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August 4, 2003

VIA HAND DELIVERY

Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: July 1, 2003 Request for Comment (Protect Act) (REVISED RESPONSE)

Dear Judge Murphy:

After sending our August 1st letter to the Commission, we noticed a couple of statistical errors that we wanted to correct. Accordingly, please accept this revised letter as the Practitioners' Advisory Group response to the Commission's July 1, 2003 request for comment on the directives to the Commission contained in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21 (the "Protect Act").¹

1. Congressional Directives in the Protect Act

Section 401(m) of the Protect Act directs the Commission, *inter alia*, to "(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission," and "(2) promulgate . . . (A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are substantially reduced."

At the same time, the Commission is to promulgate a policy statement authorizing a downward departure of not more than four levels "if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General of the United States." *Id.* Though the legislation does not say so, Congress presumably is directing the Commission to reduce the incidence of departures other than

¹ We express our appreciation to PAG member Amy Baron-Evans for her assistance in drafting this letter.

those under what will be this new "fast track" policy statement, which like substantial assistance departures, are not perceived to be a problem and will be separately tracked.

The Commission should take a modest approach in responding to Congress' directive to reduce the incidence of downward departures for the following reasons.

- Section 401(m) and other portions of the Protect Act resulted from the misperception created by the Department of Justice in Congress that there is an epidemic of leniency in the federal criminal justice system caused by judges who frequently and lawlessly depart from the Guidelines. To support this contention, the Department of Justice provided Congress with misleading statistics that were not properly understood or corrected before the bill was hastily passed. We believe that the incidence of non-substantial assistance, non-"fast track" downward departures (hereinafter "judicial departures") is actually quite low, *i.e.*, somewhere between 7.5 and 12.2%. See Part 2, *infra*.
- The existing provisions of the Protect Act will further reduce the incidence of judicial departures. See Part 3, *infra*.
- The authority to depart for atypical reasons not adequately reflected in the Guidelines is an integral part of a healthy and constitutional guidelines sentencing system. If the departure power is reduced too drastically, the Sentencing Guidelines will lose credibility as a fair and rational sentencing policy, and may well be ruled unconstitutional. See Part 4, *infra*.

Our specific comments are set forth in Part 5.

2. Incidence of Judicial Departures

The Department of Justice told Congress that in non-immigration cases, non-substantial assistance departures had risen from 9.6% of all cases in 1996 to 14.7% of all cases in 2001 and attributed much of the "damage" to the Supreme Court's decision in Koon v. United States, 518 U.S. 81 (1996). See 149 Cong. Rec. S5113-01, 5128.

Based on the striking increase in the number of downward departures in the five Mexican border districts and anecdotal information from defense counsel in those districts, we believe that all or most of the increase in departures between 1996 and 2001 resulted from the "fast track" policy of the United States Attorneys in those districts to manage increasing caseloads by recommending downward departures to induce quick guilty pleas. As the Commission informed the Senate Judiciary Committee, it was important that the impact of this policy on the overall departure rate be understood, since removing those five districts from the calculation resulted in a departure rate of only 10.2%. See Letter of United States Sentencing Commissioners to Senators Hatch and Leahy, April 2, 2003.

We believe that most of the 5,928 departures in the border districts in 2001 were *de facto* "fast track" departures. There were 5,825 more downward departures in 2001 than in 1996, with 4,057 of them occurring in the five border districts and only 1,768 in the other 89 judicial districts.² There were 3,310 downward departures in the 9,277 immigration cases in 2001.³ The "fast track" policy is used not only in immigration cases, but in other cases as well, primarily drug cases.⁴

Though the Commission's data shows 845 downward departures formally labeled as "fast track" departures, defense counsel in the border districts report that what are in fact "fast track" departures are regularly categorized as something else, usually "pursuant to plea agreement" or "general mitigating circumstances." Thus, we expect that the Commission will find in its review that some number between 3,310 and 5,928 downward departures, or 50-90% of the purported increase in the rate, are attributable to the government's own "fast track" policy. If this is correct, courts are granting downward departures not controlled by the government in only 7.5-12.2% of cases.

This is a substantially lower rate than the 20% of all cases that Congress intended when it made the considered decision to include departures in the structure of the Guidelines. See S. Rep. No. 225, 98th Cong., 1st Sess. 52 n.193 (1983). Moreover, 85% of defendants granted judicial departures were sentenced to prison. See 149 Cong. Rec. S5113-01, 5121. Of those defendants eligible for straight probation, 32.3% were sentenced to prison. The prison population has quadrupled since the Guidelines were made law. Thus, far from the epidemic of leniency advertised by the proponents of the sentencing reform provisions of the Protect Act, the truth is that judges are extremely conservative in exercising what discretion they have under the Guidelines. Furthermore, over the past two years, the Commission has taken several significant steps to make sentences less lenient including passage of the Economic Crime Package of 2001 and the Sarbanes-Oxley amendments during this most recent cycle.

At the same time, it appears that the government controls 70-80% of all downward departures – 9,390 substantial assistance departures and at least 4,000 "fast track" departures in 2001. These are sentencing decisions by a party to the case that are

² See United States Sentencing Commission -- 2001 Sourcebook of Federal Sentencing Statistics, Table 26 (10,026 cases with non-substantial assistance downward departures); United States Sentencing Commission -- 1996 Sourcebook of Federal Sentencing Statistics, Table 26 (4,201 cases with non-substantial assistance downward departures). Departures in Arizona, New Mexico, the Southern District of California, and the Western and Southern Districts of Texas rose from 1,871 in 1996 to 5,928 in 2001. *Ibid*.

³ See United States Sentencing Commission -- 2001 Sourcebook of Federal Sentencing Statistics, Table 27.

⁴ This is one of the reasons that the 14.7% figure cited by the Department of Justice is misleading. That percentage was reached by subtracting departures in immigration cases rather than departures in border district cases from the numerator, thus missing other cases subject to the "fast track" policy. The percentage was further and incorrectly increased by subtracting all immigration cases from the denominator rather than using all 54,851 cases as the denominator.

essentially unreviewable. Contrary to the intent of Congress in the Sentencing Reform Act of 1984, a reduction in judicial discretion to depart would cause an even greater shift of sentencing power from judges to prosecutors than now is the case.

3. **Existing Provisions of the Act**

The existing provisions of the Protect Act will further reduce the incidence of judicial departures. The isolation of "fast track" departures will substantially reduce the incidence of judicial departures, as noted above. The elimination of departures other than those specifically identified in the guidelines or policy statements in child crimes and sexual offenses will reduce departures by another 2%. See 149 Cong. Rec. S5113-01, S5122-23. The new specificity requirement in 18 U.S.C. § 3553(c) and the new *de novo* standard of review in 18 U.S.C. § 3742(e) will deter any supposed inclination to depart inappropriately. Finally, the record-keeping and reporting requirements, criticized by Justice Rehnquist as "an unwarranted and ill-considered effort to intimidate individual judges in the performance of their duties," will surely have an effect.

4. **Role of Departures in Preserving the Sentencing Guidelines as a Fair, Responsible, and Constitutional Sentencing System**

The authority for judges to depart is an integral part of the structure of the Sentencing Guidelines. This is not because judges depart very often, but because a fair and responsible guidelines sentencing system must provide for individualized sentencing when justified.

After more than a decade of study, seventy-five hearings, and consultation with prosecutors, defense attorneys, and other criminal justice experts, Congress enacted the Sentencing Reform Act of 1984. The primary goal was to eliminate unwarranted disparity among similarly situated offenders and uncertainty as to the length of the sentence to be served.

Congress also intended to "assur[e] fairness in sentencing." See S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983). To that end, the one feature of the prior system that Congress determined to retain was the ability of a judge to impose an individualized sentence in an appropriate case. *Id.* at 51-52, 78. Congress recognized that the Sentencing Commission could not identify and quantify every meaningful distinguishing factor in formulating sentencing guidelines, *id.* at 78-79, but that there would be cases in which the history or characteristics of the offender or the circumstances of the offense were atypical in a way pertinent to the purposes of sentencing that were not adequately reflected in the guidelines but should permit a sentence outside the guideline range. *Id.* at 51-52, 150-51.

Another intended benefit of authorizing judges to depart for reasons not adequately reflected in the Guidelines was to avoid shifting sentencing discretion from judges to prosecutors. *Id.* at 60.

Thus, Congress did "not intend that the Guidelines be imposed in a mechanistic fashion" or "to eliminate the thoughtful imposition of individualized sentences." *Id.* at 52. Rather, Congress believed that the sentencing judge had "an *obligation* to consider all relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case." *Id.* In fact, Congress intended to "enhance the individualization of sentences" by structuring the departure power. *Id.* Thus, departures were authorized when the sentencing court "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." *See* 18 U.S.C. § 3553(b). It was expected that structuring the departure power in this way would assure that most sentences would be within the Guideline range, and that courts would depart in about 20% of all cases. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 52 n.193.

The fairness Congress sought to assure through the departure power is not only a matter of sound policy, but one of constitutional significance. The courts have, in fact, explicitly relied on the departure power to avoid finding various provisions of the Guidelines unconstitutional. In *Witte v. United States*, 515 U.S. 389 (1995), the Supreme Court held that prosecuting a defendant for conduct that was used as relevant conduct in a prior prosecution was constitutionally permissible, in part, because the sentencing court could depart under § 5K2.0 on the basis of double counting and/or on the basis that the defendant otherwise would be deprived of the effect of a downward departure under § 5K1.1 he received in the first sentencing. *See* 515 U.S. at 404-06. In *Nichols v. United States*, 511 U.S. 738 (1994), a majority of five held that it was "constitutionally permissible" for a sentencing court to enhance a subsequent sentence based on "consideration" of a prior uncounseled misdemeanor conviction (that did not result in incarceration) because it was consistent with traditional *discretionary* consideration of a wide range of factors in the pre-Guidelines era. *Id.* at 747-49. Justice Souter wrote separately to make clear that what made consideration of an uncounseled misdemeanor conviction constitutionally permissible was the *discretion* to downwardly depart under section 4A1.3. Since section 4A1.3 gave the defendant the chance to contest the accuracy and relevancy of the information regarding his prior uncounseled conviction,⁵ the Guidelines did not ignore the risk of unreliability, and for that reason alone, it passed constitutional muster. *Id.* at 751-53.

Several lower courts have relied on the ability to depart to avoid holding that extreme increases resulting from the otherwise mandatory application of the relevant conduct and cross-reference guidelines are unconstitutional. In *United States v. Lombard*, 72 F.3d 170 (1st Cir. 1995), a state court jury had acquitted the defendant of murder. He was then convicted in federal court for being a felon in possession of a

⁵ Nichols did not raise the issue below or in the Supreme Court that he was entitled to departure under section 4A1.3. *Id.* at 753.

firearm, and, through the operation of a cross reference and the relevant conduct guideline, sentenced to a mandatory life sentence based on the murders of which he had been acquitted. This was a "tail that wagged the dog" of the firearms charge, and would violate due process, *id.* at 174-183, but for the district court's authority to depart on remand based on the magnitude of the enhancement, the prior acquittal, the qualitative difference between the murders used to enhance the sentence and the offense of conviction, and the severity of the sentence imposed. If the guidelines were as "inflexible as the government urged," the constitution would be violated, but section 5K2.0 provided the flexibility to avoid unfairness through the mechanism of downward departure. *Id.* at 183-87. On remand, the district court imposed the same sentence; Lombard appealed the use of a preponderance standard to sentence him for a murder of which he was acquitted. United States v. Lombard, 102 F.3d 1, 2-4 (1st Cir. 1996). The First Circuit emphasized that the Guidelines, aside from departures, are compulsory and thus unlike the pre-Guidelines regime. It affirmed, but only because the sentencing court had the authority to depart. *Id.* at 4. Similarly, the Second Circuit has consistently held that while the preponderance standard governs factfinding for all uncharged and acquitted conduct at sentencing, downward departure must be available to account for risks of factual error which otherwise would violate due process. See United States v. Cordoba-Murgas, 233 F.3d 704, 709 (2d Cir. 2000); United States v. Gigante, 94 F.3d 53, 56 & n.2 (2d Cir. 1996); United States v. Monk, 15 F.3d 25, 28-29 (2d Cir. 1994); United States v. Concepcion, 983 F.2d 369, 389 (2d Cir. 1993).

Justice Rehnquist and others observed that the drastically reduced departure power contained in the Feeney Amendment "would do serious harm to the basic structure of the sentencing guideline system and seriously impair the ability of courts to impose just and responsible sentences." See 149 Cong. Rec. S5113-01, S5120-21, S5116-17. In fact, too much restriction of the departure power would either spell the demise of the Guidelines and a return to an entirely discretionary system, or full constitutional safeguards for all sentencing factors. This untenable choice between unwarranted disparity and an unwieldy process is what Congress sought to avoid in preserving some flexibility for individualized sentencing.

5. PAG's Recommendations

Only four categories of judicial departure in Table 25 of the 2001 Sourcebook exceed 5% of all such departures: "general mitigating circumstances" at 19.9%, "pursuant to plea agreement" at 17.6%, "criminal history overrepresents defendant's involvement" at 11.9%, and "other" at 10.3%. Because the "other" category is comprised of departures for reasons that are given less than 20 times, it is not a reasonable target for reduction.

1. We suggest eliminating "general mitigating circumstances" and "pursuant to plea agreement" by adding a sentence at the end of the commentary to § 5K2.0 stating that such grounds "are prohibited, standing alone, without a more specific reason or combination of reasons that comply with the foregoing guidance." This would provide

sufficient additional content to the commentary, and complement the new requirement under 18 U.S.C. § 3553(c) that the reasons for departure be "stated with specificity." It would eliminate 4,148, or 37.5%, of judicial departures.

2. Because the mitigating factors described in Chapter Five, Part K, the offender characteristics described in Chapter Five, Part H, and the downward departures authorized in Chapter Two occur so infrequently (between less than 20 times and 7.9%), we believe that any additional and/or more restrictive guidance in those categories is unnecessary and would make no appreciable difference. For the same reason, we do not believe these factors should be converted to downward adjustments or eliminated.

3. We oppose additional and/or more restrictive guidance in U.S.S.G. § 4A1.3 regarding departure when the "defendant's criminal history category significantly over-represents the seriousness of [his or her] criminal history or the likelihood that [he or she] will commit further crimes." Unlike most other guidelines factors, unwarranted disparity is inherent in the calculation of criminal history category because it depends on how prior misconduct is treated under the widely divergent laws of the fifty states. Section 4A1.3 was promulgated in recognition of the fact that "the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur." See U.S.S.G. § 4A1.3, comment. (backg'd.). In many circumstances, a mechanistic calculation of the criminal history score is such an unreliable indicator of the seriousness of a defendant's past criminal conduct or the likelihood of recidivism that the defendant's constitutional rights would be violated absent an ability to depart. See, e.g., Nichols v. United States, 511 U.S. 738, 750-53 (1994) (because section 4A1.3 gave the defendant the chance to contest the accuracy and relevancy of the information regarding a prior uncounseled misdemeanor conviction, the Guidelines did not ignore the risk of unreliability, and thus it was constitutionally permissible to "consider" such a conviction.) (Souter, J., concurring). Furthermore, in light of the Commission's ongoing study in the area of criminal history and recidivism, it would be premature to tinker with this downward departure provision.

4. We do believe that there are factors to which the Commission has assigned excessive weight, such as loss, drug quantity, acquitted conduct, certain cross references, uncharged and dismissed aggregable offenses, and aspects of criminal history category, and that this does result in some departures that otherwise would not be necessary. These departures are based on loss overstating the seriousness (less than 20 times), section 4A1.3 (11.9%), and cases like those cited in Part 4, supra (less than 20 times). The excessive weight accorded drug quantity undoubtedly encourages prosecutors, defense attorneys and judges to look for a way to ameliorate disproportionate punishment through downward departures. PAG has previously provided its views on the most recent increase in the loss table under Sarbanes-Oxley. The American College of Trial Lawyers reasonably suggests that acquitted conduct and cross references should be eliminated, and that the impact of uncharged and dismissed aggregable offenses should be reduced to four levels or 25% of the number of levels attributable to conduct determined under section 1B1.3(a)(1), whichever is less. See American College of Trial Lawyers Proposed

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Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines, 38 Am. Crim. L. Rev. 1463, 1485-1500 (2001). All of that being said, we recognize that it is impracticable to revise the Guidelines in any extensive way in the time allotted.

Conclusion

Congress was right in the first place when, after years of careful study, it chose to include in the Guidelines a structured form of individualized sentencing for appropriate cases. The departure power has preserved the Guidelines' credibility as sound sentencing policy and their very constitutionality. The approach we suggest is consistent with the actually quite modest rate of judicial departure that already existed when the Department of Justice sounded its false alarm, and the further reduction in the incidence of such departures that will result from the other provisions of the Protect Act.

As always, we appreciate the opportunity to present our perspective on these important issues and look forward to working closely with the Commission as it develops specific proposals in response to Congress' directives.

Sincerely,



James Felman
Barry Boss
Co-chairs, Practitioners' Advisory Group

cc: All Commissioners
Charles Tetzlaff, Esq.
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