

August 1, 2003

The Honorable Diana E. Murphy
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Issue for Comment: Downward Departures

Dear Judge Murphy:

We write to provide you our perspective as you respond to the directive contained in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21 ("Protect Act"). Specifically we focus on section 401(m) which directs the Sentencing Commission to review the grounds on which downward departures are based and appropriately amend the guidelines to substantially reduce the incidence of downward departures.

As you know, FAMM is a champion of judicial discretion. Because discretion is built into the guidelines, we have always taken an active interest in the Commission and supported the guidelines as preferable to mandatory minimums. FAMM and other civil rights and criminal justice organizations wrote you shortly after passage of the Protect Act urging that the Commission do everything in its power to preserve judicial departure authority. Departures are necessary to the health of the federal sentencing guidelines, particularly in light of the guidelines' relative rigidity and complexity. We specifically urged you to conduct a comprehensive review of judicial departures to develop a thorough understanding of the underlying reasons for current departure rates. *See* Letter to Diana E. Murphy from Leadership Conference on Civil Rights, *et al.* of April 28, 2003. We encouraged you to use this information and the insights you develop to reduce the incidence of departures without disturbing departure authority.

Compelling support for that position is presented in the letter submitted to you by the Practitioners' Advisory Group and we endorse its perspective and recommendations. *See* letter from James Felman and Barry Boss to Diana E. Murphy of August 1, 2003. The PAG presents evidence of the role that government-supported "fast-track" departures have played in driving departure rates and debunks the government's use of statistics to support their case that judicial departures are lawless and excessive and must be limited. *Id.* at 2-3. The PAG believes that the Commission will find that courts are granting departures not sought by or acquiesced in by the government in only 7.5 to 12 percent of all cases.

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We write separately to advise you of the Departure Study Project sponsored by FAMM and share with you our very preliminary findings. The Departure Study Project was prompted by U.S. Attorney William Mercer's testimony before the Commission on March 25, 2003. You will recall that Mr. Mercer discussed the perspective of the Department of Justice on the Commission's response to directives contained in the Sarbanes-Oxley Act.

Mr. Mercer devoted part of his testimony to the subject of judicial departures in white collar cases. He decried what he described as a pattern of judicial abuse of departure authority. Mr. Mercer identified several departures, those for charitable or civic work, aberrant behavior, employment record, family ties, post-offense rehabilitation, diminished capacity, mental condition and other, unmentioned departures as "fodder in virtually every sentencing of a white collar defendant" Testimony of William W. Mercer, U.S. Attorney, District of Montana, and Paul K. Charlton, U.S. Attorney, District of Arizona at 9 (March 25, 2003) ("Mercer Testimony"). As evidence of these alleged judicial evasions, he presented the Commission with summaries of 78 "troubling" cases from 49 federal districts. He advised the Commission that "the pattern now seems clear that federal judges are using downward departures frequently, in some cases nearly routinely, as a way of avoiding imposing the prescribed guideline sentence." Mercer Testimony at 8 (March 25, 2003).

He advised the Commission that the Department of Justice would take steps in light of these "troubling" departures and the failure of the Sentencing Commission to fulfill its responsibility to prevent departures from "becoming an obstacle to reaching the statutory goals of sentencing." Specifically, the Department would "seek legislation . . . to address the unacceptably high levels of non-substantial assistance downward departures." Mercer Testimony at 9-10.

That promise was fulfilled when Rep. Thomas Feeney introduced what came to be known as the Feeney Amendment to the Amber Alert bill, today incorporated into the Protect Act.

FAMM is perhaps best known for bringing the human face of sentencing to policy-makers, members of Congress, the public and, of course, the Sentencing Commission. We decided to examine as many of the 78 cases as we could to develop a fuller understanding of these most troubling of departures and tell the stories of the defendants they benefitted. We were particularly interested to learn why these cases were presented by Mr. Mercer as examples of widespread use of departures to evade appropriate guideline sentences.

Methodology:

Our study involves the following steps:

- Locate and contact the defense attorney by telephone, describe the project and provide the DOJ case summary and links to Mr. Mercer's testimony on the

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- Commission website.
- Conduct a scripted interview with defense counsel to determine why the departure was sought and to request relevant documents.¹
- Review all documents provided, available court opinions, including appellate opinions, and any media coverage.²
- Draft narrative summaries, with citations to the available record, describing the offenses, explaining why the departures were sought and why they were granted, and noting whether the departures were appealed, and if so, the outcomes.
- Have defense counsel review narrative summaries for accuracy.

We strived for objectivity and refrained from making judgments in the narratives about the conclusions Mr. Mercer drew from the cases. We relied as much as possible on court documents, pleadings, orders, and similar record materials in drafting our narratives. We were also committed to learning about and telling the stories of the circumstances that led the defendants to seek and the judges to grant the departures. Of course, there is tension between our roles as researchers and advocates. While we do not presume to endorse the propriety of any given departure in the DOJ example cases, we felt it important to explain why they were sought and why they were granted. The narratives that are attached to this letter at Tabs A - F tell those stories in 2-4 page summaries.³

This letter presents the DOJ examples verbatim followed by thumbnail sketches of the narratives found at Tabs A- F. We draw some conclusions about the DOJ examples, particularly where it appears the DOJ example omits what we consider relevant information as documented by our review. We have many cases to complete and present only the handful we have so far completed for your review. Our conclusions are necessarily preliminary.

¹ We are grateful to our volunteers, including summer associates from two area law firms, who are assisting us with the interviews, gathering and analyzing sentencing documents and drafting narrative summaries.

² We did not request Pre-sentence Investigation reports in light of their confidential character.

³ We do not include with this letter the court documents we gathered for each case as they are extensive. We are happy to provide them if you wish to review them.

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The DOJ Cases and our findings:

TAB A *United States v. Sarmiento*, 01-40185, Northern District of California,
Judge Claudia Wilken.

DOJ description: *In United States v. Sarmiento, the defendant pled guilty to fraud in connection with access devices. Defendant stole credit card applications belonging to 50-100 of his employer's customers and used the information to purchase roughly \$250,000 of merchandise and credit over the internet. Defendant moved for a downward departure based on extraordinary acceptance of responsibility, family ties and a combination of factors. The defendant's offense level was 13 (Zone D, 12-18 months imprisonment). Over the government's objection, the Court departed to a level 10 (6-12 months) and sentenced the defendant to five-years' probation and 12- months' community confinement.*

Our findings: The DOJ summary of the *Sarmiento* case neglects to describe the profoundly disturbing circumstances that led the defendant to seek and the judge to grant a departure. Mr. Sarmiento's wife lost their first baby in childbirth because the obstetrician failed to recognize the fact that the child was too large. The baby strangled in the birth canal while the doctor attempted to perform a caesarian section and Mrs. Sarmiento nearly died on the operating table. The couple became profoundly depressed, and the stress on Mr. Sarmiento was exacerbated when he lost his job. Mrs. Sarmiento became pregnant again and Mr. Sarmiento, unemployed, began to support his family through criminal activity, and lost himself in gambling and drug use. His wife gave birth a year to the day after the first baby died. Too deeply depressed to take an interest in motherhood, she left all caregiving to her husband who is, by all accounts, a loving father. When Mr. Sarmiento was arrested, he made every effort to cooperate, confessing, preserving evidence and offering to participate in a sting. The target would not deal with him despite his repeated efforts, and he was unable to secure a substantial assistance departure. He turned his life around following his arrest. He sought the departure for a variety of factors, especially to care for his infant son.

The government did not appeal the departure.

TAB B *United States v. Checoura*, No. 01-149, D.N.J., Judge Stephen M.
Orlofsky.

DOJ description: *In United States v. Checoura, the defendant, a bookkeeper for S&S X-Ray Products, was convicted of interstate transportation of stolen property. Pursuant to Section 5K2.13 (diminished capacity), the defendant received a two-level downward departure from an offense level of 20 because the*

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defendant's compulsive gambling disorder significantly impaired her ability to control her embezzlement of over \$4 million from her employer over a five-year period. This reduced the guideline range from 33-41 to 27-33.

Our findings: This description, while correctly noting that Ms. Checoura's gambling addiction was the underlying basis for the departure, fails to acknowledge the extensive evidence of her mental illness, the painstaking approach the court took in considering the departure or the fact that, having granted a two-level downward departure, Judge Orlofsky sentenced Ms. Checoura to the middle of the sentencing range. Ms. Checoura was sexually abused as a child and beaten violently by her first husband. She began gambling while still in the Philippines to "escape a tremendous workload and a marriage that (quite literally) nearly killed her." In the United States, she gambled almost daily, wagering up to \$50,000 monthly. Ms. Checoura's expert witness submitted a written evaluation that included diagnostic tests and the results of three examinations and testified in support of the conclusion that she suffered from, *inter alia*, Pathological Gambling, Post-traumatic Stress Disorder, and Recurrent and Severe Major Depression. Judge Orlofsky concluded in a thorough and thoughtful published opinion after a full sentencing hearing, four supplemental briefs and full consideration of the government's policy arguments that Ms. Checoura suffered from a significantly reduced mental capacity that was sufficiently linked to her criminal conduct. As further evidence of his balanced approach to the sentencing, he sentenced Ms. Checoura, who was 67 years old, to the middle to the guideline range explaining that "[a]lthough I have determined that Checoura possessed significantly reduced mental capacity, that is not to say she is entirely blameless." Ms. Checoura's counsel described Judge Orlofsky as a conservative judge, not easily given to departures.

The government did not appeal the departure.

TAB C *United States v. Jacobson*, No. 02-115, W.D.N.Y, Judge Michael A. Telesca.

In United States v. Jacobson, a psychiatrist charged in a health care fraud matter, received a probationary sentence after a seven-level downward departure (from a Zone D sentencing range of 24-30 months) principally on the grounds of diminished capacity. The Court concluded that a prison sentence would be inappropriate and departed to an offense level of 10 (which provided for a range within Zone B of 6-12 months). The five-year probationary sentence, \$50,000 fine and restitution order (\$786,585), included special conditions of probation that the defendant serve his first six months in home detention, perform 250 hours of volunteer community service per year for five years, and submit to psychiatric care. An appeal is pending. A sentence of incarceration would have removed the doctor from practice. Now the doctor is fighting to retain his medical license with the state medical board and using the fact that the district court ordered him to

perform community service as a reason to maintain his license. The Court relied primarily on the defendant's diminished capacity motion, finding that the hypomanic condition diagnosed by defendant's expert "caused him to be unable to control this drive to act as he did" in overbilling. The Court, however, also cited "other factors" coupled with the illness resulting in his diminished capacity to justify the departure. While the Court stated that the restitution agreed to by Jacobson "does not warrant any special consideration for his sentence" and concluded "that fact alone" does not entitle defendant to a downward departure, the court found the acceptance of responsibility reflected by that restitution "noteworthy" and apparently included it as one of the factors leading to the sentence imposed. More clearly cited were the Court's conclusions that "[t]he defendant is a valuable asset to this community in that he takes care of a large number of mental patients" and that removing him from the community "would cause a deep hardship to his patients who rely upon continuity of care in rendering psychotherapy and would put a tremendous burden on other psychiatrists to absorb the patient load."

Our findings: While the facts presented are accurate, if incomplete, this DOJ summary mentions that the government appealed the downward departure, but does not reveal that the departure was affirmed in January 2003 in a published opinion. The record we reviewed characterized Dr. Jacobson as a highly skilled psychiatrist who was well known for his self-sacrificing philosophy of treatment and extraordinary commitment to those in need. He turned no patient away. He was known for treating difficult patients other psychiatrists refused and he was the only doctor of his skill level in the community who would always accept patients regardless of conditions, finances or insurance status. Dr. Jacobson's expert described a man who was himself severely depressed and who kept his illness a secret, treating himself with anti-depressants that in turn induced a manic-depressive, bi-polar cycle. These swings drove his ability to work productively and also compelled him to act on the drive to compensate himself for his irresistible self-sacrifice. The government did not contradict this evidence, examine Dr. Jacobson, or offer any expert opinion to contradict the defense expert. It did argue the facts were insufficient to support a downward departure. The government also suggested on appeal that Judge Michael A. Telesca used the departure to avoid a guideline he disagreed with. It was clear that Judge Telesca struggled with this case. He opened the sentencing by telling the court "[t]his is probably one of the most difficult cases I have ever had." Over thirty pages of sentencing transcript, the judge never expressed displeasure with the guidelines and repeatedly invoked them as he made his decisions and specific findings. See Brief for Defendant-Appellee at 26.

TAB D *United States v. Hauck*, 02-63, M.D. Fl., Judge Anne C. Conway

DOJ Description: *In United States v. Hauck*, the defendant pled guilty to bank fraud. The PSR calculated defendant's offense level to be 18 even though the

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government recommended an offense level of 13 (based on its belief that the loss overstated defendant's culpability). The Court, however, departed downward below even the government's recommendation to a level 10 (range of 6-12 months) based on aberrant behavior. It sentenced defendant to three- years' probation with a special condition of six-months' home detention.

Our findings: The DOJ description is confusing if not inaccurate. Judge Conway, who denied two of Mr. Hauck's motions for departure based on extraordinary acceptance of responsibility and multiple causation of loss, granted two downward departures. One motion for a three-level departure was supported by the government. That departure was based on the parties' agreement that the loss calculated under the guidelines overstated the seriousness of the offense. The other departure granted by the court was three levels for aberrant behavior. Mr. Hauck, who was sixty-nine years old, argued that he had never offended in the past, had not engaged in significant planning of the crime and his criminal conduct was of limited duration. The Statement of Reasons is perfunctory. That said, the judge considered objections to the PSR, sentencing memoranda, and multiple briefs from both sides addressing the four motions. According to defense counsel, Judge Conway is not seen as a judge who routinely grants departures. Attorneys are expected to provide sound and documented reasons if they hope to convince the court. The government opposed three of the downward departures and the court only granted one of the three over the objection.

The government did not appeal the departures.

TAB E *United States v. Sadolsky*, 99-5780, W.D.Ky., John G. Heyburn, II

DOJ description: *In United States v. Sadolsky, a regional carpet manager with Sears fraudulently credited his personal credit card account with \$39,477 in returned merchandise. He was convicted of computer fraud because he accessed the corporation's computers thirteen times and fraudulently credited his personal credit card for returned merchandise. Although the statute required a minimum term of imprisonment of six months, the Court departed downward two levels under Section 5K2.13, based on defendant's gambling disorder. The defendant received a term of six months' home confinement (not imprisonment) in violation of the statutory requirement. The government appealed. The judgment was affirmed in an opinion published at 234 F.3d 938 (6th Cir. 2000).*

Our findings: This description refers to a six-month mandatory minimum sentence prescribed by the statute and states the judge ignored that minimum. That argument was not raised by the government on appeal. The six-month sentence was a guideline provision under then section 2F1.1(c)(1), not a statutory mandatory minimum, which may explain why the government did not appeal on that ground. As discussed by the government, Mr. Sadolsky had a

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gambling disorder. He was consumed by his gambling addiction. He earned \$30,000 annually and could gamble that amount in one week. He stole to support his habit and was so desperate at one point that he sold his wife's wedding ring. When confronted with his thefts, he immediately confessed, entered into a plea agreement, agreed to upward adjustments, and began making regular restitution. The plea agreement permitted him to seek a downward departure for significantly reduced mental capacity. Judge Heyburn held a lengthy sentencing hearing at which Mr. Sadolsky presented un rebutted evidence of his addiction and argued that his compulsion led to the theft. Judge Heyburn granted a two-level departure, one level more than requested. The government argued that gambling disorders are not proper departure grounds and that there was an insufficient nexus between Mr. Sadolsky's illness and his criminal conduct. The Court of Appeals for the Sixth Circuit carefully reviewed circuit precedent and the 1998 amendment to U.S.S.C. § 5K2.13 in a thorough opinion affirming the challenged departure.

TAB F *United States v. Sanders*, 01-0045, N.D. Al., Edwin Nelson

DOJ description: *In United States v. Sanders, a bank vice president defrauded her employer and two other victims out of monies in excess of \$200,000. Although only losses related to the bank's loss were set forth in the indictment, the other thefts were covered in the plea agreement relating to restitution. The defendant sought a departure based upon charitable works, family ties and responsibilities, aberrant behavior, diminished capacity, and extraordinary efforts at rehabilitation. The Court departed seven levels from an offense level of 15 to 8 on the basis of defendant's alleged diminished capacity and aberrant behavior. This established a guideline range of 0-6 months. He sentenced the defendant to eight hours in custody. The government appealed the sentence. The Eleventh Circuit reversed and remanded requiring the district court to explain why her mental condition took the case outside the heartland of similar cases. The Court imposed the same sentence on remand. Although she had a high paying job and spent much of the money on herself, the Court found that the defendant embezzled money to "buy love in her close relationships" which permitted her to function in a "carefully built facade of success and normality." The government has taken another appeal.*

Our findings: While the DOJ summary mentions the government's appeal of the sentence imposed on remand, it neglects to mention that Ms. Sanders' sentence, including the seven-level departure for diminished capacity, was upheld by the Eleventh Circuit prior to the March 25, 2003 Commission hearing. On remand, Judge Nelson issued a thorough and detailed description of his reasons for granting the departure that is not captured in the DOJ selections from the sentencing opinion. For example, the quote reproduced above is taken out of context. What Ms. Sanders' expert witness, a psychologist for twenty years and once the chief psychologist for a state department of correction, said was that Ms. Sanders' "illegal behavior functioned to allow [her] to

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preclude experiencing overwhelming feelings of depression and the likely suicidal behavior that would surely have resulted if her lifelong, carefully built facade of success and normality were disrupted even for a scintilla of time." He also said that "her illegal behavior functioned as a massive, almost psychotic, cry for help." Judge Nelson made explicit findings based on the evidence presented and also explicitly found, based on his experience of twenty-five years on the bench, that "few if any defendants suffer from the type of psychological pathologies with which Sanders has been diagnosed. The court finds that even fewer suffer from pathologies as prevalent and extensive as those from which Sanders suffers. Thus, the court finds that this case lies outside of the 'heartland' of cases that are contemplated by the Sentencing Guidelines."

Preliminary Conclusions

We cannot draw any conclusions about whether the cases submitted to the Commission by the DOJ that we have not yet reviewed are reliable examples of judicial guideline evasion. We can say that the cases we have explored so far do not strike us as obvious examples of judicial avoidance of the prescribed guidelines.

We generally found records rich in detail. We saw evidence of thoughtful judges presented with compelling cases and balancing difficult decisions. For example, in Ms. Checoura's case, the court considered numerous briefs, held a full sentencing hearing, and published a thoughtful, well-reasoned opinion granting the departure but sentencing the defendant to the middle of the guideline range. This did not strike us as an example of judicial evasion. Nor did the actions of Judge Telesca in the *Jacobson* case, in which the judge stated on the record how difficult he found the case to be. Similarly, in the *Sanders* case, a case successfully appealed by the government, Judge Nelson on remand wrote a thorough, detailed and well-supported opinion explaining the departure for diminished capacity. Judge Conway, in Mr. Hauck's case, considered and rejected two defendant motions for departure, granted one unopposed by the government and another over the government's objections. This careful parsing of the grounds suggested an appropriate and deliberate consideration. In other cases, we learned about defendant circumstances that simply were not captured in the government's summaries to this Commission. The Sarmiento family's tragedies and Ms. Checoura's terrible circumstances, while not conveyed in the DOJ descriptions, were before the courts that imposed those sentences.

We expected to see more appeals by the government. The government declined to appeal three of the six cases we reviewed. Of the three appealed, the Courts of Appeals affirmed the departures in two cases. In the third, *United States v. Sanders*, the Eleventh Circuit Court of Appeals overruled one departure and vacated the other, remanding it for a fuller explanation. On appeal, the court affirmed the sentence on remand. We know that among the cases on which we have yet to report that approximately 30 were appealed and, of those about which we have information, about half were reversed on appeal. This suggests to us that in the cases considered the most egregious examples of judicial evasion, the system of seeking appeals works to find and

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correct unwarranted departures. We do not yet know why the government chose not to appeal the other approximately 48 cases that it presented in summary form to the Commission as examples of unwarranted departures.

Admittedly, this is a very small sample – fewer than ten percent of the cases presented to the Commission by Mr. Mercer. We are continuing to review the remaining cases and when finished, will make our final report available to the Commission. Our initial impression, however, based on the cases that we have reviewed, is that the departures appear to have been sought and granted in good faith. They do not strike us as supporting the proposition that judges are using departures as a way to avoid imposing the sentences prescribed by the guidelines as feared by Mr. Mercer. We thus continue to urge that you take a most delicate and moderate approach to the task set you by the Protect Act and leave undisturbed the ability of judges to depart when the facts warrant.

Thank you for considering our views.

Sincerely,



Julie Stewart,
President



Mary Price
General Counsel

TAB A SARMIENTO

Case: United States v. Sarmiento, 01-40185 (N.D. Cal.)
Published Opinion: None
Judge: Claudia Wilken
Pre-dep. offense lev. 13
Departure requested: 3 levels for extraordinary acceptance of responsibility; substantial family ties; desperate family circumstances leading to offense; and/or combination of factors
Departure granted: 3 levels
Sentence: Level 10, 12 months community confinement, five years probation
Appeal taken: No
Documents: Defendant's Sentencing Memorandum and Motion for Downward Departure; PACER docket

In United States v. Sarmiento, defendant Fitzgerald "Jerry" Sarmiento pled guilty to one count of fraud in connection with access devices. Mr. Sarmiento's criminal behavior, for which he took full responsibility, was the result of a sad sequence of events set off by the death of his son during birth and the near-death of his wife. In 1999, Mr. Sarmiento's then-girlfriend and now-wife Lynn became pregnant. (Def.'s Sent. Mem. & Mot. For Down. Dep. at 2.) Mr. Sarmiento and his close-knit Filipino family were thrilled about the upcoming birth of the family's first grandchild. Id. When Lynn went into labor, however, her doctor failed to notice that the baby was too big for the birth canal. Id. Midway through the delivery, the doctor attempted to perform a caesarean section, but by then the baby had strangled and died in the birth canal. Id. at 2-3. Lynn nearly died on the operating table as well. Id. at 3.

Following this family tragedy, Mr. Sarmiento and Lynn both became severely depressed. Id. This depression was exacerbated by financial difficulties because Mr. Sarmiento had recently lost his job as a delivery driver. Id. It was in this state that Mr. Sarmiento began using drugs to escape his misery after being introduced to methamphetamine by a friend. Id.

Shortly thereafter, Lynn became pregnant again. Id. Both Lynn and Mr. Sarmiento continued to struggle with the loss of their first child, and Lynn had an especially difficult time adjusting to news of the pregnancy. Id. The stress of the situation in which the couple found itself only increased as the pregnancy progressed. Mr. Sarmiento was laid off from two jobs and began to support his family through the criminal activity with which he was charged. Id. As Mr. Sarmiento lost himself in gambling and drug use, Lynn gave birth to a baby boy exactly one year after the death of their first child. Id. Mr. Sarmiento has been, by all accounts, a loving father. Because Lynn continued to suffer from extreme depression following the baby's birth she had little interest in caring for him. Mr. Sarmiento became the primary caregiver and has continued to fill that role while he wife works during the day. Id.

When Mr. Sarmiento was arrested on the charges at issue, he immediately took full responsibility for his actions. After consenting to a search of his home, even voluntarily

preserving incriminating evidence until the search could be made, he made a full and detailed confession. Id. at 3-4. Mr. Sarmiento also agreed to cooperate with the government in any way requested. The government did not move for a downward departure for substantial assistance only because, despite Mr. Sarmiento's repeated efforts, the government's target refused to deal with him. See Id. at 4; see also Telephone Interview with Hilary Fox, Assistant Federal Public Defender (June 23, 2003). Mr. Sarmiento, who never engaged in crime before, knew no other criminals to whom he could lead the government. (Def.'s Sent. Mem. & Mot. for Down. Dep. at 4.)

His arrest prompted Mr. Sarmiento to turn his personal life around. He stopped using drugs completely and enrolled at the Hayward Adult School and Heald Business College, where he was named to the honor roll and received "Certificates of Excellence" for maintaining a GPA of 3.5 or above. Id. at 4. Mr. Sarmiento has since graduated. Interview, supra.

Due to all of these factors, and particularly due to the fact that his wife worked and could not care for their infant, Mr. Sarmiento requested that the judge grant him a downward departure and sentence him to twelve months of community confinement. Though the government agreed that twelve months would be an appropriate sentence, the prosecution opposed the downward departure on the grounds that Mr. Sarmiento should serve his sentence in confinement. Id. The judge granted the defendant a three-level downward departure and sentenced him to five years probation with twelve months in community confinement. Id.

The government did not appeal the downward departure. Id.

TAB B CHECOURA

Case: United States v. Leticia A. Checoura, No. 01-149 (D. N.J.)
Published Opinion: United States v. Checoura, 176 F.Supp.2d 310 (D. N.J. 2001)
Judge: Stephen M. Orlofsky
Pre-dep. offense lev.: 20
Departure Sought: Two levels for diminished mental capacity
Departure Granted: Two levels for diminished mental capacity
Sentence Imposed: Level 18, 31 months imprisonment, three years supervised release, restitution of \$4,864,014.23
Appeal Taken: No
Documents: Letter from Lori M. Koch, Esq. to the Honorable Stephen M. Orlofsky of July 30, 2001 (letter brief seeking downward departure for diminished capacity); Letter from Lori M. Koch to Stephen M. Orlofsky of September 24, 2001 (letter brief in further support of downward departure); Notice of Decision, In the Matter of S&S X-Ray Products, Inc. (T.A.T. 1995) (No. 93-153); Letter from Valerie C. Lorenz, Ph.D., LCPC, Ex. Dir. Compulsive Gambling Center, Inc. to Lori Koch of March 28, 2001; Intake Evaluation Summary, Compulsive Gambling Center Inc.; Psychological and Projective Test Results; V.C. Lorenz, Ph.D., Addendum to Initial Evaluation; Petition, Republic of the Philippines Juvenile and Domestic Court (1971); Government's Memorandum of Law in Opposition to Defendant's Motion for a Downward Departure Based Upon Diminished Capacity; Government's Supplemental Brief in Opposition to Defendant's Motion for a Downward Departure Based Upon Diminished Capacity; PACER Docket

Leticia Checoura pled guilty to a charge of interstate transportation of stolen property. As a bookkeeper for S&S X-Ray Products, Ms. Checoura stole over \$4 million from her employer over the course of five years to sustain her gambling addiction. United States v. Checoura, 176 F.Supp.2d 310, 311 (D. N.J. 2001). Ms. Checoura used the money stolen from her employer in Brooklyn, New York to gamble at casinos throughout Atlantic City, New Jersey. (Letter from Koch to Orlofsky of 7/30/2001, at 1.) ("Letter of 7/30/2001")

Before committing this crime, Ms. Checoura had been involved in no financial or criminal wrongdoing (Letter from Lorenz to Koch of 3/28/2001, at 3.) ("Letter of 3/28/2001") during her long and traumatic life (see generally Letter of 7/30/2001 at 2-4). Born in 1935 in the Philippines, Ms. Checoura spent part of her childhood living in a convent while her father lived with his mistress. Id. at 2. She suffered sexual abuse at the hands of a servant, and at twelve, she was sent to live with her brother, a compulsive gambler. Id. As an adult, she single-handedly supported her family, id., and was physically abused by her husband (e.g., Pet., Repub. Of Phil. Juv. & Dom. Ct. at 2). Ms. Checoura's husband once beat her so violently that she required hospitalization and spinal surgery. (Letter of 7/30/2001 at 2). She began gambling in the Philippines around this time to escape a "tremendous workload and a marriage that (quite literally) nearly killed her." (Letter of 7/30/2001 at 8.)

Ms. Checoura became addicted to gambling in 1991 or 1992 (Letter of 9/24/2001 at 3) as a response to the mounting stress in her life (Letter of 7/30/2001 at 3). The onset of her addiction coincided with her diagnosis of diabetes, *id.*, a "critical life incident" that triggered Ms. Checoura's pathological gambling (Letter of 9/24/2001 at 5). Ms. Checoura regularly gambled around \$50,000 each month. *Id.* She was an almost daily visitor to several Atlantic City casinos. *Id.* Because she gambled so much money, the casinos began sending limousines to pick her up. *Id.* The casinos frequented by Ms. Checoura, unlike the other individuals and institutions in her life, treated her "like a princess." Telephone interview with Lori M. Koch, Federal Public Defender's Office (July 16, 2003).

Ms. Checoura's plea agreement reserved her right to argue for a downward departure pursuant to section U.S.S.G. § 5K2.13. *Checoura*, 176 F.Supp at 311. Ms. Checoura requested a two-level downward departure based on her substantially reduced mental capacity. *Id.* Ms. Checoura's attorney submitted two comprehensive letter briefs supporting the departure. (See Letter of 7/30/2001; *see also* Letter of 9/24/2001.) In support of her request, Ms. Checoura presented a written evaluation from Dr. Valerie C. Lorenz, the Executive Director of the Compulsive Gambling Center and a Certified Clinical Mental Health Counselor. *Id.* Dr. Lorenz rarely makes recommendations regarding punishment, but she made an exception in Ms. Checoura's case. (Letter from Lorenz to Koch of 3/28/2001, at 4.) Dr. Lorenz examined Ms. Checoura on three separate occasions. (Letter of 9/24/2001 at 1-2.) She also conducted diagnostic testing. (See Psych. and Proj. Test Res.) Dr. Lorenz reported that Ms. Checoura's gambling disorder was severe (Letter of 9/24/2001 at 3.) She also noted that Ms. Checoura met all of the criteria promulgated by the American Psychiatric Organization for diagnosis of pathological gambling. (See Intake Eval. Summ at 11-12.)

At Ms. Checoura's sentencing hearing, Dr. Lorenz testified on her behalf and submitted to cross-examination by the government. *Checoura*, 171 F.Supp. 2d at 312. Dr. Lorenz testified that Ms. Checoura, at the time of her crime, suffered from Pathological Gambling, chronic Post-Traumatic Stress Disorder, Recurrent and Severe Major Depression, and Adjustment Disorder with Mixed Anxiety and Depressed Mood. (Letter of 9/24/2001 at 4.) On cross-examination, Dr. Checoura testified that pathological gambling was Ms. Checoura's "most severe and . . . most serious" disorder. *Id.* Dr. Lorenz testified that Ms. Checoura was unable to control her gambling or any conduct related to gambling. *Checoura*, 176 F.Supp. 2d at 313. The government offered no evidence to rebut Dr. Lorenz's submissions or testimony. (Letter of 9/24/2001 at 5.)

The government advanced the policy argument that gambling, as an addictive behavior, should, like drug or alcohol abuse, preclude departures under U.S.S.G. § 5K2.13. *Checoura*, 176 F. Supp. 2d at 314. While it did not challenge the testimony or conclusions concerning Ms. Checoura's mental illness, it did point out that the evaluating expert was neither a psychiatrist nor a psychologist. (Gov't's Mem. of Law in Opp. to Def.'s Mot. for a Down. Dep. Based Upon Dim. Cap. at 12 n.7.)

The court rejected the government's argument, concluding that the preclusion of voluntary intoxication as a basis for a departure under U.S.S.G. § 5K2.13 is intended to "assure that those who are mentally incapacitated as a result of prior rational choices are treated as penologically equivalent to those who in fact choose to commit crime." *Checoura*, 176 F. Supp.2d at 314. Because Ms. Checoura did not choose to gamble compulsively, she was not "similarly situated to [those who have voluntarily used drugs] in the most crucial respect." *Id.* at 315.

The government also argued that because there is an indirect link between Ms. Checoura's volitional impairment and the conduct that constituted her offense, no departure should be granted. Id. The court disagreed, stating that Ms. Checoura's theft was a component act of her compulsive gambling and, therefore, there was a sufficiently direct causal connection between her gambling disorder and her criminal conduct. Id.

The district court concluded, based on Dr. Lorenz's testimony, that Ms. Checoura suffered from a significantly reduced mental capacity and warranted a downward departure under U.S.S.G. § 5K2.13. Checoura, 176 F.Supp.2d at 313. After holding a full sentencing hearing, id. at 312, taking four supplemental briefs, id., and considering the government's policy arguments, id. at 314-15, the court granted Ms. Checoura's request for a two-level downward departure based on her diminished mental capacity. Id. at 316.

Although the two-level departure reduced Ms. Checoura's guideline range from level 20, or 33-41 months, to level 18, or 27-33 months, the court, recognizing that "the law demands compliance from the strong-willed and weak-willed alike," id. at 315, sentenced Ms. Checoura to the middle of the guideline range, settling on a sentence of 31 months. Id. At 316. The court explained that "[a]lthough I have determined that Checoura possessed significantly reduced mental capacity, that is not to say that she is entirely blameless. . . . Had she sought help sooner, she might have averted some of the losses suffered by the victim" Id. At 315-16.

The sentence also reflected an upward adjustment of 13 levels based on the amount of loss. The court rejected the parties' agreement that a 15-level upward adjustment based on the amount of loss was warranted. Id. It also incorporated the parties' agreement to a two-level adjustment for more than minimal planning and a two-level adjustment for abuse of trust. The court also granted a three-level adjustment for acceptance of responsibility. Id. at 310.

The government did not appeal. Interview, supra.

TAB C JACOBSON

Case: United States v. Jacobson, No. 01-6085 (W.D.N.Y.)
Opinion: United States v. Jacobson, 57 Fed. Appx. 468 (2d Cir. 2003)
Judge: Michael A. Telesca
Pre-dep. offense lev: 17
Departure Sought: Diminished mental capacity, extraordinary restitution
Departure Granted: Seven levels for diminished mental capacity and a combination of factors
Sentence Imposed: Level 10, five years of probation, six months of home confinement, restitution of \$786,585.72, fine of \$50,000, and 250 hours of community service annually for five years.
Appeal Taken: Yes
Outcome of Appeal: Departure affirmed
Documents: Transcript of Sentencing Proceedings, United States v. Jacobson (W.D.N.Y. 2002) (01-6085); Brief for Defendant-Appellee, United States v. Jacobson, 57 Fed. Appx. 468 (2d Cir. 2003) (No. 02-1151); PACER Docket

In United States v. Jacobson, 57 Fed. Appx. 468 (2d Cir. 2003), the Second Circuit Court of Appeals affirmed the sentence of Clifford R. Jacobson who pled guilty in the Western District of New York to mail fraud. Dr. Jacobson was charged with submitting false claims to and overbilling health insurers. Dr. Jacobson billed Medicare, Medicaid, and private insurers for procedures he never performed and for time he did not spend with patients. (Sent. Tr. at 11-12.)

Dr. Jacobson practiced psychiatry in Rochester, New York. He was well known for his self-sacrificing philosophy of treatment and extraordinary commitment to those in need. Twenty-two letters from colleagues and dozens of letters from patients confirmed that Dr. Jacobson turned away no patients regardless of the burden their treatment imposed on his time and resources. (Appellee's Br. at 6.) He was known for treating "difficult" patients that other doctors refused to see. (Sent. Tr. at 3.; see also Appellee's Br. at 5.) He was the only psychiatrist of his skill level in the Rochester community who would always accept patients regardless of their conditions, abilities to pay, or insurance statuses. Telephone interview with David Rothenberg, Esq., Geiger & Rothenberg (7/2/2003). He was always available for his patients in emergencies, id.; (see also Sent. Tr. at 3.), and refused to abandon patients. (Appellee's Br. at 6.) Dr. Jacobson was described by all parties as a "gifted and caring physician." (Sent. Tr. at 5.)

Dr. Jacobson's plea agreement reserved his right to argue for a downward departure pursuant to sections U.S.S.G. § 5K2.13 and 5K2.0. (Appellee's Br. At 3.) Dr. Jacobson requested a downward departure based on diminished mental capacity and extraordinary restitution. To support his motion for a departure on the grounds that he suffered from a diminished mental capacity at the time of his overbilling, Dr. Jacobson submitted an affidavit and report from Samuel L. Kent, M.D., his treating psychiatrist. (Appellee's Br. At 4.) Dr. Kent reported that Dr. Jacobson had suffered from depression since medical school. Id. Dr. Jacobson was severely depressed and expressed suicidal wishes. Id. Dr. Kent stressed that psychiatric illness carries an extra stigma for mental health professionals, noting that "a psychiatrist with psychiatric illness is suspect to all and the motivation to deny and conceal it is strong, to the point that we try to conceal it from ourselves." Id.

For many years before beginning treatment with Dr. Kent, Dr. Jacobson treated himself by self-prescribing anti-depressants. Id. Dr. Jacobson's self-prescribed regimen of anti-depressants led to hypomanic states, which are non-psychotic periods of mania. Id. Essentially, Dr. Jacobson, by treating himself with anti-depressants, entered a manic-depressive or bipolar cycle. Dr. Kent reported that the hypomanic states, which oscillated with equally intense depressive periods, "not only fueled and increased [Dr. Jacobson's] ability to work productively, but also an increased drive to act on the drive to compensate himself for his self-sacrifice that was irresistible." Id. At 5. Dr. Kent reported that Dr. Jacobson could not control his urge to overbill; his self-sacrificial tendencies combined with his intermittent hypomania created a "*dissociated* compulsion to seek compensatory rewards that he didn't normally allow himself." Id. (emphasis in original).

The government offered no contrary evidence. Instead, the government argued that Dr. Jacobson's emotional disorder did not warrant a downward departure. (Sent. Tr. at 16.)

The judge opened the sentencing by telling the court "[t]his is probably one of the most difficult cases I have ever had." (Sent. Tr. at 10.) After considering Dr. Kent's report, letters submitted on Dr. Jacobson's behalf, and the government's arguments (see Sent. Tr. at 14-16), the district court granted Dr. Jacobson's request for a downward departure based on his "diminished mental capacity as a result of an occupational disorder from over-working, suffering depression, and mistreating himself." (Sent. Tr. at 16).

Dr. Jacobson also sought a departure based on extraordinary restitution. Dr. Jacobson and the government had disagreed about the appropriate method for calculating the restitution figure. The government calculated the restitution figure without accounting for the time that Dr. Jacobson spent with the patients beyond merely managing their medication. (Appellee's Br. at 8). Consideration of the time spent with patients would have significantly reduced the amount of restitution owed by Dr. Jacobson. Id. Dr. Jacobson, however, agreed to pay the amount calculated by the government, id., and began making payments before sentencing (Sent. Tr. at 17). The district court, however, concluded that Dr. Jacobson's payment of restitution was not enough, standing alone, to warrant a departure. See id.

The district court did credit Dr. Jacobson's payment of restitution, as among a combination of factors justifying a seven-level downward departure. See id. at 17-20. The court emphasized the value of Dr. Jacobson's services to those in his community suffering from mental illness and addiction. See id. at 18-19. Numerous letters from colleagues and patients attested to Dr. Jacobson's unique willingness to help all patients regardless of their conditions or abilities to pay. Id. Removing Dr. Jacobson from his community, the court concluded, "would cause a deep hardship to his patients . . . and put a tremendous burden on other psychotherapists to absorb the patient load." Id. at 20. The court also considered the fact that Dr. Jacobson's overbilling, over which he had no control, did not harm his patients. See id. Based on these factors, the court concluded that "there exist[] mitigating circumstances of a kind or to a degree not adequately taken into consideration by the Sentencing Commission." Id. at 19-20.

Judge Telesca sentenced Dr. Jacobson to five years probation, a condition of six months home confinement, restitution of \$786,585.72, and a fine of \$50,000. (See Sent. Tr. at 20-21). As a further condition of probation, he ordered Dr. Jacobson to perform 250 hours per year for five years

of volunteer community service in the form of free psychiatric services to institutions serving indigents. Finally, he ordered Dr. Jacobson to submit to psychiatric care under a psychiatrist of the court's choosing.

On appeal, the government argued that neither the evidence of Dr. Jacobson's disorder nor evidence of the causal link between Dr. Jacobson's diagnosis and conduct were sufficient to warrant a downward departure for diminished capacity. Jacobson, 57 Fed. Appx. at 469. The Second Circuit Court of Appeals, reviewing the district court's conclusion that Dr. Jacobson met the factual requirements for a diminished capacity departure, concluded that there was no clear error in the lower courts factual findings "based primarily on the report of Dr. Samuel Kent as to the existence of Jacobson's significantly reduced mental capacity and the causal connection between that reduced mental capacity and his criminal conduct." Id.

The government also argued that the district court should not have considered Dr. Jacobson's payment of restitution and the effect of his incarceration on third parties when determining the extent of the departure. Id. The Second Circuit Court of Appeals, citing Circuit precedent for the proposition that "'in extraordinary cases . . . the district court may depart when a number of factors . . . combine to create a situation that 'differs significantly from the 'heartland'' . . .,'" found no error in the lower court's consideration of these factors, among others, as bases for a departure. See id. at 469-70.

TAB D HAUCK

Case: United States v. Hauck, No. 02-63 (M.D. Fl.)
Published Opinions: None
Judge: Anne C. Conway
Pre-dep. offense lev.: 16
Departures requested: Actual loss overstated loss, aberrant behavior, multiple loss causation, extraordinary acceptance of responsibility
Departures granted: Six levels for actual loss overstated loss, aberrant behavior
Sentence: Level 10, three years probation, special condition six months home detention
Appeal taken: No
Documents: Information; Plea Agreement; Objections to Pre-Sentence Report; Defendant's Unopposed Motion for Downward Departure Pursuant to U.S.S.G. § 2F1.1 Application Notes 10 and 7(b) Based on Over-represented Loss; Defendant's Motion for Downward Departure Pursuant to U.S.S.G. § 2F1.1 Application Note 10 Based on Multiple Causation of Loss; Defendant's Sentencing Memorandum; Defendant's Motion for Downward Departure Pursuant to U.S.S.G. § 5K2.0 Based on Extraordinary Acceptance of Responsibility; Defendant's Motion for Downward Departure Pursuant to U.S.S.G. § 5K2.0 Based on Aberrant Behavior and Incorporated Memorandum of Law; Government's Response and Memorandum of Law in Opposition to Defendant's Motion for Downward Departure Pursuant to U.S.S.G. § 5K2.20 Based on Aberrant Behavior; Government's Response and Memorandum of Law in Opposition to Defendant's Motion for Downward Departure Pursuant to U.S.S.G. § 5K2.0 Based on Extraordinary Acceptance; Government's Response to Defendant's Unopposed Motion for Downward Departure; [Defendant's] Notice of Supplemental Authority Regarding Proposed Role Enhancement; [Defendant's] Notice of Supplemental Authority Regarding Extent of Downward Departure for Aberrant Behavior; Judgement in a Criminal Case with Statement of Reasons

In United States v. Hauck, defendant C. Jonathan Hauck, III pled guilty to one count of bank fraud and was sentenced to three years of probation and 180 days of home detention. (J. in a Crim. Case at 1.) Mr. Hauck was the Chairman and CEO of InfoPower International, Inc. ("InfoPower"), a company based in Heathrow, Florida that designed and marketed computer software systems. (Plea Agreement at 9.) In 1994, InfoPower obtained a line of credit from SunTrust Bank of East Central Florida ("SunTrust"). Id. By March of 1996, this line of credit had been raised to \$1 million. Id. As part of its credit agreement, InfoPower pledged its accounts receivable as collateral and agreed to submit base borrowing certificates reporting the amount of its accounts receivable. Id. As Chairman and CEO of InfoPower, Mr. Hauck certified and signed these certificates before submitting them to Sun Trust. Id. at 9-10. In an interview with FBI agents on August 8, 2000, Mr. Hauck admitted that he knowingly submitted inflated accounts receivable figures to SunTrust. Id. at 10. Following this oral confession, Mr. Hauck made a written confession, entered a pre-indictment guilty plea to an information, and waived his right to indictment by a grand jury. (Def.'s Sent. Mem. at 1.)

Though the pre-sentence report stated that Mr. Hauck's total offense level was 18, the court reduced it to 16, agreeing with the government and the defendant that Mr. Hauck was not a manager and, therefore, not subject to enhancement under the Guidelines. (J. in a Crim. Case) The court was evidently swayed by the fact that both the defense and the government agreed that Mr. Hauck had not directed and supervised InfoPower's CPA in carrying out the fraud. (Def.'s Sent. Mem. at 3; see also Gov.'s Response to Def.'s Unopp. Mot. for Down. Dep. at 1.)

The court granted Mr. Hauck a three-level departure based on its finding that the actual loss over-represented the seriousness of the offense. (J. in a Crim. Case) The pre-sentence report listed SunTrust's loss amount as \$1,146,308.60, which was the total amount of the line of credit extended to InfoPower. (Def.'s Unopp. Mot. For Down. Dep. Pursuant to U.S.S.G. § 2F1.1 at 1.) Only \$255,000 of this total amount was extended to InfoPower as a result of Mr. Hauck's fraudulent conduct, however. Id. at 1-2. Indeed, SunTrust extended well over \$1 million before Mr. Hauck made any inflated submissions. Id. at 1. No doubt the court also took note that the government joined the defense in requesting this three-level departure. (Gov.'s Resp. to Def.'s Unopp. Mot. for Down. Dep. at 1.)

The court granted the defendant one other departure of three levels for aberrant conduct over the government's objection. (See J. in a Crim. Case; see also Gov.'s Resp. and Mem. of Law in Opp. to Def.'s Mot. for Down. Dep. Pursuant to U.S.S.G. § 5K2.20 at 1.) The defense sought this departure on the grounds that Mr. Hauck had never previously been arrested in his sixty-nine years; that his criminal conduct was committed without significant planning; and that his criminal conduct was of a limited duration. (Def.'s Motion for Down. Dep. Pursuant to U.S.S.G. § 5K2.20 at 4.) The government opposed this departure on both substantive and procedural grounds. (See Gov.'s Resp. and Mem. of Law in Opp. to Def.'s Mot. for Down. Dept. Pursuant to § 5K2.20.) It argued that Mr. Hauck's conduct was neither limited in duration nor done without significant planning, but undertaken over numerous occasions and the result of much planning and discussion. See id. at 3.

The court did not grant Mr. Hauck's final two motions for downward departures—on the bases of extraordinary acceptance of responsibility and multiple causation of loss. (See J. in a Crim. Case; see also Def.'s Mot. for Down. Dep. Pursuant to U.S.S.G. § 5K2.0; see also Def.'s Mot. for Down. Dep. Pursuant to U.S.S.G. § 2F1.1.)

Judge Conway is not seen as one who makes a habit of granting departures and attorneys must provide sound and documented reasons if they expect to convince the court. Telephone Interview with Kevin J. Darken, Esq. (June 23, 2003).

The government did not appeal Mr. Hauck's sentence. Id.

TAB E SADOLSKY

Case: United States v. Sadolsky, No. 99-5780 (W.D. Ky.).
Published Opinions: United States v. Sadolsky, 234 F.3d 938 (6th Cir. 2000)
Judge: John G. Heyburn, II
Pre-dep. offense lev.: 12
Departure Requested: One level for diminished mental capacity
Departure Granted: Two levels for diminished mental capacity
Sentence: Level 10, six months of home detention, five years of probation
Appeal taken: Yes
Outcome of Appeal: Affirmed
Documents: Final Brief of the Defendant/Appellee, United States v. Sadolsky, 234 F.3d 938 (6th Cir. 2000) (No. 99-5780); PACER docket

In United States v. Sadolsky, 234 F.3d 938 (2000), the United States Court of Appeals for the Sixth Circuit affirmed the sentence, including a two-level downward departure under U.S.S.G. § 5K2.13 based on significantly reduced mental capacity, of defendant Michael Sadolsky. Mr. Sadolsky previously pled guilty in the Western District of Kentucky to seven counts of computer fraud. Id. at 940. Mr. Sadolsky had no criminal history and had served as an excellent employee at several Louisville companies until he became addicted to gambling. (Appellee's Br. at 2.) At its peak, that addiction consumed his life. Mr. Sadolsky, who made around \$30,000 a year, would often gamble that amount in a week. Telephone Interview with Scott C. Cox, Esq. (July 7, 2003). At times, he would gamble and lose in excess of \$5,000 in a single day. (Appellee's Br. at 3.) To sustain his addiction and cover his debts, Mr. Sadolsky, then employed as a Department Manager at Sears Roebuck & Company, fraudulently credited amounts for returned merchandise to his personal credit card over a six-month period. Sadolsky, 234 F.3d at 940; (see also Appellee's Br. at 3.)

When Mr. Sadolsky was confronted by his superiors, he provided a full account of his conduct to the Louisville Office of the Secret Service and, shortly thereafter, entered into a plea agreement with the government. (Appellee's Br. at 3.) He agreed to upward adjustments based on amount and for more than minimal planning. Sadolsky, 234 F.3d at 938. Mr. Sadolsky began making regular restitution, Interview, supra, and attended several Gamblers Anonymous meetings each week following his sentencing (Appellee's Br. at 3).

The plea agreement negotiated with the government (which stipulated an offense level of 12) reserved Mr. Sadolsky's right to seek a downward departure pursuant to section U.S.S.G. § 5K2.13. Sadolsky, 234 F.3d at 940. Mr. Sadolsky requested a one-level downward departure based on his significantly reduced mental capacity. Id. Although Mr. Sadolsky knew that his actions were wrong, he was unable to control them. (Appellee's Br. at 5.)

The court held a lengthy sentencing hearing. Id. at 4. Mr. Sadolsky presented un rebutted evidence about his gambling addiction to support his request. Id. at 5; see also Sadolsky, 234 F.3d at 945. The court took testimony from an expert on gambling addictions, who testified that pathological gamblers suffer from a diminished capacity to control their conduct. Sadolsky, 234 F.3d at 945. The court also heard that Mr. Sadolsky sincerely wanted, but was unable, to control his compulsion. Id. Mr. Sadolsky and his wife also testified, telling the court of the desperation that

culminated in his criminal conduct. So desperate was he at the end for funds that he sold his own wife's wedding ring. (Appellee's Br. at 5.) In addition to offering testimony, Mr. Sadolsky cited medical reference materials that defined pathological gambling as an impulse control disorder. Sadolsky, 234 F.3d at 945.

The district court granted Mr. Sadolsky a two-level downward departure because his pathological gambling addiction significantly reduced his ability to control his behavior. (Appellee's Br. at 6.) The district court relied on the uncontroverted testimony presented by Mr. Sadolsky, concluding that "the case has been made, that his capacity was sufficiently impaired to be able to control this particular kind of behavior[.]" (Appellee's Br. at 6 (quoting Sent. Tr. at 42).) Mr. Sadolsky was sentenced to five years of probation and six months of home detention. Sadolsky, 234 F.3d 940.

The government appealed the departure arguing that, as a matter of law, gambling disorders are improper grounds for departures under U.S.S.G 5K2.13. The Court of Appeals noted, in upholding the departure, that section 5K2.13 had been amended in 1998 to include volitional, as well as cognitive, disorders in diminished capacity cases. Id. at 942. The court carefully reviewed pre- and post-amendment case law in its opinion affirming the departure.

The government also challenged the departure, arguing that there was an insufficiently direct nexus between Mr. Sadolsky's volitional impairment and his unlawful conduct. In order for a volitional impairment to warrant a downward departure under section 5K2.13, according to the government, the defendant must be unable to control the conduct that constitutes the offense. Id. at 943. The government posited that because Mr. Sadolsky's pathological gambling addiction motivated, but did not constitute, his crime, his addiction did not warrant a departure based on significantly reduced mental capacity. Id. The Court of Appeals concluded that the government's distinction was unfounded and pointed out that conditioning departures under section 5K2.13 in the fashion urged by the government would undermine the Guidelines's goal of sentencing uniformity. Id.

The government also asserted that Mr. Sadolsky did not prove, by a preponderance of the evidence, that he was entitled to a departure under section 5K2.13. Id. at 941. The Court of Appeals concluded that, in light of the expert testimony presented by Sadolsky, the medical reference evidence, and the lack of contrary evidence, the district court did not error in finding that Mr. Sadolsky qualified for a downward departure based on his compulsive gambling. Id. at 945.

TAB F SANDERS

Case: United States v. Sanders, 01-00045 (N.D. Ala.)
Opinions: United States v. Sanders, 37 Fed. Appx. 505 (Apr. 29, 2002) (unpublished);
United States v. Sanders, No. 02-15644, 2003 U.S. App. LEXIS 12250 (11th Cir. Mar. 24, 2003) (unpublished)
Judge: Edwin L. Nelson
Pre-dep. offense lev.: Level 15, including two-level enhancement for more than minimal planning
Departure sought: Diminished capacity, aberrant behavior, outside the heartland
Departure granted: Diminished capacity, aberrant behavior
Sentence imposed: Level 8, eight hours custody, six months community confinement
Appeal taken: Yes
Outcome of Appeal: Aberrant behavior departure reversed; diminished capacity vacated and remanded for fuller explanation of the departure
Sentence imposed: Level 8, eight hours custody, six months community confinement
Appeal taken: Yes
Outcome of appeal: Departure and sentence affirmed.
Documents: Brief of Appellant, United States v. Sanders (11th Cir. 2001) (No. 01-13996); United States v. Sanders, No. 01-0045 (N.D. Ala. Sept. 13, 2002); Brief of Appellant, United States v. Sanders (11th Cir. 2002) (No. 02-15644); Brief of Appellee, United States v. Sanders (11th Cir. 2002) (No. 02-15644); PACER Docket

Ms. Sanders pled guilty to one count of embezzlement for thefts totaling \$187,395.95 from her employer while she was marketing vice president for AmSouth Bank. United States v. Sanders, 01-0045 (N.D. Ala. Sept. 13, 2002). Theft from a prior employer were used to calculate her relevant conduct. (Appellee's Br. at 3.)

Ms. Sanders sought a downward departure for aberrant behavior, diminished mental capacity and circumstances outside the heartland. (Appellant's Br. at 6 (No. 01-13996).) Ms. Sanders' expert, Stephen Kaczor, a psychologist with twenty years experience, including as the chief psychologist of a state department of corrections, testified on her behalf. (Appellee's Br. at 5.) He diagnosed her with major depression with significant schizoid, masochistic and dependent traits. *Id.* Dr. Kaczor testified that Ms. Sanders' "illegal behavior functioned to allow [her] to preclude experiencing overwhelming feelings of depression and likely suicidal behavior that would surely have resulted if her lifelong carefully built facade of success and normality were disrupted even for a scintilla of time." Sanders, 01-0045 at 12. He also testified that "her illegal behavior functioned as a massive almost psychotic, cry for help." (Appellee's Br. at 6.) At a sentencing hearing the government offered no evidence to rebut the expert testimony and documentation presented by Ms. Sanders to support her request for departure. (Appellee's Br. at 2-3.) The court departed seven levels on the grounds of diminished capacity and aberrant behavior. (Appellant's Br. at 8-9 (No. 01-13996).)

The government appealed the departure, arguing that Ms. Sanders' compulsion to spend money was not sufficiently related to her act of taking money. *See id.* at 13-17. The government also argued that Ms. Sanders did not "suffer[] from a condition that compelled anything." *See id.* at 15

n.1. In support of its contentions, the government cited a "mental health specialist" who reviewed Dr. Kaczor's submissions (but did not examine Ms. Sanders) and wrote in the Pre-sentence report that "there is nothing to suggest that her cognition is distorted to the point that she would not know the difference from right or wrong or that she was compelled to behave illegally due to mental health issues." Sanders, 01-0045 at 9 (quoting PSI at 13). The government also contested her request for a departure based on aberrant conduct, arguing that a departure for aberrant conduct is "legally and factually inapplicable" given the amount of time and extent of planning that went into the scheme. (Appellant's Br. at 11, 18-20 (No. 01-13996).)

The Eleventh Circuit reversed the aberrant conduct departure and remanded the case for further explanation of the departure for diminished capacity. Sanders, 01-0045 at 2-3. On remand, the district court explained the factual and legal grounds for the departure in a 15-page order that was upheld on review. See United States v. Sanders, No. 02-15644, 2003 U.S. App. Lexis 12250 (11th Cir. March 24, 2003).

Judge Nelson cited the testimony, test results and findings contained in two letters of Mr. Kaczor. Sanders, 01-0045 at 5, 6-10.

[S]he endorsed a number of items suggesting extreme and bizarre thoughts, depression and a preoccupation with feeling guilty and unworthy. . . . She is likely to experience prolonged periods of depressive moods Severe feelings of emptiness, loneliness and recurrent thoughts of death and suicide are present [T]hese objective personality tests . . . are indicative of a woman who is experiencing profound emotional problems **and whose cognition, affect and behavior is profoundly influenced by her significant psychiatric conditions.**

Id. at 6 (quoting Exp. Letter at 1-2) (emphasis added by court). The court relied on the expert's conclusion that a significant link existed between Ms. Sander's mental illness and her conduct. Id. at 8. "[H]er basic survival . . . is what Mari believed was at risk every day of her life if she were to reveal or acknowledge her depression (not being perfect). . . . It is also why she was unable to effectively control the illegal behavior." Id. at 7 (quoting Exp. Letter at 3). The court specifically found, relying on Dr. Kaczor's two letters and testimony

that the mental illness from which Ms. Sanders suffers is not typical of those that generally come before this court, whether or not they suffer from depression. Drawing from and reflecting upon this court's experience and observation of many individual who have come before it for sentencing over a period of more than a quarter century, in cases both similar and dissimilar to Sanders, the court concluded that few, if any, defendants suffer from the type of psychological pathologies with which Sanders has been diagnosed.

Sanders, 01-0045 at 11. The court also found, citing circuit precedent, that Ms. Sanders' illness directly related to the crimes she committed:

The court is satisfied, as a matter of fact, that there is a direct and undeniable chain connecting the defendant's mental illness with the crime. . . . She had a mental condition that required her to buy the love of her family and others about her. To