

FEDERAL PUBLIC DEFENDER

District of Arizona
222 North Central Avenue, Suite 810
PHOENIX, ARIZONA 85004

FREDRIC F. KAY
Federal Public Defender

(602) 382-2743
1-800-758-7053
(FAX) 602-382-2800

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: Comments re: Section 401(m), PROTECT Act

Dear Judge Murphy:

The Federal and Community Defenders are very mindful of the plight facing the Commission because we know that you are so diligent in carrying out your statutory obligations. We applaud your willingness to address and attempt to resolve some of the most complicated sentencing issues during your tenure. Now, as you set out on one of the most considerable tasks to face the Commission, perhaps since the first set of guidelines, we commend to you an eloquent quote from Abraham Lincoln that may help guide you in this process:

I'll do the very best I know how – the very best I can; and I mean to keep doing so until the end. If the end brings me out all right, what is said against me won't amount to anything. If the end brings me out wrong, ten angels swearing I was right would make no difference.

Abraham Lincoln¹

¹ The Honorable Frank M. Johnson, Jr., federal district judge and later circuit judge, first appointed to the bench in 1955 by President Eisenhower, is said to have kept this "typed quotation from Abraham Lincoln under an unobtrusive paperweight on this courtroom desk" during his more than thirty-six years on the bench. Jack Bass, *Taming the Storm* 3 (1st ed. 1993).

Introduction – A Principled Approach

We recommend that the Commission approach the task of reviewing departure grounds and substantially reducing the incidence of downward departures by scrupulously adhering to the central, “intelligible principles” of the Sentencing Reform Act: “to establish sentencing policies and practices . . . that provide certainty and fairness in sentencing, avoiding unwarranted disparities . . . while maintaining sufficient flexibility to permit individualized sentences.”² Considering also the parsimony principle in 18 U.S.C. § 3553(a) and the departure authority in § 3553(b), this means that the Commission should (1) increase sentences only where necessary; (2) preserve judicial discretion to whenever warranted; and (3) act solely based on the facts, fully explaining the reasons for the Commission’s actions in the official commentary to the guidelines.³

We recommend this approach because we believe it provides a principled way to implement the directive without compromising the central purpose of the guidelines. It is also grounded on statutory and constitutional requirements. The alternative – longer prison terms and limits on the power of federal judges to show mercy where appropriate – is not a solution to any problem that we are aware of.

Your adherence to these first principles is particularly important now, in light of the “disturbing state of affairs” of our criminal justice system, marking us as the “most penal of civilized nations.”⁴ The criminal justice crisis is fueled by the constant ratcheting up of prison sentences

² 28 U.S.C. § 991(b)(1)(B); *United States v. Mistretta*, 488 U.S. 361, 371 (1989).

³ See 18 U.S.C. § 3553(a) and (b); 28 U.S.C. § 991. Section 3553(a) requires district court judges to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes of” sentencing, namely: just punishment, adequate deterrence, protection of the public, and providing the defendant with needed rehabilitation.

Section 3553(a) is understood as establishing the “parsimony principle” for sentencing under the guidelines. See Marc L. Miller and Ronald F. Wright, Your Cheatin' Heart(land): the Long Search for Administrative Sentencing Justice, 2 Buff. Crim. L. Rev 723, 747. The principle of parsimony means that the “least restrictive – least punitive – sanction necessary to achieve defined social purposes should be chosen. This principle is not novel. A presumption in favor of punishment less severe than imprisonment pervades all recent scholarship and most legislative reforms. This principle is utilitarian and humanitarian; its justification is somewhat obvious since any punitive suffering beyond societal need is, in this context, what defines cruelty.” *Id.* at 810, n.57, citing, Norval Morris, The Future of Imprisonment 60-62 (1974).

⁴ Richard A. Posner, Overcoming Law 157-158 (Harvard U. Press, 1995). When Judge Posner wrote in 1995, the prison population had just exceeded one million, with that number now

and the failure of Congress to correct, particularly with respect to drug offenses, the disparate impact of many of its policies and mandatory minimum sentencing schemes on minorities and the least culpable.

I. The Perceived Problem

A. Increasing Rate of Downward Departures

The rate of downward departures has steadily increased since the early days of the guidelines, spiking in 1996 and inching up steadily to a rate of 18.3% in 2001. This is not due to an epidemic of leniency among federal judges. The very judges who are assailed for being soft on criminals because of the supposed increase in the overall rate of downward departures are the judges who are ordering prison terms for the overwhelming majority of offenders even where the guidelines do not require it.⁵ Moreover, a downward departure does not mean a sentence of probation or that a defendant is released outright. In 2001, more than ninety percent of offenders received some sort of prison sentence compared with the pre-guidelines practice where almost half of all defendants received probation.⁶ Of those offenders in 2001 who were eligible for straight probation, nearly 40% received some form of prison sentence.

The increase in the rate of departure is directly related to the fact that federal prosecutors have adopted a practice of "exchanging" departures for "fast track" guilty pleas. In return for a tacit or explicit agreement from the prosecutor to not oppose a motion for departure, the defendant is required to waive his rights to discovery, appeal, confrontation, and trial by jury, among others. See generally Testimony of USSC Vice Chair John Steer, before the Senate Judiciary Oversight Committee, October 2000. The government has adopted this practice as a case-management tool in immigration cases, and also in drug cases in some districts, particularly along the Southwestern border.

In addition, most downward departures are controlled by the government in one form or another. In a growing number of districts, for example, the standard plea agreement requires the defendant to waive the right to seek a downward departure. In the Southern District of New York the standard plea agreement in white collar cases requires such a departure waiver. In such districts,

having doubled in less than a decade.

⁵ USSC, *Sourcebook of Federal Sentencing Statistics*, at 34; 53 (2001)

⁶ USSC, *Sourcebook of Federal Sentencing Statistics*, at 27 (2001) (81.9% received straight prison terms; 3.8 received prison and conditions of confinement; 5.5% received probation and confinement; and only 8.8 % received straight probation); U.S. Bureau of the Census, *Statistical Abstract of the United States* 183 (110th ed. 1990).

a defendant must go to trial or plead guilty without an agreement if he wants to preserve his right to seek a departure. Although district courts have independent authority to grant departures, it is rare for a district court to grant a departure in the absence of an express request for one. Hence, in such districts, when the plea agreement does not forbid the request for a departure, it serves as signal to the court that the government does not oppose the departure.

1. So-Called "Fast Track" Practices

Fast-track departures are not limited to immigration cases and are not standard from district to district or even within court divisions in a single district. The government's rationale for offering fast-track departures differs depending on the district and type of case. In reentry cases, the crushing caseloads drive the fast-track policies. In addition, in some border and point-of-entry districts that see a lot of drug courier cases, the government agrees to a departure in drug cases. In some instances, the government will offer "fast-track" deals in cases that would ordinarily be handled in state court because the quantity of drugs does not meet the district's criteria for federal prosecution and the state has declined prosecution. Reportedly, this is a more frequent occurrence with state budgetary systems strapped for cash.

a. Departures "Pursuant to Plea Agreement"

In the district of Arizona, the practices differ depending on the division. In Tucson, fast-track agreements provide for a downward departure with the reason stated in open court that the departure is based on the "plea agreement." Commission statistics reflect that departures "pursuant to plea agreements" account for nearly 20% of all departures nationally (1947 departures out of 10,026 departures).⁷ The majority of these departures will presumably be eliminated once the Commission promulgates an "Early Disposition" departures as required by the PROTECT Act. That change will reduce the overall departure rate by nearly 4% to somewhere over 14%. If the Commission were also to specifically forbid departures "pursuant to plea agreement" simultaneously requiring more specificity in the stated reason for departure, as required by 18 U.S.C. § 3553(c), this would push such departures into the now-government controlled "Early Disposition program" and also serve as a self-policing mechanism as courts realize that the reason put forward is not an adequate departure ground.

In any event, however, even if some of these departures are not in fact "fast-track" departures, the Commission ought to make some provision in the guidelines for downward adjustments where a defendant enters into a quid-pro-quo agreement with the government giving up some right in exchange for leniency. From the perspective of sentencing policy and consistent with the "truth-in-sentencing" principles embodied in the guidelines, it would be preferable if such arrangements were

⁷ USSC Sourcebook at Table 24-25 (2001).

brought to light and acknowledged by the court rather than negotiated in the dark.⁸ The Commission should consider promulgating a new adjustment in Chapter 3, by identifying a non-exhaustive list of factors that, when present in a plea agreement would merit an additional reduction, *e.g.*,

(1) a defendant expressly waives some constitutional right, such as the right to appeal or to review discovery;

(2) a defendant assists the government by not putting it to its proof or waiving the right to pursue a motion to suppress, where the facts or the law raise a substantial issue;

(3) a defendant relieves the government of the expense of making a material witness available by stipulating to the testimony; and

(4) factors of a similar nature.

**b. Departures Based on "Totality of Circumstances" or
"General Mitigating Circumstances"**

In the Phoenix division of the district of Arizona, the fast-track practice is slightly different. There, departures pursuant to fast-track agreements are granted for the stated reason that the guidelines have not accounted for the "totality of the circumstances." We believe that the Commission statistics that reflect that 19.9% of downward departures nationally were granted on the ground of "general mitigating circumstances" include a substantial number of these departures, which when moved to the "Early Disposition" column would substantially reduce the departure rate nationwide by another 3 to 4%.

Other districts may use formulations similar to those used in the District of Arizona and as those practices change consistent with the mandate in the Protect Act, there will be a corresponding substantial reduction in the rate of departures nationwide.

B. Few Upward Departures

At the other end, the very low rate of upward departures does not reflect a judiciary intent on soft-on-crime sentences. It simply reflects the realities of legislative and guideline changes, which with a handful of notable exceptions, raise penalties and add enhancements. Simply put, sentences are very high and upward adjustments are added frequently to the many that already exist making upward departures redundant and unwarranted. For example, when a court in a single,

⁸ Plea agreements, as the Supreme Court has explained, are a sanctioned method of resolving criminal cases. *See Santobello v. New York*, 404 U.S. 257 (1971).

recent case, held that a prison cook, who had been assaulted by an inmate did not qualify as an "official victim" for purposes of the enhancement in U.S.S.G. § 3A1.2, the Commission promptly amended the guideline in response to concerns expressed by the Bureau of Prisons.⁹ The amendment expanded the category of persons who may be considered official victims to include a variety of "prison employees, as well as independent contractors and volunteers on prison premises with official authorization."¹⁰ As a result, there is rarely a situation where an aggravating factor has not been more than adequately considered in establishing the guideline and thus rarely does the need for an upward departure arise.

II. The Task: Review Departure Grounds, Reduce Incidence of Downward Departures & Promulgate an Early Disposition Departure

Section 401(m) of the PROTECT Act directs the Commission to:

- (1) review the grounds of downward departure that are authorized by the sentencing guidelines, . . . and
- (2) promulgate . . .
 - (A) appropriate amendments . . . to ensure that the incidence of downward departures are substantially reduced;
 - (B) a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney; and
 - (C) any other conforming amendments to the sentencing guidelines . . . necessitated by this Act.

⁹ United States v. Walker, 202 F.3d 181 (3d Cir. 2000).

¹⁰ USSG App.C, amend. 643 (2002).

A. Reducing the Incidence of Downward Departures Should be Accomplished Without Limiting Judicial Discretion

Sentencing "lies so close to the heart of the judicial function" and the judicial flexibility to impose individualized sentences is so integral to the goals and structure of the Sentencing Reform Act that the Commission should preserve judicial discretion whenever possible. Congress did not explicitly direct the Commission to abolish or restrict judicial discretion.¹¹ Instead, Congress has directed the Commission to "reduce the incidence of downward departures." Congress left intact the statutory authority allowing district judges to depart when warranted. The directive should be read as a command to the Commission concerning its ongoing obligation to "review and revise" the guidelines "in consideration of [the] data coming to its attention," in this case the rising trend of downward departures rather than a directive to restrict summarily judicial discretion.¹²

Were the Commission to promulgate amendments broadly limiting the authority of district courts to depart – say for example by abolishing all unmentioned factors – such changes may be struck down as inconsistent with the statutory mandates in §§ 3553(a) & (b).¹³ Such a drastic approach would also alter the basic structure of the guidelines, from one that promotes flexibility, requiring district judges to consider inadequately considered factors on a case-by-case basis to something altogether different. In 1984, Congress rejected a "strict determinate sentencing" scheme in favor of the "mandatory-guideline system" that it adopted.¹⁴ At the time, Congress settled on this system over competing proposals because it "would be successful in reducing sentence disparities while retaining the flexibility needed to adjust for unanticipated factors arising in a particular case."¹⁵

Congress preserved judicial authority to depart as a critical component of the new scheme.¹⁶ Drastic restrictions on the district court's discretion to depart would transfer even more power to

¹¹ *Mistretta*, 488 U.S. at 673-74; 18 U.S.C. § 3553(b); 28 U.S.C. § 991(b)(1)(B); *see also* *Koon v. United States*, 518 U.S. 81, 116 S. Ct. 2035, 2053 (1996).

¹² 28 U.S.C. § 994(o).

¹³ *See Stinson v. United States*, 113 S.Ct. 1913, 1915 (1993) ("commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline").

¹⁴ *United States v. Mistretta*, 488 at 367.

¹⁵ *Id.* (reviewing the Senate Report on the Sentencing Reform Act of 1984, S.Rep. No. 98-225 (1983), U.S. Code Cong. & Admin. News 1984 at 78-79, 62); *see also* 28 U.S.C. § 991(b)(1)(B).

¹⁶ *United States v. Mistretta*, 488 U.S. at 367.

federal prosecutors, whose charging decisions would control the outcome even more than at present. The Commission does not have the authority to make changes that drastically change that structure without a more explicit mandate from Congress that laying down a different set of intelligible principles.

It is not altogether clear, moreover, that the Commission could displace one of the basic goals that Congress laid down for the Commission – “maintaining flexibility to permit individualized sentences” – without implicating the “nondelegation doctrine rooted in the separation of powers that underlies our tripartite system of Government.”¹⁷ In *Mistretta*, the Supreme Court made clear that the delegation of power to the Commission to establish sentencing policy is constitutional only because Congress laid down an “intelligible principle” to guide the Commission.¹⁸ Section 401(m) of the PROTECT Act does not replace that principle with one that authorizes a transfer of discretion to prosecutors or to the Commission.

B. The Commission Needs to Understand the Departure Trend

The Commission is not Congress, which has almost unfettered discretion to make policy judgments. Before limiting judicial flexibility to grant departures, the Commission first needs to review and understand the sentencing data it has collected. It simply makes sense to understand a problem before drafting a solution. But more importantly, one of the central functions of the Commission is to monitor and make sense of sentencing data, including the district court’s statement of reasons for imposing a departure, so that it may carry out the Congressional mandate to “review and revise” the guidelines.¹⁹ That is precisely why Congress created a Sentencing Commission to serve as an expert body that could monitor sentencing data and practices. Indeed, the nondelegation doctrine is driven by “a practical understanding” of Congress’ inability to conduct fact finding on increasingly complex issues.²⁰

It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework . . .

¹⁷ *United States v. Mistretta*, 488 U.S. at 371.

¹⁸ *United States v. Mistretta*, 488 U.S. at 374-75.

¹⁹ 28 U.S.C. § 994(o); *see* 18 U.S.C. § 3553(c).

²⁰ *Mistretta*, at 372; *see* 28 U.S.C. § 991(b)(1).

Mistretta at 378-79. It is in part because of the fact-finding function of the Commission that Congress may delegate the power to make sentencing policy to the Commission. The Commission simply cannot make policy divorced from a grasp of the underlying facts and without reference to the "intelligible principles" laid out by Congress in the Sentencing Reform Act – and neither repealed or replaced by the PROTECT Act – without risking a constitutional challenge.

If the departure trends reflect guidelines that require change because there are recurring mitigating circumstances "not adequately taken into consideration" by the guideline, the Commission should amend the guideline and thus reduce the incidence of departure. If those trends reflect case-management methods used by the government in exchange for waiver of appellate rights or an expedited guilty plea, that ground will be addressed by the Early Disposition departure. Alternatively, the Commission may promulgate amendments or add commentary to existing guidelines to address other frequently relied-on mitigating circumstances as, for example with the role adjustment or the acceptance of responsibility guideline.

The Commission should limit departure authority only if determines from its review of the trends and the available sentencing information that there is a systemic failure on the part of district judges to comply with statutory or guidelines commands. Even if there is a failure on the part of individual judges to abide by the guidelines, such problems should not be handled by broad policy changes. Those corrections, if they are necessary, should be accomplished through the appeal process, which the Department of Justice will monitor with more rigor under the new directive implemented by Attorney General Ashcroft in compliance with the PROTECT Act.

In addition, any such non-systemic problems are likely to be corrected by the newly broadened standard of review for departure decisions and the enhanced specificity requirement in § 3553(c). The enhanced specificity requirement in § 3553(c), for example, will result in a form of self-policing by district courts, when including reasons in the written order of judgment, "which reasons must also be stated with specificity." 18 U.S.C. § 3553(c) (as amended by the PROTECT Act). That exercise will lead district judges either to realize that a departure is not warranted or to articulate more clearly why the departure is warranted, which in turn will allow the Commission to review and revise the guidelines more readily. *See* 28 U.S.C. §994(o).

In addition, the newly expanded *de novo* standard of review, will also serve the same self-policing purpose except this time by appellate courts. 18 U.S.C. § 3742(e). In any event, the Commission should not act except on the basis of a real understanding of the reasons for the departure trends and by reference to guidelines principles laid down in the Sentencing Reform Act.

2. Acceptable Rates of Departures

Congress has left for the Commission to decide what rate of downward departure is appropriate; no statute specifies an appropriate rate. One possibility is the inference to be drawn from § 3553(b) that the number of departures that may be granted is limitless. The only question under § 3553(b) is whether the departure is warranted or unwarranted in each case where the district court is required to impose a sentence under the guidelines.

The legislative history of the 1984 Sentencing Reform Act contemplates a departure rate of 20%.²¹

²¹ S. Rep. No. 225, 98th Cong., 1st Sess. 52 n.71 (1983). Commissioner Steer believes that Congress contemplated a downward departure rate around 12%:

In a footnote, the [Senate] Report went on to "anticipate" that judges would depart from the sentencing guidelines "at about the same rate or possibly at a somewhat lower rate" than the U.S. Parole Commission customarily set parole release dates outside its guidelines, which then was about 20% (12% above and 8% below). S.Rep. No. 225, at 52, n.71. A direct comparison between the two systems is difficult, however, for several reasons, including the advent of substantial assistance as a formally recognized, statutory departure under the sentencing guideline system (whereas the parole guidelines actually incorporate into the range determination a more limited form of cooperation), and the generally greater severity of the sentencing guidelines.

Statement of John R. Steer, Vice-Chair, USSC, before the Subcommittee on Criminal Justice Oversight, U.S. Senate Judiciary Committee (Oct. 13, 2000).

Others believe that Congress anticipated a departure rate fully at 20%:

Congress contemplated that the sentencing guidelines system will enhance, rather than detract from, the individualization of sentences. Each sentence will be the result of careful consideration of the particular characteristics of the offense and the offender, rather than being dependent on the identity of the sentencing judge and the nature of his sentencing philosophy. Congress thought that judges would depart from the guidelines when necessary to create individualized sentences, and estimated that this would occur in about twenty percent of the cases. Although courts depart from the sentencing range in approximately thirty percent of the cases, about twenty percent of all departures are for substantial assistance to the government. When Congress estimated a twenty percent departure rate, it had yet to pass the legislation that authorized departures for substantial assistance to the authorities. Accordingly,

The Commission should tread lightly in this area. Without any indication of what rate of departure the current Congress considers appropriate, the Commission is left without clear guidance from Congress as to how much of a reduction in the rate of departures would amount to a "substantial" reduction. The better practice would certainly be to await making further changes until after the Commission is able to assess what impact the current changes (i.e., the new Early Disposition program, specificity requirements, etc.) will have on the departure rates. The Commission should implement the directive to "substantially reduce" departures by means other than reducing judicial flexibility.

C. The Incidence of Downward Departures

Commission statistics reflect an upward trend in the rate of downward departures for non-substantial assistance departures ("other downward departures") beginning around 1995 and continuing to 2001, the date of the most recently published USSC Sourcebook of Federal Sentencing Statistics. The Department of Justice has complained to the Commission and to Congress that the increasing trend reflects an avoidance of guidelines sentences that creates unwarranted sentencing disparities. Testimony of William M. Mercer before the USSC at 7 (March 25, 2003).

Based on our experience, we believe that the rate of departures granted by federal judges have remained relatively constant during this period. The increased departure rates are directly related to a spike in immigration case loads in border districts, where the government offers reduced sentences based on departures as a case-management tool. Some of the departures reflect quid-pro-quo waiver of rights agreements, primarily in border and other districts where caseloads have also increased dramatically. Although only a review of the sentencing data submitted to the Commission can fairly resolve this question, we address the reasons for the various departures based on our experience.

its estimate of the rate of departure did not include substantial assistance departures. In fiscal year 1996, approximately 70% of defendants were sentenced within the guideline range, 19% received a substantial assistance departure, 10% received a down-ward departure (other than substantial assistance), and 1% received an upward departure. The sentencing judges are departing, it could be argued, about 50% less frequently than Congress contemplated.

Sharon O. Henegan, *Teaching Judges How to Find the Appropriate Sentence*, 10 Fed. Sent. R.310 (1998).

1. Drastic Increase in Immigration Cases

a. **"Fast-Track" or Early Disposition Departures.** The spike in downward departures directly corresponds to the spike in immigration cases more so than to any change in the law of departure that resulted from the decision in *Koon v. United States*. A large number of downward departures generated by the case-management policies of federal prosecutors should be properly identified for what they are. This class of departures in border states as well as in other districts with a high volume of cases or unusual cases likely accounts for 5% to 7% or more of the non-substantial assistance departures. We believe that these departures are not limited to immigration cases but also include marijuana "backpack" cases.

These departures are controlled by government prosecutors to ease their caseload. They are not departures granted by judges in the exercise of their independent discretion. The Commission should not narrow judicial discretion, provide additional guidance to district judges based on the incidence of this type of departure, nor abolish any grounds for departure based on these departures. These departures should be designated as government-generated departures in the same category as substantial assistance departures and included in Chapter 5K1. The Commission's review of departures and the creation of the "early disposition" departure, pursuant to the directive in §401(m)(2)(B) of the PROTECT Act, should clarify this issue.

b. **Standard of Review & Specificity of Ground for Departure.** The recent amendments to the standard of review and the specificity requirements will also reduce the number of downward departures. The Commission may be able to project the number of cases that would not meet the new specificity standard set out in 18 U.S.C. § 3553(c) from its review of departure records. In any event, it is clear that those changes have had an impact on departure jurisprudence. Of the cases, where opinions have been issued relating to downward departures since April 30, the date the PROTECT Act became law, 10 affirmed upward departures; 2 affirmed the denial of downward departures; 4 reversed downward departures; 1 involved a remand of a downward departure to reconsider the extent of the departure; 1 remanded to consider a downward departure that the court believed it had no authority to consider and only 1 case, a district court case out of Utah granted a downward departure on the ground that the felon-in-possession prosecution presented a lesser harm. These cases all specifically referred to changes in the Protect Act, thus supporting our assessment that the operation of changes included in the Protect Act will reduce the incidence of downward departures.

c. **Amend §5K2.0 to Require That Reasons for Departures be Stated with More Specificity.** The Commission should add language to §5K2.0 to implement the amendment to 18 U.S.C. § 3553(c).

d. **Amend Immigration Guidelines.** The Commission should refine the immigration guidelines to eliminate some of the sentencing disparities that are generated by adjustments that do not adequately differentiate between defendants whose relative culpability or potential for dangerousness or recidivism varies widely. Defenders have offered a number of suggested amendments, including some during this past cycle. As the Commission knows, the 16-level bump for a prior aggravated felony in U.S.S.G. § 2L1.2, still does not sufficiently differentiate for severity, particularly with respect to prior drug convictions which can range from the sale of small quantities of drugs to involvement as a leader of a large scale drug trafficking offenses.

2. Criminal History Departures

The incidence of criminal history downward departures has in fact decreased in recent years. In 1995, criminal history departures accounted for 15.1% of the overall downward departure rate whereas in 2001 they accounted for a modest 11.9% of the overall downward departure rate.²² There is no indication that district courts are improperly exercising discretion under this provision. In fact, there is a body of very considered appellate law that has developed in this area to guide judicial discretion.²³

Criminal history departures are necessary for reasons that the Commission has explicitly identified – “in recognition of the imperfection of this measure.”²⁴ This is particularly true where a

²² USSC *Annual Report*, Table 29-30 (1995); USSC *Sourcebook* at Table 24-25 (2001).

²³ *E.g.*, *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001) (explaining that courts may not depart down simply because prior drug offense involved small quantity without making a more considered totality of circumstances review); *United States v. Collins*, 122 F.3d 1297 (10th Cir. 1997) (Tacha, J) (affirming downward departure from career offender designation, setting out appropriate factors to consider).

²⁴ The commentary to U.S.S.G. § 4A1.1 explains the need for the discretion to depart from the criminal history score:

Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. In recognition of the imperfection of this measure

number of state jurisdictions have admitted, some in response to suits brought by the Civil Rights Division of the Department of Justice, that they have engaged in unconstitutional racial profiling. District courts must be free to adjust the criminal history of persons who have been affected by such unconstitutional practices. This is consistent with the fairness and flexibility principles that Congress laid down in the Sentencing Reform Act. There is no need to reduce discretion in this area as such departures have been used sparingly by district courts, with only two reported district court cases even identifying this measure. If anything, the Commission should add language encouraging consideration of such disparate state practices to eliminate any unwarranted disparity that may creep into the criminal history calculation as a result.

The Commission needs to address, however, the provision for counting minor offenses set out in U.S.S.G. § 4A1.2(c), which we believe would reduce a number of criminal history departures. Indeed, the Commission has been reviewing this provision for some years, even receiving a recommendation from the Probationers Advisory Group that these minor offense not be included in the calculation of criminal history at all because of problems with the accuracy of the records available for these cases. These also are the types of cases that may be imbued with the convictions based on unconstitutional racial profiling and other disparate state practices.

In any event, it would be advisable for the Commission to await the results of its two-year recidivism study before it makes any changes to limit discretion to depart in this area.

3. Family Ties

The rate of downward departures based on family ties has diminished throughout the years. In 1996, there were 290 departures granted for family ties out of 42,436 cases. That represented 6.2% of the 4,201 downward departures that were granted during that year. In 2001, there were 418 departures based on family ties out of 59,897 cases that year, meaning that the departure rate for family ties had thus been reduced to only 3.8% of the 10,026 departure granted that year. This also reflects that district judges granted departures based on family ties in only .6% of the cases that appeared before them in 2001. Through the years, appellate courts have clarified the standard for granting a departure on this ground; district courts have also exercised discretion to grant and deny

however, §4A1.3 permits information about the significance or similarity of past conduct underlying prior convictions to be used as a basis for imposing a sentence outside the applicable guideline range.

U.S.S.G. § 4A1.1, comment (backg'd)

departures on this ground.²⁵

On these numbers alone, one would be hard-pressed to say that this departure ground is being abused. In theory, every defendant who is convicted and has family ties could potentially seek a departure on this ground. More to the point, with 8,641 female offenders in 2001, and statistics showing that women offenders tend to be first time, single parents in greater proportions than men, it is clear that this departure is "not ordinarily" granted, in accordance with its designation as a discouraged factor in U.S.S.G. § 5H1.6. The discretion to grant this departure should certainly not be narrowed. If anything, this ground is not being used often enough particularly in light of the *Family Unit Demonstration Project* that Congress passed in 1994 to mitigate the separation of small children from their primary care-taking parent, a project that has never been fully implemented.²⁶

Also, because this factor has become a prohibited factor in child-related offenses, its incidence as a ground for departure will be reduced.

4. Diminished Capacity

Departures for this reason were granted in fewer than .4% of cases in 2001 (286/59,897). Although we do not have statistics as to the number of persons with mental disabilities who are prosecuted and sentenced in federal courts, our experience with indigent clients is that many of them suffer from a number of mental disabilities, including mental retardation and bipolar disorders that do in fact contribute to their commission of the offense. In our experience, which seems borne out by the low rate of departures on this ground, courts often reject downward departures on this ground

²⁵ See, e.g., *United States v. Dyce*, 874 F. Supp. 1 (D. D.C. 1994), *rev'd*, 78 F.3d 610 (D.C. Cir. 1994) (reversing family ties departure); *Rivera v. United States*, 994 F.2d 942 (1st Cir. 1993) (Breyer, then CJ) (remanding for consideration of family ties departure to a first-time offender, a single mother of three children who had accepted payment to courier cocaine).

²⁶ In 1994 Congress itself recognized the importance of preserving family unity. The "Family Unity Demonstration Project Act", was enacted, in part, to

- (1) alleviate the harm to children and primary caretaker parents caused by separation due to the incarceration of the parents; [and]
- (2) reduce recidivism rates for prisoners by encouraging strong and supportive family relationships;

42 U.S.C. § 13881. The Act provides for the establishment and evaluation of community correctional facilities, not within the confines of a prison, where primary caretaker parents facing sentences of less than seven years could be housed with their minor children. To date, the Federal Bureau of Prisons has not implemented this project.

because they are not satisfied that the disability contributed to the offense in any manner that the court believes warrants a departure. Other departures are rejected because the defendant's criminal history includes categorical crimes of violence or because the defendant is also addicted to controlled substance. The Commission has amended this guideline, most recently in 1998 to clarify issues with respect to the definition of diminished capacity that generated circuit conflicts. If anything, the departure is applied too strictly to deny downward departures to persons who are indeed suffering from diminished capacity, which in many ways does contribute to the commission of the offense.

This is a departure that is particularly appropriate because persons who suffer from mental disabilities are less deserving of punishment and less likely to be deterred by the a lengthier sentence. For these reasons, also it is a departure that is consistent with at least three of the purposes of sentencing -- just punishment, adequate deterrence, the need for rehabilitation. See 18 U.S.C. § 3553(a)(2)(A), (B)& (D).

Again, this is not a departure that is being overused. The incidence of downward departures based on diminished capacity have decreased from nearly 5.5% (153/3110 cases) of all departures in 1991 to approximately 2.6 % (286/10,026 cases) in 2001. It is difficult to see how it could be suggested that district courts are abusing or improperly granting departures on this ground.

5. Substantial Assistance Departures

The rate of substantial assistance departures as a percentage of all departures has decreased slightly. The number of safety valve cases has increased. The safety valve applies to persons with no serious criminal history and no managerial role. It stands to reason that such persons are less likely to possess information about higher ups in the drug organization and thus less likely to qualify for substantial assistance departures. The increase in safety valve cases may also explain the increased rate of downward departures as safety valve defendants, by definition are less culpable than other drug defendants and thus may warrant additional downward departures.

The Commission really needs the government to disclose its reasons for granting and denying departures before any rational inferences can be drawn from this trend.

6. Increased Rate and Number of Departures in Drug Cases

The increased rate of non-substantial assistance departures in drug cases is also directly related to factors controlled by the government. For example, the increase in the rate of downward departures since 1996 can be attributed for the most part to the increased number of MJ cases prosecuted, which have nearly doubled from 4,147 cases in 1996 to 7,723 cases in 2001. We believe that these increases are primarily in the Southwestern border districts.

The rate of other downward departures granted in marijuana cases nearly doubled from a rate

of 15.0% to 29.5% during that same period. We believe that this increase is due in large part to the marijuana importation cases prosecuted in the Southwestern border districts. Those cases often involve couriers. For purposes of managing the increased caseload in these districts, the government agrees to downward departures on grounds other than substantial assistance.

We believe that a large percentage of the increase in non-substantial assistance departures the types of cases the government conduct. Data shows that in marijuana cases, 5K1.1 departures are granted at a lower rate than for other drug types. At the same time, downward departures for grounds other than substantial assistance are granted at a higher rate in marijuana cases. Lastly, there has been an increase in marijuana prosecutions, which tends to spike the downward departures in drug cases.

These trends can be illustrated by reference to statistics, from the Commission's annual publication, which reflect a four-fold increase in downward departures in marijuana cases although the number of cases has only doubled.

Departure Statistics in Drug Cases						
	1996	1997	1998	1999	2000	2001
MJ -- Other Downward	620	973	1,294	1,950	1,800	2,281
MJ -- Total # of Cases	4,147	5,085	5,967	6,933	7,100	7,723
All Drugs -- Total	16,735					23,197
All Drugs -- Other Downward	1,523					3,929
MJ -- Departure Rate Other	15.0%	19.1%	21.7%	28.1%	25.0%	29.5%
All Drugs -- Rate of Other Downward Departure	9.1%					16.9%
All Drugs Excluding MJ -- Rate of Other Departures	7.2%					10.6%

a. **The Need for Refining Adjustments to Reflect Range of Culpability in Drug Cases**

In general also, the drug guideline which is driven by quantity does not sufficiently differentiate among the great range of culpability of persons engaged in drug trafficking, from the kingpin who controls a murderous cartel in Colombia to the street dealer who is selling nickel bags and snorting half his profits, to the look-out, courier, packager, cook, middle-man, manager, organizer, leader, enforcer, and the girlfriend, in love with one of the actors who gets caught in the trafficking web when she accepts a package at the door. The only provision for differentiating for this broad range of activity and culpability is the role in the offense adjustment, with range of 2 to 4-level downward adjustment. This adjustment is not often used, particularly with respect to some street-level sales of crack cocaine. The Commission's recent drug cap may reduce the incidence of

downward departures in these cases.

7. **Unmentioned Factors.** These departures are at the heart of the judicial flexibility and the parsimony principle codified in §§ 3553(a) and (b) and implicate the core judicial power, wherein federal judges consider each person as an individual. The nondelegation separation of powers doctrine would certainly be implicated were the Commission to restrict departures in this area without reference to the "intelligible principle" laid out by Congress. Furthermore, as the departure statistics reflect, this does not seem to be a ground that is overly used or abused by district courts.

8. **Departures in White Collar Cases.** The fact that the government may want higher sentences in such cases does not justify restricting judicial discretion in the absence of some showing of systemic abuse or need to guide discretion. The departure rate for white collar offenses stood at a reasonable 10.8% in the most recently published Commission statistics.²⁷ This is a rather modest rate given that this guideline is quantity-driven and thus may often tend to overstate the culpability of offenders who are merely carrying out the scheme formulated by more culpable defendants, such as the clerk, secretary or mid-level manager who knowingly participates in a scheme to defraud without receiving any personal benefit.²⁸

D. Need to Explain Commission Action in Official Commentary

The Commission would do well to be explicit in explaining its actions in response to this directive and in general. It is clear that part of the firestorm over departures results from a failure to understand fully the integral function that departures play in the guidelines, the reasons why the Commission has identified certain encouraged and discouraged grounds for departure, and the reasons why departures are granted. The Commission has a great responsibility in the process of explaining to courts and the Congress the reason for its policy judgments. For this reason, we recommend to the Commission that it include more explicit explanations for its policy choices in the official commentary. In that manner, it may become clearer to Congress that its concerns are being addressed.

²⁷ USSC *Sourcebook* at Table 28 (2001) (offenders sentenced under U.S.S.G. § 2F1.1 received 629 departures in 5,778 cases).

²⁸ *E.g., United States v. Dominguez*, 296 F.3d 192(3d Cir. 2003) (granting family ties departure to a bank branch manager, an unmarried woman in her mid-forties with no prior contact with the criminal justice system, who was the primary caretaker of her elderly, disabled parents in a case where she was guilty of conspiracy to structure financial transactions for helping a customer open several accounts under different names apparently out of some misguided attempt to increase customer base for the bank although she received no personal gain from the offense).

Conclusion

The Commission has before it a daunting task to preserve the integrity of the guideline system under a very tight schedule in the midst of intense political rhetoric. As we stated at the start, Federal and Community Defenders recommend that the Commission act by scrupulously adhering to the central or "intelligible principles" of the Sentencing Reform Act, the only principled way to proceed. We also ask the Commission to be mindful of the persons we represent, whose actions prove that they are human and fallible and who, in most cases, also have innocent loved ones who are affected by the sentence.

Thank you for your consideration. We are ready and willing to assist the Commission with this task. If the Commission desires additional information, we welcome the opportunity to provide it.

Very truly yours,

JON M. SANDS
Asst. Federal Public Defender
Chair, Federal Sentencing Guidelines Committee
of the Federal Public and Community Defenders

cc: US Sentencing Commissioners
Carmen Hernandez
Timothy McGrath
Kathleen Williams

Cases Decided Since April 30, 2003, referring to the PATRIOT Act

U.S. v. Thurston, 2003 WL 21782339, *23, No. 02-1966 (1st Cir. Aug 4, 2003) (vacating sentence, reversing downward departure based on good works and purported disparity, and remanding for imposition of the statutory maximum sentence of sixty months in prison and for imposition of an appropriate fine in case involving conspiracy to defraud medicare of over \$5 million).

U.S. v. Carter, 2003 WL 21760511, No. 02-5001 (4th Cir. Jul 21, 2003) (affirming upward departure to fifty-four months imprisonment for uttering forged securities on the ground that defendant's conduct resulted in "reasonably foreseeable, substantial non-monetary harm" to her former employer, an encouraged departure under U.S.S.G. § 2F1.1, comment. (n.11(a)).

U.S. v. Gendraw, 2003 WL 21730594, No. 02-2099 (1st Cir. Jul 28, 2003) (affirming denial of defendant's motion for a downward departure because designation as a career criminal did not overstate defendant's criminal history).

U.S. v. Semsak, 2003 WL 21730615, No. 02-30153 (9th Cir. Jul 28, 2003) (affirming four-level upward departure in case where defendant, who drove a tractor-trailer drunk and collided with a car, killing its driver, pleaded guilty to involuntary manslaughter because of defendant's extraordinarily reckless conduct).

U.S. v. Flores, 2003 WL 21673619, No. 02-3380 (8th Cir. Jul 18, 2003) (LSD trafficking offense, affirming upward departure to career offender designation from a mandatory 10-year sentence to 235 months based on fact that criminal history category IV for 18-year old defendant underrepresented the severity of past conduct and likelihood of recidivism).

U.S. v. Swick, 334 F.3d 784, 789 (8th Cir. 2003) (case involved conviction for tampering with consumer products where defendant had placed needles in food products, committed perjury at trial; court reversed 17-month downward departure for post-offense rehabilitation based on defendant's decision to stop abusing alcohol and his successful completion of alcohol treatment and aftercare, where defendant's conduct "by refraining from alcohol and subjecting himself to periodic drug/alcohol testing," was merely complying with the conditions of his pretrial release).

U.S. v. Dyck, 334 F.3d 736 (8th Cir. 2003) (vacating and remanding for resentencing downward departure granted to defendant who had illegally reentered the country after having been deported with an aggravated felony because defendant's criminal history category did not significantly overrepresent the seriousness of his criminal history, as fact that defendant's prior drug-trafficking conviction could be used both to enhance his base offense level and to compute his criminal history category did not create special circumstance which would warrant downward sentencing departure; sentencing court could not consider extent of defendant's role in prior offense in granting downward sentencing departure; and defendant's purported lack of criminal intent in reentering country was

invalid basis for granting downward departure).

U.S. v. Guerrero, 333 F.3d 1078 (9th Cir. 2003) (remanding downward departure for aberrant behavior in MJ conspiracy case where district court did not make finding that defendant's case was both extraordinary and aberrant)

U.S. v. Camejo, 333 F.3d 669 (6th Cir. 2003) (in assault case, affirming upward departure for underrepresentation of criminal history and remanding for consideration of downward departure for defendant who had been detained for two years as an immigration detainee where court believed it did not have authority to depart on this ground).

U.S. v. Chesborough, 333 F.3d 872 (8th Cir. 2003) (affirming upward departure where defendant's criminal history score failed to reflect the seriousness of defendant's past criminal conduct, warranting an upward departure from the sentencing guidelines for defendant's conviction of being felon in possession of a firearm; presentence report (PSR) reflected the fact that defendant was a recidivist criminal, who, during the last 45 years, had been convicted of approximately 20 crimes).

U.S. v. Agee, 333 F.3d 864, 865- 866 (8th Cir. 2003) (affirming upward criminal history departure for defendant convicted of being a felon in possession of a firearm).

U.S. v. Orchard, 332 F.3d 1133 (8th Cir. 2003) (seriousness of psychological harm to victim, defendant's abuse of relationship of trust, and his facilitation of further criminal act were all factors supporting upward departure from sentencing guidelines).

U.S. v. Jones, 332 F.3d 1294 (10th Cir. 2003) (affirmed seven-level upward departure, defendant had pleaded guilty to three counts of involuntary manslaughter; district court satisfied statutory requirement that it set forth with specificity, in written order of judgment, its reasons for departing from Sentencing Guidelines range; (2) district court did not rely on impermissible factors in making "heartland" determination for upward departure; (3) factors underlying upward departure were authorized by statute and justified by facts of case; and (4) seven-level upward departure was appropriate).

U.S. v. Tarantola, 332 F.3d 498, 500 (8th Cir. 2003) (affirmed upward departure for criminal history in felon-in-possession case).

U.S. v. Aguilar-Lopez, 329 F.3d 960 (8th Cir. 2003) (affirmed upward departure in reentry after deportation case on basis of criminal history underrepresented)

U.S. v. Payne, 66 Fed.Appx. 805, 2003 WL 21259748 (10th Cir. 2003) (remanded for reconsideration of extent of departure where district court departed down 24 levels based on post-

Federal Defenders' Comments re PROTECT Act
August 2003
Page 23

offense rehab in case involving possession of an unregistered firearm)

U.S. v. VanLeer, 2003 WL 21545099, No. 2:03-CR-00137 PGC (D. Utah July 17, 2003) (Cassell, J.) (granted downward departure under lesser harms grounds for felon in possession case).

U.S. v. Lester, 2003 WL 21489720, No. CRIM.A.03-0033 (E.D. PA June 20, 2003) (denying diminished capacity departure for defendant, convicted of two counts of transporting child pornography in interstate commerce, on basis of an obsessive-compulsive personality disorder and a sexual addiction, even though defendant had engaged in substance abuse, which did not contribute to the offense conduct, no actual violence or serious threat of violence was involved, and defendant did not present so severe a threat that any sentence below the Guidelines would endanger the public)