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PUBLIC COMMENT SUMMARIES (LATE SUBMISSIONS)

Federal Public and Community Defenders (FPCD)

Jon M. Sands

Chair, Federal Sentencing Guidelines Committee of the FPCD

SECTION I

A. Increasing Rate of Downward Departures

When making decisions to change the guidelines, the FPCD recommends that the Commission only increase sentences "where necessary, preserve judicial discretion whenever warranted, and act solely based on the facts, fully explaining the reasons for the Commission's actions in the official commentary to the guidelines." The FPCD recognizes that the rate of downward departures has been steadily increasing, but does not believe that this is due to an "epidemic of leniency among federal judges." The FPCD believes that the increase in the rate of departure is directly related to the "fact that federal prosecutors have adopted a practice of "exchanging" departures for "fast track" guilty pleas. In return for a tacit or explicit agreement from the prosecutor to not oppose a motion for departure, the defendant is required to waive his rights to discovery, appeal, confrontation, and trial by jury, among others." The FPCD goes on to say that most downward departures are controlled by the government in one form or another, and cites as an example the Southern District of New York where the standard plea agreement in white collar cases requires the defendant to waive the right to seek a downward departure.

1. Fast Track Practices

The FPCD argues that fast-track departures are not limited to immigration cases and are not standard from district to district or even within a single district. In the Tucson division in the district of Arizona, for example, fast track departures are stated to be based on a "plea agreement."

a. Departures Pursuant to Plea Agreement

The FPCD cites the Commission's statistics that departures "pursuant to plea agreements" account for nearly 20% of all departures nationally, and states that the majority of these departures will presumably be eliminated once the Commission promulgates an "Early Disposition" departure as required by the PROTECT Act. The FPCD goes on to argue that if the Commission were also to specifically forbid departures "pursuant to plea agreement" simultaneously requiring more specificity in the stated reason for departure, as required by 18 U.S.C. § 3553(c), this would push such departures into the now-government controlled "Early Disposition program" and also serve as a self-policing mechanism as courts realize that the

reason put forward is not an adequate departure ground. The FPCD believes that the Commission ought to make some provision in the guidelines for downward adjustments where a defendant enters into a quid-pro-quo agreement with the government giving up some right in exchange for leniency.

The FPCD contends that the Commission should consider promulgating a new adjustment in Chapter 3, by identifying a non-exhaustive list of factors that, when present in a plea agreement would merit an additional reduction, e.g., (1) a defendant expressly waives some constitutional right, such as the right to appeal or to review discovery; (2) a defendant assists the government by not putting it to its proof or waiving the right to pursue a motion to suppress, where the facts or the law raise a substantial issue; (3) a defendant relieves the government of the expense of making a material witness available by stipulating to the testimony; and (4) factors of a similar nature.

b. Departures Based on "Totality of Circumstances" or "General Mitigating Circumstances"

The FPCD notes that in the Phoenix division of the district of Arizona, the fast-track practice is slightly different, departures pursuant to fast-track agreements are granted for the stated reason that the guidelines have not accounted for the "totality of the circumstances." The FPCD believes the Commission's statistics that reflect that 19.9% of downward departures nationally were granted on the ground of "general mitigating circumstances" include a substantial number of these departures, which when moved to the "Early Disposition" column would substantially reduce the departure rate nationwide by another 3 to 4%. The FPCD believes that other districts may use formulations similar to those in the District of Arizona and as those practices change consistent with the mandate in the PROTECT Act, there will be a corresponding substantial reduction in the rate of departures nationwide.

B. Few Upward Departures

The FPCD also notes that the very low rate of upward departures does not reflect a judiciary intent on soft-on-crime sentences.

SECTION II

A. Reducing the Incidence of Downward Departures Should be Accomplished Without Limiting Judicial Discretion

The FPCD believes that the Commission should preserve judicial discretion whenever possible. It asserts Congress did not explicitly direct the Commission to abolish or restrict judicial discretion, but directed it to "reduce the incidence of downward departures" and left intact the statutory authority allowing district judges to depart when warranted. The FPCD thinks that changes that broadly limit the authority of district court judges to depart might be struck down as

inconsistent with the statutory mandates in §§ 3553(a) & (b). The FPCD also believes that drastic restrictions on the district court's discretion to depart would transfer even more power to federal prosecutors, whose charging decisions would control the outcome even more than at present. The FPCD further states that the Commission could displace one of the basic goals that Congress laid down for the Commission - "maintaining flexibility to permit individualized sentences" - without implicating the "nondelegation doctrine rooted in the separation of powers that underlies our tripartite system of Government." citing *United States v. Mistretta*, 488 U.S. 361, 371 (1989). The FPCD concludes that section 401(m) of the PROTECT Act does not replace that principle with one that authorizes a transfer of discretion to prosecutors or to the Commission.

B. The Commission Needs to Understand the Departure Trend

The FPCD recognizes as one of the central functions of the Commission to monitor and make sense of sentencing data, including the district court's statement of reasons for imposing a departure, so that it may carry out the Congressional mandate to "review and revise" the guidelines. The FPCD argues that "the Commission simply cannot make policy divorced from a grasp of the underlying facts and without reference to the "intelligible principles" laid out by Congress in the Sentencing Reform Act - and neither repealed nor replaced by the PROTECT Act - without risking a constitutional challenge."

The FPCD thinks that if the departure trends reflect guidelines that require change because there are recurring mitigating circumstances "not adequately taken into consideration" by the guideline, the Commission should amend the guideline and thus reduce the incidence of departure. If those trends reflect case-management methods used by the government in exchange for waiver of appellate rights or an expedited guilty plea, that ground will be addressed by the Early Disposition departure. The FPCD argues that alternatively the Commission might promulgate amendments or add commentary to existing guidelines to address other frequently relied-on mitigating circumstances as, for example with the role adjustment or the acceptance of responsibility guideline.

The FPCD goes on to say that the Commission should limit departure authority only if it determines that there is a systemic failure on the part of district judges to comply with statutory or guideline commands. Failure of individual judges to abide by the guidelines should be corrected through the appeal process, which the Department of Justice will monitor with more rigor under the new directive implemented by Attorney General Ashcroft.

The FPCD thinks that the enhanced specificity requirement in § 3553(c) will result in a form of self-policing by district courts, when including reasons in the written order of judgment, "which reasons must also be stated with specificity." 18 U.S.C. § 3553(c). The FPCD believes that this will lead district judges either to realize that a departure is not warranted or to articulate more clearly why the departure is warranted, which will allow the Commission to more readily review and revise the guidelines.

The FPCD also believes that the newly expanded de novo standard of review will serve the same self-policing purpose by appellate courts. 18 U.S.C. § 3742(e). The FPCD concludes that the Commission should not act except on the basis of a real understanding of the reasons for the departure trends and by reference to guidelines principles laid down in the Sentencing Reform Act.

1. Acceptable Rates of Departures

While the Sentencing Reform Act of 1984 contemplates a departure rate of 20%, Congress has left for the Commission to decide what rate of departure is appropriate. The FPCD suggests that an inference can be drawn from § 3553(b) that the number of departures that may be granted is limitless.

The FPCD says that the Commission should be cautious in determining how much of a reduction in the rate of departures would amount to “substantial” reduction. The FPCD suggest that the Commission should await making further changes until after it is able to assess what impact the current changes (i.e., the new Early Disposition program, specificity requirements, etc.) will have on the departure rates. The FPCD recommends that the Commission implement the directive to “substantially reduce” departures by means other than reducing judicial flexibility.

C. *The Incidence of Downward Departures*

Contrary to the Commission’s statistics, the FPCD believes that the rate of departures granted by federal judges have remained relatively constant from 1995 to 2001. The FPCD contends that the increased departure rates evidenced in the Commission’s statistics are directly related to a spike in immigration cases in border districts. In the following sections of its comments, the FPCD addresses reasons for the various departures based on its own experience.

1. Drastic Increase in Immigration Cases

a. “Fast-Track” or Early Disposition Departures

The spike in downward departures directly corresponds to the spike in immigration cases more so than to any change in the law of departure that resulted from the decision in *Koon v. United States*. The FPCD believes that the departures in the border states include marijuana “backpack” cases in addition to immigration cases.

b. Standard of Review & Specificity of Ground for Departure

The amendments to the standard of review and the specificity requirements will also reduce the number of downward departures. The FPCD asserts that the cases that have been decided since the effective date of the PROTECT Act support its assessment that the operation of changes included in the PROTECT Act will reduce the incidence of downward departures.

c. Amend §5K2.0 to Require that Reasons for Departures be Stated with More Specificity

The Commission should add language to §5K2.0 to implement the amendment to 18 U.S.C. § 3553(c).

d. Amend Immigration Guidelines

The Commission should refine the immigration guidelines to eliminate some of the sentencing disparities that are generated by adjustments that do not adequately differentiate between defendants whose relative culpability or potential for dangerousness or recidivism varies widely.

2. Criminal History Departures

The incidence of criminal history downward departures has decreased in recent years from 15.1% in 1995 to 11.9% in 2001. Criminal history departures are necessary for reasons identified by the Commission in the commentary to § 4A1.1. Criminal history departures are especially necessary in light of the state jurisdictions that have recently admitted to engaging in racial profiling. The FPCD argues that because departures in this area have been used sparingly by district courts, there is no need to reduce discretion. If anything, the FPCD believes that the Commission should add language encouraging consideration of disparate state practices.

The FPCD believes that the Commission should, however, address the provision for counting minor offenses under §4A1.2(c), which it argues would reduce a number of criminal history departures.

The FPCD suggests that the Commission should await the results of its two-year recidivism study before making changes to limit discretion to depart under the criminal history provision.

3. Family Ties

The rate of departures based on family ties has diminished throughout the years from 6.2% of all departures in 1996 to 3.8% in 2001. The FPCD does not believe that discretion to grant this departure should be narrowed. To the contrary, it suggests that this departure is not being used often enough in light of the *Family Unit Demonstration Project* passed by Congress in 1994.

The FPCD notes that because this factor has become a prohibited factor in child-related offenses, its incidence as a ground for departure will be reduced.

4. Diminished Capacity

Departures for this reason were granted in fewer than .4% of cases in 2001. The FPCD believes that the departure is applied too strictly to deny downward departures to persons who are

suffering from diminished capacity, which in many ways does contribute to the commission of the offense.

This departure is particularly appropriate because person who suffer from mental disabilities are less deserving of punishment and less likely to be deterred by a lengthier sentence.

The FPCD argues that this departure is not overused and district courts are not abusing or improperly granting departures on this ground.

5. Substantial Assistance Departures

The FPCD points out that the rate of substantial assistance departures has decreased, while the number of safety valve cases has increased. The FPCD believes that the Commission needs to require the government disclose its reasons for granting and denying departures before any rational inferences can be drawn.

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. The FPCD believes the increased rate of departures are primarily in the Southwester border districts. Similarly, the FPCD believes that the increase in downward departures in marijuana cases is due in large part to the marijuana importation cases prosecuted in the Southwestern border districts.

The FPCD provided a table of departure statistics in drug cases taken from statistics in the Commission's annual report.

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

The FPCD argues that the drug guideline, which is driven by quantity, does not sufficiently differentiate among the great range of culpability of persons engaged in drug trafficking. The FPCD notes that the only provision for differentiating for the broad range of activity and culpability is the role in the offense adjustment, which it argues is not often used. The FPCD suggests that the Commission's recent drug cap may reduce the incidence of downward departures in these cases.

7. Unmentioned Factors

The FPCD states that these departures are at the heart of judicial flexibility and allow judges to consider each person as an individual. The FPCD claims that 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. The FPCD does not believe that this is a ground that is overly used or abused by district courts.

8. Departures in White Collar Cases

The FPCD argues that 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 FPCD believes that the current rate of departure in this area is modest 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.

D. Need to Explain Commission Action in Official Commentary

The FPCD suggests that the Commission should explicitly explain its actions in response to the congressional directive and in general. Additionally, the FPCD recommends that the Commission include more explicit explanations for its policy choices in the official commentary of the guidelines.

CONCLUSION

The FPCD recommends that, in responding to the PROTECT Act, the Commission act by scrupulously adhering to the central or “intelligible principles” of the Sentencing Reform Act.

Probation Officers Advisory Group (POAG)
Concord, NH

THE PROTECT ACT

The Probation Officers Advisory Group (POAG) met in July to discuss the directives of the PROTECT Act and other issues of concern to probation officers around the country. In that meeting, the POAG noted that downward departures are appropriate when valid reasons exist, and probation officers do not want to lose the ability to recommend departures to the courts.

Further, the POAG believes that while Commission staff presented information regarding the rates of downward departures, significant data found only in sentencing transcripts is missing, and it believes this information would allow Commission staff to conduct a more detailed analysis regarding that rate. It noted that while courts were perhaps stating more specific departure findings on the record, since the transcripts are not provided to the Commission, those specified reasons cannot be determined. The POAG thinks the new proposed Statement of Reasons might help Commission staff gather more accurate departure information, noting that the new form includes blocks to be checked for specific departures and adds a section entitled "Additional Supporting Explanation." The POAG believes the form will make Commission coding more accurate.

The POAG does not believe the category marked as "plea agreements" is a valid reason for departure. The POAG suspects that binding stipulations for drug weight or other factors might be 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. Further, the POAG notes that this downward departure involved either the explicit or implicit approval of the Department of Justice. Therefore, according to the POAG, 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.

Additionally, the POAG discussed the appropriateness of a standard downward departure in immigration cases, and considered a specific offense characteristic for defendants subject to deportation, but concerns were raised that not all deportation cases are for simple re-entry offenses. Thus, the POAG agreed a specific offense characteristic would be difficult to draft. However, the POAG recognizes that if this departure was added to Chapter 5 and addressed separately from "judicial departures," similar to §5K1.1, 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

The POAG wishes to emphasize that downward departures under §5K2.0 are appropriate and should not be more restrictive, but it recognizes the PROTECT Act mandates a reduction in downward departures. The POAG believes 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 Comment 2

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

Issue for Comment 3

The POAG argues that while Commission data preliminarily indicates that the over-representation of the defendant's criminal history is a frequent basis for departure, there is currently insufficient data to determine what specific factors the courts are relying on in making these departures. In its view, 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. The 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, the POAG strongly believes the Commission needs to review Chapter 4 in its entirety, noting that the concepts of "related cases," §4A1.2 issues, recency points, revocations, and the staleness factor should be addressed.

Issue for Comment 4

The POAG does not think the guidelines require any more restrictive guidance, however, it believes specific examples in those sections suggesting a downward departure could be helpful.

Issue for Comment 5

The POAG does not believe any of the aforementioned departure issues should be prohibited.

NOTICE OF PROPOSED PRIORITIES

1. Involuntary Manslaughter

The POAG believes this guideline warrants change as the conduct for this type of crime can vary substantially. In its view, the guideline does not provide for any specific offense characteristics, and it believes 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.

2. Immigration

The POAG believes the ambiguous language in the guideline needs to be corrected because of the large number of immigration cases and because this is frequently a question on the Helpline.

Additionally, the POAG suggests 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. If a defendant was eligible for the Early Departure Program, then this specific offense characteristic should not be applied.

3. Review of the Limitation on the Base Offense Level

The POAG believes that no application difficulties with the specific offense characteristic regarding the mitigating role cap in the drug guideline exists. However, the POAG has ongoing concerns, and believes more examples or guidance are needed in Chapter 3 regarding this issue. It further notes that this is a circuit conflict which it wishes the Commission would address.

TENTATIVE ISSUES

The POAG suggests that a two level reduction should be added in §2D1.11 if an offender meets the criteria for the safety valve because defendants who are similarly situated as those sentenced pursuant to §2D1.1 are not receiving this benefit.

Finally, the POAG believes an index to Appendix C should be created to ease research regarding all amendments.

The Honorable John W. Bissel, Chief Judge
United States District Court
District of New Jersey
Newark, New Jersey

THE PROTECT ACT

Judge Bissel notes that the commentary to §5K2.0 needs to be revised in light of the PROTECT Act and its impact on the holding of *Koon v. United States*, 581 U.S. 82 (1996).

Judge Bissel suggests the following changes to Chapters Two, Three and Four:

- 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 to 5 under §3B1.2, rather than 2 to 4;
- an examination of §4A1.1(d) and (e) - if the numerical impact of these subparts could be lowered, or if they could be applied only to higher criminal history categories, this might reduce the need for downward departures due to criminal history overstatements;
- expand 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.

Regarding Chapter Five Part H, Judge Bissel believes that some added exceptions, if well-defined and clearly justified, would aid sentencing judges.

Judge Bissel concludes by suggesting that Chapter I, Part A, Subsection 4(b) be reexamined in light of the PROTECT Act and its impact upon the continuing viability of *Koon v. United States*. Judge Bissel notes that the revisiting of this Subsection could result in an elaboration and clarification of the heartland/non-heartland population of cases.

The Honorable James C. Fox, Senior Judge
United States District Court
Eastern District of North Carolina
Wilmington, North Carolina

THE PROTECT ACT

Judge Fox states that it would be helpful if §5K2.0 and the commentary thereto were amended to provide hypothetical situations that might warrant a departure thereunder. Judge Fox believes

that the Commission should 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 departure. Judge Fox believes that the guideline provisions governing downward departures for criminal history should offer more detailed suggestions as to how the court should structure the departure. Judge Fox notes that the Commission should 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. Judge Fox notes that a defendant should receive a two-offense level downward adjustment if he has no prior scorable convictions. Judge Fox also notes that the penalties for crack cocaine are disproportionate.

The Honorable Max Rosenn, Senior Circuit Judge
United States Court of Appeals
Third Circuit
Wilkesbarre, Pennsylvania

THE PROTECT ACT

Judge Rosenn believes that §401(m) of the PROTECT Act runs the serious risk of undermining judicial autonomy and encouraging one-size-fits-all sentencing. Judge Rosenn believes that 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.