minimum, only

one point should be added to this status. As a practical matter, virtually everyone who commits a new offense on probation or parole does it within 2 years of release so you pick up the 1 or 2 additional points on that basis. These additional points become more disproportionate when the prior offenses are misdemeanors or relatively minor felonies. I have had the sense in individual cases that the criminal history score has been "piled up" by the above situations in a manner that over-represents the seriousness of the criminal history. I think if the guidelines for criminal history calculations were made more reasonable, then the need for downward departures on this basis would be alleviated.

4. Offense Conduct departures: I have a strong objection to statutory mandatory minimum sentencing in general and to the extent the guidelines incorporate those mandatory minimums as their threshold for sentencing, I also object to the offense conduct calculation. This exists primarily in the drug offense area, to a lesser degree with regard to weapons.

5. Downward adjustments in lieu of downward departures: I think this is a bulls-eye solution. 5K1.1 downward departures aside, my guess is that most downward departures are based on the perception that the guideline calculation result is simply too harsh under the individual circumstances. Whether it is because the offense severity rating is too high (crack cocaine being the prime offender) or the criminal history calculated as disproportionately severe or because the offender characteristics under Chapter Five, Part H, are too miserly, the result is the same. If the guidelines would modify those areas to authorize downward adjustments, then the pressure to downward depart would be alleviated.

6. Should any of the above downward departures be eliminated. My short answer is "no." My longer answer is that I think 5K1.1 departures need to be reviewed, particularly with respect to those offenders who are minor players, tell all they know, and are denied a 5K1.1 because what they know isn't of significant use to the government. I have had the not infrequent situation where a more culpable offender has a lower guideline range, as a result of a 5K1.1., than his co-defendants who are lesser players. The difference is because the more culpable offender also had more incriminating information about

others than did the less culpable offender. Since we are trying to impose a sentence that relates to culpability and acceptance of responsibility, the lesser offender should be a candidate as well.

7. 4-Point reduction for early disposition. I assume this relates to the so-called border courts. While I have served over there, I would defer to the full-time judges there on how that could be structure.

Thank you very much for asking our input.

Sincerely,

A handwritten signature in black ink, appearing to read 'Helen G. Berrigan', with a stylized, cursive script.

Helen G. Berrigan