IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA	)	CRIMINAL ACTION NO. 3:95CR00062
	)	
v.	)	
	)	MEMORANDUM OPINION & ORDER
LOUIS STEPHEN EYE,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the defendant's February 16, 2001 Objection and Motion for Proper Notice, in which the defendant objects to the court's February 14, 2001 order giving the defendant prior notice that the court may depart from the recommended sentence rage set forth in section 7B1.4 of the United States Sentencing Guidelines. Specifically, the defendant states that neither the defendant's Probation Violation Report nor the government have identified any grounds for upward departure, and relies on Rule 32 of the Federal Rules of Criminal Procedure and *Burns v. United States*, 501 U.S. 129 (1991) for the proposition that the defendant is entitled to specific notice of the grounds on which the court contemplates any *sua sponte* departure. As the court shall explain herein, the defendant's reliance is misplaced and his objection and motion shall be overruled accordingly.

In *Burns*, the Supreme Court held that district courts must give notice when contemplating a *sua sponte* departure from the Guidelines at sentencing, holding that such notice "must specifically identify the ground on which the district court is contemplating an

upward departure." *See id.* at 138-39 (footnote omitted). Explaining the rationale behind the ruling in *Burns*, the Court repeatedly emphasized the language of Rule 32, which mandates that, at the sentencing hearing, the parties be "offered an opportunity to comment upon . . . matters relating to the appropriate sentence." *See id.* at 135-36. However, the instant matter comes before the court for a revocation, not a sentencing.

Whereas Rule 32 promulgates the requirements for sentencing hearings, Rule 32.1 of the Federal Rules of Criminal Procedure promulgates the requirements for revocation hearings. This court finds it significant that there are separate rules for sentencing and revocation hearings, and that, pursuant to Rule 32.1, revocation hearings do not have the "opportunity to comment" requirement of Rule 32, on which the *Burns* Court relied in the sentencing hearing context. Furthermore, the Supreme Court has explicitly distinguished revocation hearings from other criminal matters, holding that revocation hearings are informal procedures to which the full panoply of procedural safeguards do not apply. *See Black v. Romano*, 471 U.S. 606, 613 (1985).

At a revocation hearing, the district court must abide by 18 U.S.C. § 3565, Revocation of Probation. If the court revokes the defendant's probation, the court shall "resentence the defendant under subchapter A." §§ 3565 (a)(2); (b). Pursuant to subchater A, specifically 18 U.S.C. § 3553 (a)(4)(B), the court shall consider (among other things) the applicable guidelines and advisory policies of the Sentencing Commission. Chapter Seven of the Guidelines, which deals with violations of probation and supervised release and contains the revocation table of recommended penalty ranges, U.S.S.G. § 7B1.4, is advisory and not

binding on the district courts. *See* U.S.S.G. Ch. 7, Pt. A., intro. (Nov. 2000); *United States v. Denard*, 24 F.3d 599, 602 (4th Cir. 1994) ("district courts are free to consider the suggested ranges in the probation revocation tables, but are not bound to impose a sentence within that range"); *see also United States v. Davis*, 53 F.3d 638, 641 n.10 (citing other Circuits which hold that Chapter Seven of the Guidelines is non-binding at probation revocation hearings). "A sentence which diverges from advisory policy statements is not a departure." *See Davis*, 53 F.3d at 642 n.15 (quoting *United States v. Mathena*, 23 F.3d 87, 93 n.13 (5th Cir. 1994)). Accordingly, the strict requirements for a sentencing departures -- including the specific notice requirements of *Burns* -- do not apply to any sentence that diverges from the advisory probation revocation tables, because the such divergence is not a departure. *See Davis*, 53 F.3d at 642 n.15.

In accordance with the foregoing, it is this day

ADJUDGED, ORDERED, AND DECREED

as follows:

(1) The defendant's Objection and Motion for Proper Notice shall be, and hereby is, OVERRULED;

(2) The defendant shall be, and hereby is, given PRIOR NOTICE that, at the hearing on this matter, should the court find that the defendant violated any of the conditions of probation, as alleged in the Probation Violation Report, the court reserves the right to impose a sentence in accordance with 18 U.S.C. §§ 3553 and 3565, which sentence may differ from the recommended sentence range listed in section 7B1.4 of the United States

Sentencing Guidelines;

(3) In an effort to clarify any perceived ambiguity, the court's prior order of February 14, 2001 shall be, and hereby is VACATED.

The Clerk of the Court hereby is directed to send a certified copy of this order to all counsel of record.

ENTERED: _____
Senior United States District Judge

_____
Date