

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
JOHN W. BISSELL
CHIEF JUDGE

U.S.D. & COURTHOUSE
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July 31, 2003

8/7/03
COPY TO JUDGE MURPHY
AND KIM WHARLEY
[Signature]

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.

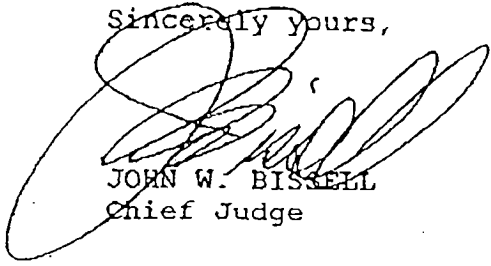
(12.) Chapter 1, Part A of the Guidelines is entitled "Introduction and General Application Principles." Subsection 4(b) of that Chapter addresses the subject of departures. The statements in that Subsection may have to be revisited in light of the focus of the Protect Act and its impact upon the continuing 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
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