

Protect Act
Implementation / Guidance
Brida

UNITED STATES DISTRICT COURT

DISTRICT OF NEBRASKA
ROOM 586

ROBERT V. DENNEY FEDERAL BUILDING
100 CENTENNIAL MALL NORTH
LINCOLN, NEBRASKA 68508

RICHARD G. KOPF
CHIEF UNITED STATES DISTRICT JUDGE

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July 23, 2003

Via Federal Express

United States Sentencing Commission
One Columbus Circle, N.E. Ste. 2-500
Washington, D.C. 20002-8002

Judge William T. Moore, Jr.
Chair, Subcommittee on Sentencing Issues
Committee on Criminal Law of the
Judicial Conference of the United States
c/o United States District Court
Old Federal Bldg.
125 Bull St.
Savannah, GA 31401

Re: United States Sentencing Commission Request for Public Comment

Dear Commissioners and Judge Moore:

I write regarding the implementation of Section 401(m) of the "Protect Act" and the Commission's request for comment. Given the shortness of time, I have not had an opportunity to consult with my judicial colleagues in Nebraska. Therefore, these comments are my own.

I respectfully suggest that the provisions of the Protect Act that are explicitly intended to further limit the discretion of sentencing judges are unwise and unneeded. That said, I submit these comments understanding that the Sentencing Commission and the judiciary must follow the will of Congress in this matter. In so doing, I respond to two of the more important questions posed in the Commission's notice seeking public comment.

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

I would limit the maximum extent of a downward departure to a fixed percentage of the bottom of the otherwise applicable Guideline range.

I would require that all facts used to justify a downward departure be proven by clear and convincing evidence and not merely the greater weight of the evidence.

I would categorically prohibit downward departures in any case where a weapon was actively used by the defendant in connection with the offense of conviction.

I would categorically prohibit a downward departure in any case where the defendant caused serious physical, mental or emotional injury to a victim of the offense of conviction.

If a downward departure pursuant to § 5K2.0 were granted, and if the government elected not to appeal on that issue, I would require the government to file with the district court and submit to the Commission a detailed statement of reasons why it decided not to appeal the decision to grant a downward departure.

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

I would prohibit downward departures for criminal history that exceeded one criminal history category below the otherwise applicable criminal history category. In other words, if the criminal history category was VI, the maximum departure would be to category V.

I would categorically limit downward departures for criminal history to misdemeanor convictions. That is, while misdemeanor convictions could be discounted for departure purposes, felony convictions would always be counted and not subject to departure.

If a downward departure for criminal history were granted, and if the government elected not to appeal on that issue, I would require the government to file with the district court and submit to the Commission a detailed statement of reasons why it decided not to appeal the decision to grant a downward departure.

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Conclusion

I urge the Sentencing Commission to implement the Protect Act in a way that is simple and responsive, but not draconian. I believe the foregoing suggestions satisfy these objectives. Thank you for considering my thoughts.

Sincerely,

s/ Richard G. Kopf
Chief District Judge

cc: Chief Judge James B. Loken
Nebraska Federal Judges
Craig Saigh, Chief Probation Officer, Nebraska
Mike Norton, Guideline Supervisor, Nebraska
Michael Heavican, United States Attorney, Nebraska
David Stickman, Federal Public Defender, Nebraska