



COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
9535 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, Texas 77002

Honorable Donata W. Ambrose
Honorable William M. Catoe, Jr.
Honorable William F. Downes
Honorable Richard A. Engle
Honorable David F. Hamilton
Honorable Henry M. Herlong, Jr.
Honorable James B. Loken
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Honorable A. David Muzzone
Honorable William T. Moore, Jr.
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Honorable Sim Lake, Chair

July 18, 2003

MEMORANDUM TO ALL UNITED STATES JUDGES

SUBJECT: United States Sentencing Commission Request for Public Comment
(URGENT INFORMATION)

RESPONSE DUE DATE: August 1, 2003

The United States Sentencing Commission is seeking public comment in connection with the implementation of Section 401(m) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 or "PROTECT Act" (Pub. Law No. 108-21, 117 Stat. 650 (April 30, 2003)). The Act directs the Commission to review the grounds for downward departure that are authorized by the guidelines; amend the guidelines to ensure that the incidence of downward departures is "substantially reduced"; promulgate a policy statement authorizing a downward departure of not more than four levels if the government files a motion pursuant to an early disposition program; and make other conforming amendments, including a revision of Chapter 1, Part A, and Policy Statement 5K2.0 of the sentencing guidelines. The request for comments can be found on the United States Sentencing Commission website at <http://www.ussc.gov>. Comments are due to the Commission by August 1, 2003.

The Criminal Law Committee encourages all judges to carefully review several specific questions that have been posed by the Commission and to forward written comments directly to the United States Sentencing Commission, One Columbus Circle, NE, Suite 2-500, Washington, DC 20002-8002. In addition, the Committee expects to submit comments to the Commission on behalf of the judiciary. The Committee would appreciate receiving copies of any comments you make to the Sentencing Commission, or if you prefer you may make your comments through the Committee. Judge William T. Moore, Jr. serves as the Committee's chair of the subcommittee on sentencing issues. Please address any comments to his attention at United States District Court, Old Federal Building, 125 Bull Street, Savannah, Georgia 31401, telephone number 912/650-4172.

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The Sentencing Commission notice poses the following questions.

(1.) How should §5K2.0 and/or the commentary to §5K2.0 be revised?

(2.) Should the Commission provide additional and/or more restrictive guidance on mitigating factors, particularly those described in other provisions of Chapter 5, Part K, that may warrant a downward departure?

(3.) Are there factors in Chapter Two (Offense Conduct), Chapter Three (Adjustments), or Chapter Four (Criminal History) to which the Commission has attached excessive weight, and if so, should the Commission change the weight attached to those factors, thereby reducing the likelihood that a departure is warranted in a particular case?

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

(5.) Should the Commission provide additional and/or more restrictive guidance on the offender characteristics described in provisions of Chapter Five, Part H, that may warrant a downward departure?

(6.) Should, for example, the Commission provide additional guidance on the circumstances under which an offender characteristic may become relevant that is ordinarily not relevant in sentencing?

(7.) How, if at all, should guideline provisions governing downward departures for criminal history be revised?

(8.) Should the Commission 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?

(9.) Should the Commission provide for a downward departure adjustment (or, in the case of criminal history, a reduction in criminal history points) in lieu of a downward departure for any factor or downward departure basis, or for a combination of factors and/or downward departure bases described above, or for any other mitigating factors the Commission should more fully take into account in the guidelines?

(10.) If so, how should such a downward adjustment or reduction be structured, and what should be the extent of the downward departure or reduction?

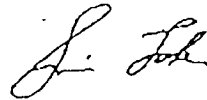
(11.) Should any of the downward departure bases described above be prohibited as a basis for downward departure?

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- (12.) Are there other specific suggestions that the Commission might consider in responding to the directive?
- (13.) How should the Commission structure the downward departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney?

On behalf of the Criminal Law Committee, thank you in advance for your input on these very important issues.



Sim Lake

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

POST OFFICE BOX 2143

WILMINGTON, NORTH CAROLINA 28402

JAMES C. FOX
SENIOR JUDGE

TELEPHONE: (910) 815-4738

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August 1, 2003

8/7/03
Copy to Judge Murphy
and Mr. Wootley
[Signature]

Honorable William T. Moore, Jr., Chair
Subcommittee on Sentencing Issues
United States Sentencing Commission
United States District Court
Old Federal Building 125 Bull Street
Savannah, GA 31401

Re: United States Sentencing Commission Request
for Public Comment -- PROTECT Act

Dear Judge Moore:

With the encouragement of the Judicial Conference's Criminal Law Committee, and the advice and assistance of Senior United States Probation Officer (E.D.N.C.), Steven E. Horne, I wish to take this opportunity to respond to the Sentencing Commission's request for public comment in connection with the implementation of the "PROTECT Act," Pub. Law No. 108-21, 117 Stat. 650 (April 30, 2003).

As you know, the Criminal Law Committee has forwarded to all the district judges a list of questions posed by the Sentencing Commission. Please find my responses below.

Thank you for the opportunity to participate in the public comment process.

Q. How should § 5K2.0 and/or the commentary to § 5K2.0 be revised?

A. It would be very helpful if § 5K2.0 and the Commentary thereto were amended to provide hypothetical situations that might warrant a departure thereunder.

Q. Should the Commission 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 downward departure?

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A. Yes.

Q. Are there factors in Chapter Two (Offense Conduct), Chapter Three (Adjustments), or Chapter Four (Criminal History) to which the Commission has attached excessive weight, and if so, should the Commission change the weight attached to those factors, thereby reducing the likelihood that a departure is warranted in a particular case?

A. Yes. *The penalties for crack cocaine are disproportionate. All other base offense levels, specific offense characteristics, and Chapter Three adjustments appear to be fair.*

Q. How, if at all, should Chapter Five, Part H, be revised?

A. *Chapter Five, Part H seems adequate as written.*

Q. Should the Commission provide additional and/or more restrictive guidance on the offender characteristics described in provisions of Chapter Five, Part H, that may warrant a downward departure?

A. *Yes, it always is helpful when specific circumstances are included.*

Q. Should, for example, the Commission provide additional guidance on the circumstances under which an offender characteristic may become relevant that is ordinarily not relevant in sentencing?

A. *Yes, it always is helpful when specific circumstances are included.*

Q. How, if at all, should guideline provisions governing downward departures for criminal history be revised?

A. *The guidelines should offer more detailed suggestions as to how the court should structure the departure.*

Q. Should the Commission provide additional and/or more restrictive guidance in § 4A1.3 regarding the circumstances under which the court may depart for the overrepresentation of the defendant's criminal history?

A. Yes.

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Q. Should the Commission provide for a downward departure adjustment (or, in the case of criminal history, a reduction in criminal history points) in lieu of a downward departure for any factor or downward departure basis, or for a combination of factors and/or downward departure bases described above, or for any other mitigating factors the Commission should more fully take into account in the guidelines?

A. Yes.

Q. If so, how should such a downward adjustment or reduction be structured, and what should be the extent of the downward departure or reduction?

A. A defendant should receive a two-offense level downward adjustment if he has no prior scorable convictions.

Q. Should any of the downward departure bases described above be prohibited as a basis for downward departure?

A. No.

Q. Are there specific suggestions that the Commission might consider in responding to the directive?

A. I am not familiar with the Commission's criteria for responding to Congress's directives.

Q. How should the Commission structure the downward departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney?

A. I am not familiar enough with the program to offer suggestions.

Thank you again for the opportunity to comment.

Sincerely,

James C. Fox

James C. Fox

Senior United States District Judge

with permission by
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JCF/ejj

cc: Hon. Sim Lake, Chair
Committee on Criminal Law, Judicial Conf. of the U.S.

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