
PUBLIC COMMENT

2004 AMENDMENT CYCLE

(August 1, 2003 Submissions)



United States Sentencing Commission

August 2003



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, DC 20530-0001

August 1, 2003

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

Dear Judge Murphy:

Under the Sentencing Reform Act of 1984, the Criminal Division is required to submit to the United States Sentencing Commission, at least annually, a report commenting on the operation of the sentencing guidelines, suggesting changes that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. § 994(o). We are pleased to submit this report pursuant to that provision. This report also responds to the Notice of Proposed Priorities and Notice of Issues for Comment on the PROTECT Act, both published in the Federal Register on July 1, 2003.

I. Operation of the Sentencing Guidelines

On the whole, we believe that the sentencing guidelines are operating reasonably well.¹ Many of the proposals to amend the guidelines described below constitute discrete and sometimes technical improvements as opposed to broad substantive reforms. However, as we have discussed with the Commission before and as addressed by the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108-21, 117 Stat. 650 (Apr. 30, 2003) ("PROTECT Act"), we believe that the guidelines require significant improvement and reform to address the growing incidence of non-substantial assistance downward departures over the past several years. We discuss the issue of downward departures

¹We note that when asked to provide a general overall rating of effectiveness of the federal sentencing guidelines in achieving the purposes of sentencing, approximately 77% of district court judges and 79% of circuit court judges reported a moderate or high degree of effectiveness. *Summary Report, U.S. Sentencing Commission's Survey of Article III Judges; A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate* (December 2002), Q.18, p. 1.

and how we believe the Commission should address the issue in significant detail below (see section III, *infra*).

We recognize, however, that changes in the Guidelines Manual alone, while necessary to achieve the promise of sentencing reform, are not sufficient. Because the Justice Department alone represents the Executive branch in carrying out its "core executive constitutional function" in bringing and pursuing federal prosecutions, *United States v. Armstrong*, 517 U.S. 456, 465 (1996), the Department has the unique responsibility to ensure that its actions fully support the Sentencing Reform Act as well as the important reforms that are part of the PROTECT Act. In order to carry out this responsibility most effectively, the Department, over the past several months, has begun a comprehensive review of its policies regarding federal charging and sentencing practices.

Already as a result of this review, and consistent with section 401(I) of the PROTECT Act, the Attorney General earlier this week issued a new policy directive to all federal prosecutors concerning sentencing recommendations and appeals. In his memorandum to all federal prosecutors, the Attorney General prohibits prosecutors from engaging in any type of "fact bargaining"; agreements about the applicability of the sentencing guidelines must be fully consistent with the readily provable facts. Furthermore, if readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office. (This latter instruction specifically addresses a concern that has been raised in the past by the Commission.) Prosecutors now also have an affirmative obligation to oppose any sentencing adjustment, including downward departures, that are not supported by the facts and the law. Regarding appeals, the new policy requires that federal prosecutors promptly report adverse, appealable decisions to the appellate section of the appropriate division of the Department in a variety of specifically articulated circumstances and that each of those cases be reviewed for appealability. For example, all downward departures that reduce an offense level from Zone C or Zone D to a lower zone and that result in a non-imprisonment sentence must be reported and considered for an appeal.

Over the coming weeks, the Department will complete a review of its charging and plea policies and practices, and we anticipate a new policy statement from the Attorney General addressing these matters. In addition, the Attorney General will be issuing new guidance to ensure that expedited disposition (or "fast track") programs are only authorized where warranted.²

Taken as a whole, we believe these new charging, plea, appeal, and fast track policies will be an important reaffirmation of the Justice Department's commitment to the principles of consistency and effective deterrence embodied in the Sentencing Reform Act and the sentencing

²In response to the Commission's letter to the Deputy Attorney General requesting data on the current use of fast track programs, the Department is presently compiling such data and will supply that data to the Commission as soon as possible.

guidelines. We also believe they will be important, practical steps that will have a real impact on criminal practice in the federal courts. Together with reform to the law of downward departures and the improvement in the guidelines that takes place as part of the regular, ongoing work of the Sentencing Commission, we are confident these changes will bring significant improvement to federal sentencing.

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II. Priorities and Proposals for Improvement in the Sentencing Guidelines

Based on the Notice of Proposed Priorities, published in the Federal Register on July 1, 2003, and due in large part to the passage of the PROTECT Act, the upcoming amendment year is shaping up to be a very full one.

A. The PROTECT Act

Implementation of the PROTECT Act and other crime legislation, we believe, must be the top Commission priority for this amendment year. In addition to the requirement that the Commission reduce the incidence of downward departures, the PROTECT Act creates new crimes, changes maximum and minimum penalties, addresses supervised release terms for sex offenders and revocation terms for all offenders, and in general, will require much Commission action. The Commission staff has already ably itemized the specific work required of the Commission, and we will not address each of the relevant PROTECT Act provisions here. The implementation work has indeed already begun, and we have already met at the staff level with the Commission on many of the pending issues. This notwithstanding, there are two specific PROTECT Act issues which we think it important to highlight here so they are not overlooked.

1. Data

Section 401(h) of the PROTECT Act was intended to improve the Commission's data collection work. It requires the Chief Judge of each district court to ensure that each sentencing court submit to the Commission a set of documents to allow the Commission to gather important sentencing statistics. Section 401(h) also requires the Commission, upon request, to make available to the House and Senate Committees on the Judiciary all of the documents submitted by the courts to the Commission.

Already, in the first months since the PROTECT Act was signed into law, significant issues have arisen in courts around the country about section 401(h), including whether the requirement that all documents be made available to the Congress essentially makes public otherwise sensitive court documents. We believe it is critical both that the Commission receive documentation of all cases sentenced under the guidelines and that the confidentiality of sensitive court information be maintained. As to confidentiality, we are especially concerned that making available to the public defendant cooperation agreements may, in certain cases, jeopardize the

cooperating defendant as well as law enforcement officers and public safety generally. We think the Commission should work quickly with the Judicial Conference, the Congress, and others to resolve any outstanding issues so that the intent of Congress to improve the Commission's data collection work is achieved and that appropriate confidentiality is maintained. We pledge our support to assist the Commission in any way we can on this matter.

2. Supervised Release

Section 101 of the PROTECT Act makes significant changes in the law of supervised release. This section amends 18 U.S.C. § 3583 to provide a judge with the discretion to impose up to a life term of post-release supervision for sex offenders. Prior to the PROTECT Act, the statutory maximum period of post-release supervision in federal cases was generally five years even for the most serious crimes, and the guideline maximum period for most offenses was three years or less. This section responds to the longstanding concerns of federal judges and prosecutors regarding the inadequacy of the supervision periods for sex offenders, particularly for the perpetrators of child sexual abuse crimes, whose criminal conduct may reflect deep-seated aberrant sexual disorders that are not likely to disappear within a few years of release from prison.

Section 101 also changes the maximum term of imprisonment allowed upon revocation of supervised release. Prior to the PROTECT Act, the maximum term of imprisonment upon revocation was five years for any one offender. This section amends Title 18 to now permit up to five years imprisonment for each individual revocation, thus permitting a defendant to receive a series of imprisonment terms which could equal an extended period of time.

We think these and other related changes (*see* the discussion of circuit conflicts, *infra*) require careful and significant Commission consideration, and will require appropriate amendments to Chapter Seven of the guidelines. Indeed, we also think this may be the right time for the Commission to undertake a more comprehensive revision of Chapter Seven of the guidelines and other relevant provisions addressing supervised release and supervised release revocations.

B. Circuit Conflicts And Case Law Generally

The Supreme Court explicitly recognized that Congress gave the Commission the responsibility for resolving circuit conflicts involving guideline interpretation issues. Over the past few years, the Commission has addressed only a limited number of circuit conflicts. It has always been important to the Justice Department, and in particular the Solicitor General's Office, that the Commission fulfill this responsibility by actively addressing circuit conflicts. We think it critically important to do this in each amendment year. We raise two specific issues here that we believe are ripe for resolution, although we know many others exist and warrant consideration. In the first, courts of appeals have reached differing outcomes in reviewing computer and Internet access restrictions in child pornography cases and have disagreed about

the extent to which Internet access limitations may be justified. While these cases do not raise a direct conflict of law, we believe this issue – and the tension among the circuits on the issue – is precisely the type the Commission was meant to address. The second, where there is a clearer split among the circuits, involves when a defendant must provide truthful information to the government to be eligible for a “safety valve” sentence reduction.

1. Conditions Of Supervised Release For Certain Sex Offenders

We believe the Commission should address the issue of the appropriateness of restricting computer and/or Internet use as a condition of supervised release for offenses under Title 18, Chapters 110 and 117 that involved the defendant’s use of a computer or the Internet. Recognizing the pivotal role that access to computers and the Internet play in facilitating these crimes, some courts have upheld bans on access to computers or the Internet as conditions of supervised release. While this tack clearly has the legitimate goal of preventing recidivism and protecting society, other courts have concluded in other circumstances that precluding access to computers as a condition of supervised release is too onerous a deprivation of personal liberty. Ultimately, the Commission should address this issue and the appropriate circumstances for restricting computer and Internet access. We believe a policy statement is needed to provide guidance to the courts and ensure that conditions of supervised release effectuate both deterrence and protection of the public.

a. Background

In addition to the mandatory conditions of supervised release set forth in §5D1.3(a) of the sentencing guidelines, courts are permitted to impose other conditions if those conditions are reasonably related to (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) deterring future criminal conduct; (3) protecting the public from further crimes of the defendant; and (4) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. §§ 3583(d), 3553(a). The conditions must also involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and must be consistent with any pertinent policy statements issued by the Sentencing Commission. *Id.*; see also USSG §5D1.3(b) (setting forth equivalent requirements for any special conditions of supervised release imposed by court).

Accordingly, the Commission has issued Policy Statements reflecting both “standard” conditions recommended for all instances of supervised release, as well as “special” conditions recommended for supervised release in certain circumstances. See §5D1.3(c), (d). With respect to the latter category, conditions are often tailored to the crime committed. For example, if the instant conviction is for a felony or the defendant was previously convicted of a felony or used a firearm in the instant offense, the guidelines recommend as a special condition that defendant be

prohibited from possessing a firearm. See *id.* at § (d)(1).³ In many instances, by limiting defendant's access to the very instrument of the crime committed, such special conditions substantially reduce the potential for recidivism and increase protection of the public.

b. Recent Case Law

Several courts have upheld restrictions on computer or Internet use as a special condition of supervised release for child exploitation offenders. For example, in *United States v. Crandon*, 173 F.3d 122 (3d Cir.), *cert. denied*, 528 U.S. 855 (1999), the defendant developed a relationship via the Internet with a 14-year-old girl and later traveled interstate to engage in sexual relationships with her and took photographs of their encounter. The defendant pled guilty to one count of receiving child pornography and was sentenced to 78 months in prison and a three-year term of supervised release, during which he could not "possess, procure, purchase or otherwise obtain access to any form of computer network, bulletin board, Internet, or exchange format involving computers unless specifically approved by the United States Probation Office." *Id.* at 125. The defendant argued on appeal that given the prevalence of computers, the condition could limit his employment opportunities and his freedom of speech. *Id.* at 128. Nevertheless, the Third Circuit concluded that "in this case the restrictions on employment and First Amendment freedoms are permissible because the special condition is narrowly tailored and is directly related to deterring [defendant] and protecting the public." *Id.*

The Fifth Circuit has upheld a more severe condition that absolutely banned the defendant from "possess[ing] or hav[ing] access to computers [or] the Internet" during his three-year term of supervised release. *United States v. Paul*, 274 F.3d 155, 160 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 1571 (2002). The defendant in *Paul* had stored over 1,200 images of child pornography on his computer and had used the Internet to access child pornography chat rooms, bulletin boards and newsgroups. *Id.* at 168. In addition, he communicated with like-minded individuals via e-mail about how to "scout" for vulnerable children. *Id.* Relying in part on *Crandon*, the Fifth Circuit concluded that the special condition prohibiting computer and Internet access was "reasonably related to [the defendant's] offense and to the need to prevent recidivism and protect the public." *Id.* at 169. The court expressly stated that even though the condition was broader than the condition imposed in *Crandon* in that it did not allow a probation officer to permit

³ See also, *United States v. Kingsley*, 241 F.3d 828 (6th Cir. 2001) (affirming special condition barring defendant from driving during 3-year supervised release because condition was reasonably related to defendant's past automotive violations and to his weapons conviction involving transportation of weapons in his vehicle for purposes of intimidating and coercing victims); *United States v. Bee*, 162 F.3d 1232, 1235-36 (9th Cir. 1998), *cert. denied*, 526 U.S. 1093 (1999) (upholding condition that barred defendant from having contact with minors and loitering in places primarily used by minors where defendant was convicted of abusive sexual contact with six-year-old girl); *United States v. Szenay*, 1999 WL 426886 at *3 (6th Cir. June 15, 1999) (*unpublished*) (defendant convicted of credit card fraud prohibited from incurring credit card charges without probation officer's approval).

computer or Internet access, the condition was nevertheless appropriate. *Id.* Courts in the Eighth and Tenth Circuits have upheld similar restrictions for child exploitation offenders.⁴

Some courts, however, hesitate to impose restrictive conditions on computer and Internet use for child exploitation offenders under some circumstances. In *United States v. Sofsky*, 287 F.3d 122 (2d Cir. 2002), the defendant was accused of receiving more than 1,000 moving and still images of child pornography on his home computer via the Internet and exchanging images on the Internet. He pled guilty and was sentenced to 121 months with three years of supervised release. *Id.* at 124. The Second Circuit vacated a special condition of supervised release that would have prohibited the defendant from accessing a computer, the Internet, or a bulletin board system unless approved by the probation officer. *Id.* According to the Second Circuit, the ban prevented "common-place computer uses" such as email communication, conducting research, obtaining a weather forecast, or reading a newspaper, and therefore, "inflict[ed] a greater deprivation on [defendant's] liberty than [was] reasonably necessary." *Id.* at 126; *see also United States v. Carlson*, No. 01-1570, 2002 WL 31119859 (2d Cir. Sept. 25, 2002) (*unpublished*) (remanding for more restricted condition in light of *Sofsky*); *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2001) (special condition prohibiting Internet access and computer use was neither reasonably related to conviction nor reasonably necessary to achieve sentencing goals where defendant was convicted of bank larceny, worked in computer field, and prior state conviction for incest had no connection to computers or Internet).

The Tenth Circuit has similarly vacated a special condition that prohibited a defendant convicted of receiving child pornography from "possess[ing] a computer with Internet access throughout his period of supervised release." *United States v. White*, 244 F.3d 1199, 1201 (10th Cir. 2001). The Tenth Circuit remanded for the district court to revise the condition, concluding

⁴*See United States v. Fields*, 324 F.3d 1025, 1026 (8th Cir. 2003) (upholding complete ban on Internet access where defendant had created child-pornography website; noting such restrictions have been upheld "[i]n cases where defendants used computers or the internet to commit crimes involving greater exploitation"); *United States v. Walser*, 275 F.3d 981, 985 (10th Cir. 2001), *cert. denied*, 122 S.Ct. 1943 (2002) (upholding condition prohibiting access to Internet without prior permission of probation officer for a defendant who possessed images of child pornography on his computer); *United States v. Deaton*, 204 F.Supp.2d 1181 (E.D. Ark. 2002) (court modified condition for a defendant found guilty of possessing child pornography to prohibit him from subscribing to any Internet service providers or using services of Internet without permission of probation officer). *See also, United States v. Suggs*, Nos. 01-6080, 01-6081, 2002 WL 31428630 (6th Cir. Oct. 29, 2002) (*unpublished*) (upholding special condition of supervised release that prohibited the defendant convicted of mail fraud, wire fraud and money laundering from having access to personal computers); *United States v. Mitnick*, 145 F.3d 1342 (9th Cir.), *cert. denied*, 525 U.S. 917 (1998) (*unpublished*) (a defendant convicted of computer "hacking" offenses was properly restricted from accessing computers and computer-related equipment without prior approval of probation officer).

that the condition was both too narrow (because it did not bar the defendant from accessing the Internet through channels other than his own computer) and too broad (because it precluded him from using a computer for benign purposes). *Id.* at 1205-06; compare *Walser*, 275 F.3d at 987-88 (Tenth Circuit upheld condition that the defendant not access the Internet unless approved by a probation office because it was less restrictive than the absolute ban imposed in *White*); see also *Paul*, 274 F.3d at 169-70 ("we reject the *White* court's implication that an absolute prohibition on accessing computers or the Internet is *per se* an unacceptable condition of supervised release [S]uch a . . . condition can be acceptable if it is reasonably necessary to serve the statutory goals outlined in 18 U.S.C. § 3583(d)").

Likewise, the Third Circuit recently cut back on *Crandon* and held that a special condition prohibiting the defendant from possessing a computer in his home or using any on-line computer service without the written approval of his probation officer was overly broad. *United States v. Freeman*, 316 F.3d 386 (3d Cir. 2003). The defendant in *Freeman* pled guilty to receipt and possession of child pornography after an investigation in which the defendant admitted to storing images of child pornography on his laptop computer. The Third Circuit held that the district court erred both in not stating a basis for the restriction and in imposing the restriction. Citing the Second Circuit's *Sofsky* decision, the court stated that the condition involved a greater deprivation of liberty than reasonably necessary: "There is no need to cut off [the defendant's] access to email or benign internet usage when a more focused restriction, limited to pornography sites and images, can be enforced by unannounced inspections of material stored on [the defendant's] hard drive or removable disks." The Third Circuit went on to expressly distinguish its prior holding in *Crandon*, stating that this type of restriction was acceptable in *Crandon* because that defendant used the Internet to contact young children, whereas the defendant in *Freeman* had not. The court also allowed that a more restrictive condition might be appropriate if the defendant in *Freeman* ultimately did not abide by the condition permitting benign use of the Internet.

c. Time for Resolution

We think the time is right for the Commission to address this issue. A special condition imposing significant restrictions, and in some cases a total ban on access to a computer or the Internet, provides the greatest assurance that a defendant will not repeat his computer-related child exploitation crime. Such restrictions would not only hinder a defendant's access to the illegal materials themselves, but also would deprive him of access to like-minded individuals who supply such materials and are, but for their on-line personas, typically unknown to the defendant.

2. Safety Valve

A defendant is eligible for the so-called safety valve reduction, 18 U.S.C. § 3553(f) and USSG §5C1.2, only if

not later than the time of the sentencing hearing, [he] has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan . . .

In *United States v. Madrigal*, ____ F.3d ____, 2003 WL ____, No. 01-2250 (8th Cir. Apr. 28, 2003) the defendant falsely denied that he had participated in prior related conduct. At the sentencing hearing, the government opposed the application of the safety valve on the ground that full and truthful information had not been timely provided. Instead of denying the safety valve reduction, the district court continued the sentencing hearing to allow the defendant to make a new proffer that would meet the requirements of the safety valve provision. In his second proffer, the defendant admitted he had lied about participating in the prior conduct, but also provided other information that the government believed to be false. Despite the government's objections, the district court found that the defendant had truthfully revealed substantially all offense-related information he knew of when the sentencing hearing was reconvened and awarded a sentencing reduction under the safety valve provision.

The government appealed, and the Eighth Circuit unanimously affirmed. The appellate panel recognized that other circuits have adopted the rule that, in order to qualify for the safety valve, a defendant must provide complete and truthful information before the commencement of the sentencing hearing. Slip op. 11-12 (citing *United States v. Marin*, 144 F.3d 1085, 1091 (7th Cir. 1998); *United States v. Brenes*, 250 F.3d 290, 293 (5th Cir. 2001); and *United States v. Schreiber*, 191 F.3d 103, 107 (2nd Cir. 1999)). Nonetheless, the court ruled otherwise. Slip op. 11-12. The court stated that neither the statute nor the guidelines provision contained the word "commencement," but instead use the "somewhat ambiguous" language "not later than the time of the sentencing hearing." Slip op. 13. We think this issue is also now ripe for Commission consideration, and we urge the Commission to address it by adding a policy statement following the Fifth, Seventh, and Second Circuit holdings.

C. Alien Smuggling, Immigration and Related Crimes

We think the Commission has appropriately identified in its notice of tentative priorities sentencing policy for alien smuggling and other immigration offenses as warranting review. As you may know, last week, the Senate Judiciary Committee held a hearing on alien smuggling offenses at which John Malcolm, Deputy Assistant Attorney General for the Criminal Division, Jane Boyle, United States Attorney for the Northern District of Texas, and Paul Charlton, United States Attorney for the District of Arizona, testified. Their testimony highlighted some significant sentencing issues that are of concern to the Justice Department, and we look forward to working with the Commission to review these concerns and to develop appropriate policy responses. We also believe the Commission should examine more broadly some related crimes, such as passport and visa fraud, and the sentencing guidelines applicable to these offenses. The sentencing guidelines may provide insufficient penalties for these offenses, at least in some cases.

D. Homicide/Murder/Manslaughter/Attempted Murder

We commend the Commission for the amendments passed earlier this year relating to involuntary manslaughter offenses and for agreeing to consider that issue further this amendment year. But as we have stated on several occasions, the guideline penalties for all homicide, other than for first degree murder, are inadequate and in need of review. While the number of homicides prosecuted in federal court is relatively small because of the limitations of federal jurisdiction, the relevant guidelines are extremely important because of the seriousness of the crimes.

The guidelines for second degree murder and attempted murder are particularly problematic. A defendant who accepts responsibility for a second degree murder, §2A1.2, and falls within either Criminal History Category I or II is eligible to receive a sentence of less than 10 years' imprisonment. Even a defendant who falls within the most serious criminal history category is eligible to receive a sentence of just 14 years.

First and second degree murder have much in common under federal law. Both are the "unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a). The difference in the two degrees of murder is that the more serious form is accomplished with premeditation or in the perpetration of certain enumerated felonies. However, the presence or absence of premeditation is a jury matter that sometimes turns on fine distinctions; in many cases, the difference turns on the degree of intoxication (which may negate the existence of premeditation). Because both are extremely serious offenses, the relatively low guideline sentence for second degree murder fails adequately to recognize the similarity between the two crimes or the maximum life sentence available for second-degree murder. The inadequate guideline sentence for second degree murder also creates a significant gap with the mandatory life sentence applicable to first degree murder.

We urge the Commission to evaluate the operation of the second degree murder guideline carefully. First, the Commission should consider whether the base offense level of 33 is appropriate relative to the guideline sentences for other forms of homicide and for other offenses. For example, the offense level for second degree murder is lower than that for certain bank robberies that result in injury but not death, §2B3.1. Next, the Commission should determine if the second degree murder guideline should be amended to include specific offense characteristics, which it currently lacks. Some forms of second degree murder are especially aggravated because of prolonged conduct or dominance over the victim, or because the means of killing is especially cruel. The guideline could account for such facts.

We are also concerned about how attempted murder is treated under the current guidelines, especially where the attempt, had it been successful, would have caused the death of many people (e.g., a bomb on a plane, ship, subway, in a federal building, etc.) The attempt may not have been successful because of bad design or interruption by law enforcement or a good Samaritan. In these situations, the defendant should, we believe, be sentenced close to the level

which would have been applicable had he been successful. Elsewhere in the guidelines, an attempt is usually treated three levels lower than the underlying offense under §2X1.1(b)(1). However, "attempted murder" can be 15 levels lower than the underlying crime, pursuant to §2A2.1. We think this is something that the Commission ought to reexamine.

In sum, the guidelines relevant to second degree murder, attempted murder, voluntary manslaughter, and involuntary manslaughter should be the subject of careful study by the Commission. The need to arrive at sentences that serve the purposes of sentencing – just punishment, deterrence, incapacitation, and rehabilitation – is paramount for all offenses, especially those that result in the taking of human life.

E. Public Corruption

We are pleased that the Commission has indicated that it will consider amendment proposals related to the guidelines for public corruption offenses. We have already begun working with the Commission staff on this issue.

F. MANPADS

Portable rockets and missiles are a category of destructive device that pose a particular risk due to their potential range, accuracy, portability, and destructive power. Included within this category of destructive devices are MANPADS (man-portable air defense systems) and similar weapons that have been used by terrorists, for example, in the 2002 attack in Kenya on an Israeli aircraft using a shoulder-fired missile. They have the ability to inflict death or injury on large numbers of persons if fired at a building, aircraft, train, or similar target. Even if death or injury does not result from such an attack, there may be significant economic consequences and adverse effects on public confidence in the transportation industry. For example, if a MANPAD were fired at a commercial aircraft, but no casualties resulted, the news alone that an attempted attack had occurred would severely harm the vulnerable airline industry and create a potential domino effect on industries involved in other forms of transportation.

MANPADS and similar weapons are currently highly regulated under the National Firearms Act ("NFA"), 26 U.S.C. Chapter 53, and the Gun Control Act of 1968 ("GCA"), 18 U.S.C. Chapter 44. Under the NFA, such weapons are classified as "destructive devices." See 26 U.S.C. § 5845(f). Currently, the sentencing guidelines provide for a two-level increase to the base offense level applicable to unlawful possession and certain other offenses involving NFA weapons if the offense involves a destructive device. However, the sentencing guidelines do not provide for an increase specifically addressing MANPADS and similar weapons. See USSG §2K2.1. As a result, an offender who unlawfully possesses a MANPAD would face a guideline offense level of 20, which requires only 33-41 months of imprisonment if the defendant is in criminal history category I.

We think the Commission should correct the low current sentences applicable to possession and related offenses involving MANPADS and other portable rockets and missiles. In addition, we believe the Commission should consider raising penalties for an attempt or conspiracy to commit any of several serious offenses in connection with a crime of violence if the attempt or conspiracy involved a portable rocket or missile or a device intended for launching such a rocket or missile. These serious offenses include: destruction of an aircraft or aircraft facilities, 18 U.S.C. § 32; terrorist attacks and other acts of violence against mass transportation systems, 18 U.S.C. § 1993; and use of certain weapons of mass destruction, 18 U.S.C. § 2332a.

The sentencing guidelines currently applicable to attempts and conspiracies to violate the serious offenses listed above produce relatively low penalties. For example, for a violation of 18 U.S.C. § 1993(a)(8), which includes attempts, threats, and conspiracies to wreck or disable a mass transportation vehicle (including a plane), the guidelines direct the user to the guideline applicable to threatening or harassing communications, §2A6.1. However, this guideline is not appropriate for attempts and conspiracies to violate § 1993 and produces an offense level of just 22 (41-51 months of imprisonment for an offender in the lowest criminal history category), even with the application of specific offenses characteristics from this guideline that might apply. While the sentencing guidelines would direct the user to more appropriate guidelines for cases involving aggravated violations, 18 U.S.C. § 1993(b), we believe the Commission should clarify the application in the case of attempts and conspiracies to commit aggravated offenses and should also raise penalties so that any applicable reduction for incomplete attempts and conspiracies pursuant to §2X1.1 of the guidelines would not apply. In short, the guidelines should assure that attempts and conspiracies to use MANPADS and similar weapons in connection with a crime of violence, such as shooting down a plane, produce extremely long sentences – longer than currently produced even with a consecutive sentence under 18 U.S.C. § 924(c) for using or carrying a firearm (including a destructive device) during and in relation to a crime of violence.

G. Miscellaneous Drug Issues

We are pleased the Commission has agreed to examine miscellaneous drug issues, including sentencing policy for offenses involving the unlawful sale or transportation of drug paraphernalia. We note here a number of other such miscellaneous issues, some that have already been brought to the Commission's attention. We hope the Commission can address as many of these issues as possible in the coming amendment year.

1. GHB

In addition to considering amendments for GHB, as required by the PROTECT Act, the Commission should also consider amending the guidelines for GHB precursors and analogues, such as GBL (gamma-butyrolactone).

2. Ketamine

The Commission should consider increasing the sentences for ketamine – a Schedule III and “emerging,” diverted “club drug,” which is sometimes used to facilitate sexual assault.

3. Marihuana Equivalencies

We think the Commission should consider establishing marihuana equivalencies for the following drugs:

- (a) 2C-B
- (b) N-benzylpiperazine (BZP)
- (c) 1-(3-trifluoromethylphenyl) piperazine (TFMPP)
- (d) 2,5-dimethoxy-4-(n)-propylthiophenethylamine (2C-T-7)
- (e) alpha-methyltryptamine (AMT)
- (f) 5-methoxy-N,N-diisopropyltryptamine (5-MeO-DIPT (“Foxy”))⁵

4. White Phosphorous and Hypophosphorous Acid

Last year, the Commission amended the guidelines to provide for a sentencing structure for Red Phosphorous. The Commission should now address the penalties for White Phosphorous and Hypophosphorous Acid (also methamphetamine manufacturing chemicals).

5. Anhydrous Ammonia Theft

The guideline for anhydrous ammonia theft (21 U.S.C. § 864) usually yields a 15 month sentence on a ten-year statutory maximum penalty. We believe this guideline is insufficient and should be reconsidered. In a typical case where individuals tap a pipeline or container to steal anhydrous ammonia, the highest applicable guideline, USSG §2D1.12, sets a base offense level of 12 plus 2 points for intending or at least having reasonable cause to believe the chemical would be used to manufacture methamphetamine. The corresponding sentence is 15-21 months (criminal history category I).

⁵The drugs in subsections (b), (c), and (d) listed above are recently scheduled, formerly legal substances that were marketed on the Internet as legal alternatives to MDMA. The drugs in subsections (e) and (f) are recently scheduled hallucinogenic/stimulant substances also popular at raves and other venues. These five substances were placed in Schedule I in 2002 and 2003 pursuant to 21 U.S.C. §811(h) (temporary emergency scheduling authority). In addition, a number of cases have arisen involving 4-Bromo-2,5-dimethoxyphenethylamine (2-CB or Nexus – a Schedule I hallucinogen); 2C-B should be given a guideline equivalency.

6. Chemical Offenses

We appreciate the Commission's consideration of the guideline sentences for chemical offenses. The Commission should consider developing a new guideline for violations of 21 U.S.C. §§ 843(a)(6) and (a)(7), and 960(d)(6). The statutory scheme for chemical offenses has a continuum of violations and the guidelines scheme generally evinces an intent to create a continuum of penalties. However, the sentencing guidelines for chemical offenses do not offer a useable middle ground between severe sentences for overt chemical trafficking and minimal sentences for regulatory type offenses.

7. Drug cap

The Department strongly adheres to its view that Amendment 640 should be repealed to the extent that it amended §2D1.1(a)(3) and the commentary to §3B1.2.

H. Sentencing Policy for Illegal Transportation of Hazardous Materials

Illegal transportation of hazardous materials has emerged as a significant terrorist vulnerability in the aftermath of the attacks of September 11, 2001. More than a billion tons of hazardous materials⁶ are shipped yearly across the United States by road, rail, pipeline, ship and air. Serious incidents involving these materials have the potential to cause widespread disruption, death, injury, and harm to property and the environment.⁷

The Department's Environment and Natural Resources Division ("ENRD") recently launched a hazardous materials ("hazmat") transportation initiative to enforce more strictly the federal Hazardous Materials Transportation Law, 49 U.S.C. §§ 5101-5127.⁸ The purpose of this initiative is to make it more difficult for terrorists and other criminals to transport hazardous materials illegally, and to ensure that industries regulated under the hazardous materials transportation laws comply with those laws so as to reduce the inherent risks posed by the transportation of hazardous materials.

⁶A hazardous material is defined as a substance or material that the Secretary of Transportation has determined is capable of posing an unreasonable risk to health, safety, and property when transported in commerce. 49 U.S.C. § 5103.

⁷See, e.g., GAO Report, "Rail Safety and Security: Some Actions Already Taken to Enhance Rail Security, but Risk-based Plan Needed" at 1 (April 2003) (GAO-03-435); GAO Report, "Aviation Safety: Undeclared Air Shipments of Dangerous Goods and DOT's Enforcement Approach" at 11 (January 2003) (GAO-03-22).

⁸This law is administered by the Department of Transportation ("DOT") and the Department of Homeland Security ("DHS") now that the Coast Guard and the Transportation Security Administration have been transferred from the former to the latter.

In preparing to launch its hazmat initiative, the Department reviewed the sentencing guideline applicable to hazmat crimes – §2Q1.2 – and determined that it is not adequately suited to such crimes. As a result, application of §2Q1.2 to hazmat crimes may well generate total offense levels that provide neither adequate punishment nor adequate deterrence for these felonies.⁹ Accordingly, we believe the Commission should consider possible ways to improve sentencing policy for these offenses.

Section 2Q1.2 was originally adopted to deal with violations of statutes involving hazardous or toxic substances or pesticides in an environmental protection context.¹⁰ In 1993, hazmat crimes were added to §2Q1.2 although no attendant changes were made to the specific offense characteristics or the application notes, nor was an explanation for the consolidation offered by the Sentencing Commission. See 58 Fed. Reg. 27148 (May 6, 1993).¹¹ For several reasons, the incorporation of hazmat violations into §2Q1.2 has never been an entirely good fit, a fact highlighted by the homeland security concerns that have taken on greater prominence in the wake of the events of September 11, 2001.

1. Hazmat Offenses are Different from the Pollution Offenses Covered in §2Q1.2 and have Characteristics that are not Adequately Addressed by that Guideline

Incidents resulting from hazmat offenses are likely to pose a great risk of harm to human life, health, property and the environment largely because hazardous materials are, by definition, moving in commerce. Therefore, such incidents are likely to occur along heavily traveled arteries, often in proximity to populated areas. In this respect, they are unlike many environmental crimes, which often involve illegal disposal of wastes in less populated, and thus less visible, areas (e.g., “midnight dumping”).

The mobile nature of hazardous materials also makes it more difficult for first responders and others to address hazmat incidents. First, incidents involving hazardous materials can occur

⁹ There are exceptions, for example, when a hazmat crime overlaps with a hazardous waste transportation crime under the Resource Conservation and Recovery Act (“RCRA”). In those circumstances, specific offense characteristics driven by the RCRA crime may raise the total offense level to an appropriate level. Those few exceptions, however, underscore the need for a new guideline section that generates appropriate offense levels for all hazmat crimes.

¹⁰ These statutes include the Toxic Substances Control Act (“TSCA”), the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”), the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), the Clean Air Act (“CAA”), the Clean Water Act (“CWA”) and RCRA.

¹¹ Hazmat crimes were originally addressed in §2K3.1, although that section simply provided that the guideline provision for §2Q1.2 was to be applied. See 52 Fed. Reg. 18046 (May 13, 1987).

anywhere. As a result, first responders must attempt to prepare for emergency situations where it is impossible to know in advance what substance or substances will be involved (e.g., flammable, toxic, corrosive), whether there will be vulnerable facilities nearby (e.g., schools, hospitals, government facilities), and how the topography of the incident location (e.g., urban, rural) will affect the response.

Second, because millions of tons of explosive, poisonous, corrosive, flammable, and radioactive materials are transported every day, hazardous materials transportation is a "target rich" environment. The problem of securing so many potential terrorist targets – all of which are mobile – is compounded by the legal requirement that hazmat shipments be conspicuously identified to aid responders in the event of an incident. Consequently, a potential terrorist would have little problem determining whether a particular truck or tanker car was transporting a hazardous material, and targeting that vehicle for nefarious purposes, such as hijacking and subsequent use as an explosive device.

Third, because so many different parties (e.g., shippers, carriers, freight forwarders, brokers, agents and others) are routinely involved in moving hazardous materials, as a practical matter no single party can be exclusively responsible for its safety. This multiplies the potential opportunities for theft, tampering, sabotage, contamination and misuse of hazardous materials.

2. The Specific Offense Characteristics of §2Q1.2 are not a Good Fit for Hazmat Offenses

In addition to the particular risks and vulnerabilities associated with hazardous materials transportation, incidents resulting from hazmat crimes are not well described by the specific offense characteristics of §2Q1.2. Indeed, in some instances, the specific offense characteristics of §2Q1.2 are inapplicable.

For example, §2Q1.2(b)(1)(A) increases the base offense level for violations that result in an ongoing, continuous or repetitive release to the environment. If a hazmat crime results in a release to the environment, that release is likely to be a one-time, often sudden catastrophic occurrence, such as the ignition of mislabeled chemical oxygen generators that caused the 1996 crash of a ValuJet plane into the Florida Everglades. See, *U.S. v. Sabretech*, 271 F.3d 1018 (11th Cir. 2001).

Similarly, §2Q1.2(b)(4) increases the base offense level for violations involving transportation, treatment, storage or disposal without, or in violation of, a permit. While the environmental laws regulating hazardous substances, toxics and pesticides typically require a person to obtain a permit from EPA before importing, selling, or releasing such substances, the

laws governing the transportation of hazardous materials do not require persons involved with such activities to obtain a permit from DOT or DHS.¹²

Finally, §2Q1.2 lacks specific offense characteristics for certain types of hazmat crimes. For example, §2Q1.2 does not address concealment of hazardous materials during transportation, one of the factors that make these crimes especially dangerous. It also does not take into account the mode of transportation aboard which the results of a hazmat offense may unfold. If an incident arising from a hazmat crime takes place on a passenger-carrying aircraft where there is little room for error or time to take corrective action, and the options for escape may be non-existent, no enhancement is available under the specific offense characteristics of §2Q1.2.¹³

To more adequately deter and punish hazmat offenses, we recommend that the Commission undertake a review of such offenses and determine the best means of addressing them in a manner tailored specifically for their characteristics. We are considering various possibilities, and we hope we soon can begin discussions with the Commission on them.

I. Grouping Rules As Applied To Tax Cases

The current grouping rules as applied to certain tax offenses deserve consideration because they have produced widely varying judicial conclusions as to their appropriateness. *See e.g., Weinberger v. United States*, 268 F.3d 346, 352-55 (6th Cir. 2001) (holding that fraud and tax evasion counts are not grouped under either §3D1.2(c) or §3D1.2(d)); *United States v. Fitzgerald*, 232 F.3d 315, 319-21 (2d Cir. 2000) (holding that tax evasion, fraud and conversions counts could be grouped under USSG §3D1.2(d) and the loss attributable to all of defendant's offenses aggregated); *United States v. Vitale*, 159 F.3d 810, 813-15 (3d Cir. 1998) (rejecting claim that wire fraud and tax evasion counts should be grouped under §3D1.2(c), as such grouping would have no incremental effect on sentencing for tax evasion count); *United States v. Haltom*, 113 F.3d 43, 45-47 (5th Cir. 1997) (holding that tax evasion and mail fraud counts must be grouped under §3D1.2(c)); *United States v. Astorri*, 923 F.2d 1052, 1055-57 (3d Cir. 1991) (concluding that wire fraud and tax evasion counts were properly grouped under §3D1.2(c), and adding that under §3D1.4, the court correctly added two units or levels to the fraud offense calculation).

The Commission considered amending the grouping rules as to tax crimes during the 2001 amendment year, but withdrew its proposal after the Department and the Tax Division pointed out that the Commission's proposal would not "provide incremental punishment for

¹²There is one exception. Motor carriers that transport certain especially dangerous hazardous materials (e.g., explosives and radioactive materials) must obtain a safety permit from DOT. 49 U.S.C. § 5109.

¹³At the same time, there plainly are overlaps between the two. For example, either type of crime may cause disruption such as evacuations, and may result in substantial cleanup costs.

significant additional conduct." USSG Ch. 3, Part D, intro. comment. When it removed the grouping issue from consideration, the Commission indicated that it would be seeking input from the Department on the issue. We believe that the time is right for the Commission to address the grouping issue, either as part of its 15-year study of the guidelines or as a stand-alone area.

J. Enhancement to the Guidelines For Certain Tax Offenses

We urge consideration of a new upward adjustment in §2T1.4, dealing with aiding, assisting, or advising tax fraud (violations of 26 U.S.C. § 7206(2)), where 50 or more tax returns are involved, such as in an abusive tax shelter program or a fraudulent refund scheme. During consideration of the Sarbanes-Oxley implementing amendments in 2002, the Department suggested this additional enhancement as a tax analog to the 50-victim enhancement in §2B1.1 for fraud and theft offenses. Such an enhancement is warranted because these widespread schemes pose a far-greater threat to the tax system than an individual's mere failure to file a tax return or underreporting of income.

* * * * *

III. Implementing Section 401(m) of the PROTECT Act

A. Downward Departures Generally

By establishing a guideline range for all individual cases, the Commission contemplated that the vast majority of defendants would be sentenced within the applicable range. USSG Ch. 1, Pt. A, intro. comment 4(b) ("the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice."). Departures based upon factors not mentioned in the sentencing guidelines are to be "highly infrequent." USSG Ch. 1, Pt. A. Discouraged factors (those defined in the guidelines as "not ordinarily relevant") may be the basis of a downward departure, but only in "exceptional cases." USSG Ch. 5, Pt. H, intro. comment (citing the Commentary to §5K2.0 ("the commission believes that such cases will be extremely rare.")).

Unfortunately, these hortatory provisions have proved insufficient to ensure the consistency that Congress sought to achieve in the Sentencing Reform Act. While the Commission has not established quantitative benchmarks for the terms "not very often", "highly infrequent," "exceptional," and "extremely rare," the national percentage of non-substantial assistance downward departures ("NSADD") and many individual district NSADD percentages have been, we believe, out of compliance with all of these standards. Unless the Commission adopts more specific measures to regulate the ability to depart, unjustifiably wide variability in departure rates would likely continue – contrary to Congress' mandate in the PROTECT Act.

B. Steps to Implement Section 401(m) of the PROTECT Act

To comply with the PROTECT Act, the Commission should take several definitive steps to implement the key directives of section 401(m), *i.e.*, to formally authorize departures for "early disposition" programs, and to otherwise significantly reduce the rate of non-substantial-assistance downward departures.

1. Departures for Early Disposition Programs

Section 401(m) of the PROTECT Act requires that the Commission promulgate a policy statement authorizing a downward departure of not more than four levels if the government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney. We think the policy statement should simply restate the legislative language and, for at least the time being, leave to the sentencing court the extent of the departure under these early disposition programs. It may be appropriate at some later date to review how these early disposition programs are actually being implemented and whether further guidance to the courts might be useful.

2. Comprehensive Review of Other Mentioned Departure Factors

First, the Commission should comprehensively review all other non-substantial-assistance departure factors now mentioned in the Guidelines Manual.

We think the Commission should make it a goal to catalogue *all* such factors in Chapter Five of the guidelines within the next two amendment years. Wherever possible, the Commission should replace departures authorized in Chapter Two with appropriate amendments to the underlying guideline (*e.g.*, by addition of new specific offense characteristics). We would be pleased to work with Commission staff in developing specific proposals to accomplish this goal.

The Commission should also carefully review and reform the existing grounds of departure authorized in Chapter Five. Consistent with concerns we previously voiced to the Commission and to Congress during the debate over implementation of the Sarbanes-Oxley Act, we believe the Commission should convert certain disfavored departure factors – factors often associated with white-collar and fraud defendants – to prohibited factors or, at the very least, severely limit the availability of these factors as a basis for departure as well as the extent of the permissible departure. These factors include community service (§5H1.11), age (§5H1.1), employment record (§5H1.5), civic or charitable service or prior good works (§5H1.11), rehabilitation (§5K2.19), physical condition (§5H1.4), and gambling abuse/dependence (§5H1.4). Health and/or mental and emotional conditions should be prohibited factors unless the Bureau of Prisons indicates it does not have the capacity to accommodate the specific medical problems of the defendant. We also believe a defendant's willingness to be deported should be a prohibited departure factor.

We are concerned that the availability of certain downward departures pursuant to §5K2.0 – civic or charitable work (§5H1.11), aberrant behavior (§5K2.20), employment record (§5H1.5), family ties (§5H1.6), diminished capacity (§5K2.13), physical condition (§5H1.4), mental condition (§5H1.3), and even so-called “extraordinary” acceptance of responsibility – are fodder in virtually every fraud and tax sentencing, given the community standing and background of many white collar defendants, as well as the sophistication of their legal counsel, experts, and consultants. Despite the fact that existing policy statements generally discourage such grounds for departure, prosecutors report an ever-increasing number of cases where these departures are granted. This phenomenon further erodes the relatively less onerous guideline ranges in white-collar cases, and feeds the public perception that businesspeople who steal get unduly lenient sentences.

A recent example of the need for significant review of these factors is *United States v. Cockett*, 330 F.3d 706 (6th Cir. 2003), which upheld a downward departure for diminished capacity. The defendant was convicted of aiding and abetting a number of women in filing false tax returns, claiming refunds to which they were not entitled. Although the jury necessarily found that the defendant knew tax returns had to be truthful and that she voluntarily and intentionally assisted in filing false returns, the majority affirmed because of psychological testimony that her reasoning had been impaired and that she had rationalized the lies of the women she abetted.

The decision endorses downward departures for misguided motives, which frequently exist in tax cases – e.g., the owner of a business cheated on employment taxes because he was trying to save the business and the jobs of his employees; a tax protestor filed a false return because it was the only way he could challenge the legality of the tax laws, etc. It illustrates why the Commission should seriously consider the impact of all of the departures factors described above, especially in white-collar cases.

3. Criminal History Departures

In 2001, district courts departed 1,315 times on the basis that the defendant’s criminal history “overrepresented” his involvement in the criminal justice system. In some of those cases, the departure was substantial. S. 151, as passed by the House and supported by the Department, would have effectively banned such downward departures entirely. We continue to adhere to that goal. To the extent that the Commission believes that this would result in unduly severe sentences for certain offenders, it should attempt, in light of the 15 years’ experience under the guidelines, to articulate such circumstances by making appropriate adjustments to the underlying rules that govern the calculation of criminal history categories.

At a minimum, we believe the Commission should make significant reforms concerning the use of this departure (see §4A1.3). Instead of allowing an unlimited reduction in the offense level or the overall sentence, the guidelines should explicitly cap such departures to a specified

reduction in criminal history category. We further think such a reduction should in no event exceed one criminal history category.

In addition, in some circuits, this departure factor is available for career offenders. *See, e.g., United States v. Lindia*, 82 F.3d 1154, 1165 (1st Cir.1996). There is also some question in some circuits whether a court may depart because a career offender's predicate convictions were "minor" (for example, the *en banc* First Circuit split three-three on this issue in *United States v. Perez*, 160 F.3d 87 (1st Cir.1998) (*en banc*)). We believe such departures run afoul of 28 U.S.C. § 994(h) and that the guidelines should explicitly prohibit these criminal history departures for career offenders.

4. Use of Unmentioned Factors

The version of the PROTECT Act initially passed by the House and supported by the Department would have effectively banned all unmentioned factors as grounds for downward departure in all cases. That across-the-board reform, however, was not included in the final legislation, which preserved in many cases the authority to depart if the statutory standards in 18 U.S.C. § 3553 are met (which incorporate by reference the applicable provisions of the Guidelines Manual). Instead, the Congress directed the Commission, *inter alia*, to take measures to ensure that the rates of downward departure would be "substantially reduced." We believe that a centerpiece of that effort must be the adoption of additional measures to ensure that the use of unmentioned factors is very sharply reduced.

The Commission's initial rationale for allowing unmentioned departure factors was "for two reasons." USSG, Ch. 1, Pt. A. First, the Commission noted that it could not prescribe a single set of provisions governing all relevant human conduct and that it did not need to do so at the outset, because, "over time" it would "be able to refine the guidelines to specify more precisely when departures should and should not be permitted." *Id.* Second, the Commission stated its belief that, "despite the courts' legal freedom to depart from the guidelines, they will not do so very often." *Id.* Both rationales have been vitiated by the passage of time. The Commission now has 15 years of experience under the Guidelines, and greater specificity is both possible and warranted. Moreover, the prediction that courts would not depart "very often" has not proved to be accurate.

We think the Commission should, given its exhaustive and comprehensive work now spanning 15 years, promulgate a policy statement that establishes a strong and effective presumption that, in establishing the applicable guideline and specific offense characteristics and in cataloguing permissible and impermissible grounds of departure, the Commission has indeed considered virtually all factors that might be relevant to setting the guidelines range at sentencing, leaving other factors to be considered, as appropriate, only in determining the sentence within the range. The exact formulation of such a policy statement must be carefully considered, especially in light of the fact that the existing policy statement stating that such departures should be "highly infrequent" has proved to be ineffective. In conjunction with

issuing such a new policy statement, the Commission may wish to consider whether there are any unmentioned factors that should be specifically mentioned. We also believe that, thereafter, the Commission should, annually, review departures based on unmentioned factors and consider whether to address them in the Guidelines Manual. We would be pleased to work with Commission staff in developing proposals in this area.

5. Combination of Factors

The commentary to §5K2.0 currently provides that in an extraordinary case in which a combination of offender characteristics or not ordinarily relevant circumstances takes a case out of the "heartland," even though none of the characteristics or circumstances individually distinguishes the case, a departure may be warranted. Since this provision was enacted, despite the commentary that such cases will be extremely rare, this amorphous, catch-all provision has been urged on sentencing courts all too frequently by defendants and has been relied upon by the courts to grant downward departures.

We believe the Commission should seriously reconsider combination departures. At the very least, we believe the Commission should provide further guidance to ensure that such combination departures are and will be, as originally intended, extremely rare. For example, district courts, could be required to provide extensive fact-finding to justify this type of departure. We would be pleased to work with Commission staff in developing such proposals.

* * * * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other Commissioners to refine the sentencing guidelines and to develop effective, efficient, and fair sentencing policy.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric H. Jaso" followed by a stylized flourish or initials.

Eric H. Jaso
Counselor to the Assistant Attorney General

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August 4, 2003

VIA HAND DELIVERY

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

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

Dear Judge Murphy:

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

1. Congressional Directives in the Protect Act

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

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

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

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

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

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

Our specific comments are set forth in Part 5.

2. Incidence of Judicial Departures

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

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

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

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

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

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

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

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

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

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

3. **Existing Provisions of the Act**

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

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

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

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

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

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

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

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

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

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

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

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

5. PAG's Recommendations

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

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

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

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

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

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

The Honorable Diana E. Murphy
August 4, 2003
Page 8 of 8

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

Conclusion

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

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

Sincerely,



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

cc: All Commissioners
Charles Tetzlaff, Esq.
Timothy McGrath, Esq.

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July 31, 2003

The Honorable Diana E. Murphy
Chair
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Murphy:

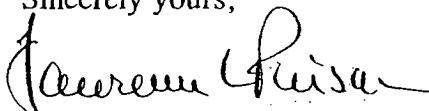
In response to the request of the United States Sentencing Commission for public comment regarding the implementation of Section 401(m) of the Protect Act, sometimes referred to as the Feeney Amendment, the Federal Judges Association responds:

Sentencing is an individualized process. In each criminal case, the sentencing court must consider the factors set forth in 18 U.S.C. § 3553. Appropriate sentencing requires that the sentencing judge be independent in his or her application of the law to the facts of that case. In order to safeguard the fairness of the federal sentencing process, the Federal Judges Association suggests the repeal of Section 401(m) of the Protect Act and supports S. 1086 and H.R. 2213. Section 401(m) fundamentally changed significant portions of the federal sentencing process. Change can be for the better. These changes were not. We believe that if the usual legislative process had been followed, this troubling amendment to the Protect Act would not have taken place. We urge that in the future, as in the past, there be time allowed for the Sentencing Commission to gather and present information concerning any proposed sentencing changes.

We believe that the judicial review of sentences provided for by the United States Supreme Court in Koon v. United States, 518 U.S. 81 (1996) should be reinstated.

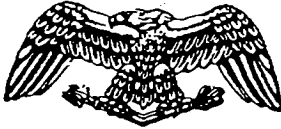
We also believe that the reporting and oversight requirements of the Feeney Amendment are a clear encroachment upon judicial independence and an attempt to intimidate. Judicial independence is essential to the proper discharge of the Constitutional responsibilities of the federal judiciary.

Sincerely yours,



Lawrence L. Piersol, President
Federal Judges Association

LLP:jh



Federal Bar Council

GERALD WALPIN
President

July 30, 2003

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs-Public Comment

Re: Comments on Implementing Section 401(m) of the PROTECT Act

To Whom This May Concern:

This letter is submitted in response to the request for comment on the implementation of Section 401(m) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ("PROTECT Act").

Introduction

The Federal Bar Council is a not-for-profit organization of over 2,000 lawyers and federal judges who practice and administer the law in the United States courts for the Second Circuit. Formed in 1932, the Council includes, as members, both prosecutors and criminal defense attorneys as well as other distinguished members of the bench and bar. We welcome the opportunity to submit comments on the United States Sentencing Commission's responsibility for implementing the Congressional directive to reform the existing permissible grounds for downward departures from the Sentencing Guidelines.

As a general matter, we believe that it is essential that any effort to reduce the incidence of downward departures not undermine the critical role that individualized circumstances play in fashioning appropriate sentences for criminal defendants. We believe that there are several ways in which the Commission can provide additional guidance to courts and practitioners that will eliminate inappropriate departures but preserve the panoply of departure grounds for cases in which they are truly warranted.

Specifically, we wish to address two particular issues identified in the Commission's request for comment: potential revisions to Section 5K2.0, and potential revisions

to Chapter 5, Part H -- two of the principal sources of downward departure authority. We address each of these in turn.

(1) How should subsection (a) of § 5K2.0 (Grounds for Departure) and/or the commentary to § 5K2.0 (and/or Part A of Chapter One) be revised?

Section 5K2.0 reflects the congressional mandate (expressed in 18 U.S.C. § 3553(b)) that federal judges applying the guidelines retain the ability to impose individualized sentences by departing downward in cases presenting a mitigating factor not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. Subsection (a) of § 5K2.0 correctly notes that the range of possible circumstances warranting a downward departure cannot be comprehensively listed in advance. Thus, while the Commission has attempted to anticipate and provide guidance on a number of possible departure factors (in Parts H and K of Chapter Five), § 5K2.0 makes clear that courts have authority to depart in atypical cases that fall outside the "heartland" of cases considered by the Commission. At the same time, the Commission (in Chapter One, Part A, Paragraph 4(b)) has stated that it believes the guidelines have been formulated in such a manner that courts will not need to depart very often. The Commission has further stated (again in Chapter One, Part A, Paragraph 4(b)) that departures on grounds not specifically discussed in Part K of Chapter 5 -- i.e., those authorized by the general grant of authority in § 5K2.0 -- or departures outside suggested levels will be "highly infrequent."

These precepts from the existing guidelines, which together make clear that departures should be granted infrequently and only when necessary to deal appropriately with a case presenting circumstances not adequately accounted for in the guidelines, are consistent with congressional sentencing statutes, including the PROTECT Act. Accordingly, substantial reform of Section 5K2.0 is unnecessary and, to the extent it would hinder courts' ability to fashion appropriately individualized sentences, undesirable. The Commission might, however, consider importing into the commentary to § 5K2.0 the above-referenced language from Part A of Chapter One, which makes clear that departures based on factors not discussed in the guidelines are envisioned to be "highly infrequent." Such an amendment would further emphasize the Commission's view on this point and place a reminder of the limited nature of the departure power in the same place where that power is granted. We respectfully submit that any further modification of § 5K2.0 be considered only after the Commission has reviewed empirical data about the factual bases of departures granted pursuant to § 5K2.0 to determine whether there exists any incidence of particular departures that warrant targeted attention, rather than a wholesale restriction of § 5K2.0.

There is likewise no need to amend the commentary to § 5K2.0 to address the case of a departure due to the presence of a combination of factors that the Commission has stated are individually not sufficient to warrant a departure. The commentary appropriately notes the possibility that such cases will, in fact, exist, while also recognizing that they will be "extremely rare." Courts are, thereby, placed on notice to be particularly careful in granting such combination-of-factors departures. There is, therefore, no need to instruct courts not to grant combination departures at all -- which would run counter to the mandate that departures be

granted in unusual cases outside the heartland covered by the guidelines. In short, we respectfully suggest that no further restriction of this departure authority is warranted.

We also urge the Commission to examine carefully the types of cases in which downward departures are most frequently granted. To the extent that departure decisions are rendered that do not fully comport with the standards set forth in the guidelines, this may well be the result of well-meaning efforts to ameliorate the harshness of guideline sentences in particular types of cases - for example, fraud cases involving large amounts of actual or intended loss; narcotics cases involving cocaine base, or certain immigration cases. Further refinements to the base and adjusted offense levels for such offenses would likely reduce the incidence of downward departures.

(2) How, if at all, should Chapter Five, Part H be revised?

Congress has directed that the Sentencing Commission recognize "the general inappropriateness of considering the defendant's education, vocational skills, employment record, family ties and responsibilities, and community ties in" fashioning a just sentence. U.S.S.G. Ch. 5, Pt. H, Introductory Commentary; see 28 U.S.C. § 994(e). Originally, the guidelines created 10 separate offender characteristic provisions, all but three of which (role in the offense, criminal history and criminal livelihood, §§ 5H1.7-5H1.9) were deemed to be ordinarily not relevant to the decision whether to downwardly depart. Since then, two additional groups of offender characteristics have been added: § 5H1.11, dealing with military, civic, charitable or other public service activities, employment-related contributions, and similar good works; and § 5H1.12, covering lack of guidance as a youth and similar circumstances. Thus, there has already been, overall, considerable restrictive guidance on the use of these offender characteristics in downward departures.

Nevertheless, a review of the individual sections within Part H reflects that, in many instances, these provisions contain little more than a bare-bones recitation of the disfavored offender characteristic, without the benefit of much clarifying commentary and illustration. Section 5H1.5 (employment record), for example, indicates only that an offender's employment record is not usually relevant for departure purposes, but may be relevant as to the conditions of probation or supervised release. This illustration sheds no light on when employment history properly may be the basis of a downward departure. Compare United States v. Rutana, 932 F.2d 1155, 1158 (6th Cir. 1991) (downward departure improper in Clean Water Act case where effect of defendant's imprisonment would be merely that people he employed would be out of work) with United States v. Milikowsky, 65 F.3d 4, 8 (2d Cir. 1995) (downward departure proper in Sherman Act antitrust case where company could be forced into bankruptcy, with consequent loss of jobs, if defendant was imprisoned and unavailable to run the company). If the basis for placing little weight on employment history is that most adults work and many have impressive employment histories, the Commission might consider adding a sentence setting out a standard, such as specifying that an employment record may not be the basis of a downward departure if it does not distinguish the defendant from other workers in a highly distinctive and unusual way. An addition of this sort will provide added guidance on when not to depart while preserving the ability to depart in appropriate cases. See, e.g., United States v. Big Crow, 898 F.2d 1326, 1331

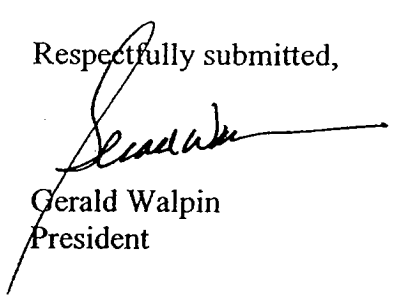
(8th Cir. 1990) (defendant's excellent employment record against backdrop of "adverse environment" of Indian reservation justified downward departure). Other provisions that currently provide no specific guidance are § 5H1.6 (family ties and responsibilities and community ties) and § 5H1.11 (military, civic, charitable or public service; employment-related contributions, and record of prior good works).

Other provisions in the guidelines provide a degree of specificity that may be usefully employed in giving additional guidance on 5H departures. For example, Section 3C1.1 (obstructing or impeding the administration of justice) contains 14 separately-lettered examples of situations in which the obstruction enhancement is either appropriate (such as threatening a witness, escaping from custody or providing materially false information that goes into a presentence report) or inappropriate (such as resisting arrest or making unsworn false statements to law enforcement officers). These examples, while understood to be "a non-exhaustive list," provide a sensible framework for judges to impose (or not impose) an adjustment under this section. Such a framework -- with examples of both appropriate and inappropriate departures -- would be equally valuable in delineating when downward departures under Sections 5H1.5, .6 and .11 are (and are not) warranted.

Conclusion

We respectfully request that the Commission take the foregoing comments into consideration in formulating measures to reduce the incidence of downward departures while preserving the judicial discretion and individualized consideration necessary for a fair criminal sentencing system.

Respectfully submitted,



Gerald Walpin
President



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July 31, 2003

VIA FACSIMILE

Honorable Diane E. Murphy
Chair

United States Sentencing Commission
One Columbus Circuit, NE,
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Comments of the National Conference of Federal
Trial Judges of the American Bar Association

Dear Judge Murphy:

In response to the request of the United States Sentencing Commission for public comment regarding the implementation of Section 401(m) of the PROTECT Act, the National Conference of Federal Trial Judges of the American Bar Association submits the following:

Appropriate sentences must be fashioned on a case-by-case basis under the comprehensive plan and purpose of the Sentencing Guidelines. To safeguard a fair and just federal sentencing system, the National Conference of Federal Trial Judges of the American Bar Association supports S.1086 and H.R. 2213 and urges repeal of section 401(m) of the PROTECT Act, which fundamentally altered that sentencing system. Moreover, before any further amendments to the Guidelines, particularly to Chapter 5, occur, the Conference urges the United States Sentencing Commission to request that Congress hold hearings on S. 1086 and H.R. 2213, gather accurate information about the actual incidence of downward departures from the Sentencing Guidelines by federal courts, and obtain testimony from affected entities such as the Judicial Conference of the United States and the United States Sentencing Commission.

JUDICIAL
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National Conference of Federal Trial Judges
www.abanet.org/jd

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Honorable Diane E. Murphy
Chair, United States Sentencing Commission
July 31, 2003
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We appreciate the opportunity to provide these
comments.

Very truly yours,

A handwritten signature in cursive script that reads "Irene M. Keeley". The signature is written in dark ink and is positioned above the printed name and title.

IRENE M. KEELEY
Chair, ABA National Conference
Of Federal Trial Judges

IMK/esj

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.

Honorable Diana E. Murphy
August 1, 2003
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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

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

**RESPONSE OF
THE NEW YORK COUNCIL OF DEFENSE LAWYERS
TO THE JULY 1, 2003 REQUESTS FOR COMMENTS
REGARDING DOWNWARD DEPARTURES**

Respectfully submitted,

**NEW YORK COUNCIL OF
DEFENSE LAWYERS**

**420 Fifth Avenue
New York, New York 10018
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**Edward M. Shaw, President
Brian E. Maas, Co- Chairman, Sentencing Guidelines Committee
Marion Bachrach, Co- Chairman, Sentencing Guidelines Committee**

Dated: July 31, 2003

**RESPONSE OF
THE NEW YORK COUNCIL OF DEFENSE LAWYERS
TO THE JULY 1, 2003 REQUESTS FOR COMMENTS
REGARDING DOWNWARD DEPARTURES**

As the Commission knows, the New York Council of Defense Lawyers ("NYCDL") has participated actively in the Commission's periodic reviews of whether the Guidelines should be modified to address perceived inadequacies in the Guidelines. Regardless of whether we opposed or endorsed a Commission proposal, we have always believed that the Requests for Comment promulgated by the Commission have presented issues on which our organization's perspective could be constructive. However, the pending Issues for Comment concerning the appropriate Commission response to the Congressional directive on downward departures pose a challenge for our organization unlike any other proposal promulgated by the Commission; we do not see how we can constructively participate in a process that results from such a misguided and misinformed premise. As the Commission's own statistics demonstrate, and as our extensive experience teaches, there is not an excessive incidence of downward departures. On the contrary, the Federal Courts have, in fact, been utilizing the safety valve of downward departure in a relatively small number of cases in an effort to balance the competing values of sentencing uniformity and individualized considerations.

Thus, although we understand that the Commission has a Congressional mandate to review downward departures, we do not believe that any of the proposed language changes to the text or commentary of Chapter 5 will contribute to a fairer and better functioning sentencing process. Even, if such changes would reduce the incidence of downward departures, which we doubt because we believe that downward departures result primarily from a perceived unfairness in the application of the Guidelines to a

particular case, then such a reduction will only contribute to an increased unfairness in the sentencing process, which we cannot endorse. Our experience in the Federal Courts in New York, where most of our cases are litigated, is that downward departures in white collar cases are sparingly applied to that small portion of cases where the Guidelines are so demonstrably out of line with the facts of a particular case as to compel departure or where the defendant's individual circumstances make the strict application of the Guidelines inappropriate. In fact, those few cases in which the ability to make a downward departure motion survives plea negotiations are generally those where even the prosecution perceives that a mitigating factor of the sort contemplated by 18 U.S.C. § 3553 (b) is present.

Thus, we cannot support any language changes to the existing provisions of Chapter 5. To the extent that the Commission will consider easing excessively harsh Guidelines provisions which are triggering downward departures, such as those circumstances where a history of minor criminal offense results in a criminal history calculation that overstates the seriousness of a defendant's actual criminal history, we certainly endorse such modifications. In fact, we believe that the ever-increasing harshness of the fraud tables and the proliferation of sentencing enhancements are contributing factors to the limited downward departure activity as currently exists. Thus, to the extent that the Commission takes any action that would reduce the incidence of downward departures, we urge the Commission to reconsider its recent revisions of the fraud guidelines to insure that fair sentencing is still possible

Congress has set an impossible task for the Commission—to make changes in the Guidelines to reduce downward departures when the existing language already

discourages departures. It is our hope that the Commission, as it attempts to comply with the statute, does not tinker with language in ways that could cause unnecessarily harsh sentences and have unintended consequences for years to come.¹

¹ The New York Council of Defense Lawyers is an organization comprised of more than 150 attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including previous chiefs of the Criminal Division in the Southern and Eastern Districts of New York. Our membership also includes attorneys from the Federal Defender Services offices in the Eastern and Southern Districts of New York.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
JOHN JOSEPH MOAKLEY UNITED STATES COURTHOUSE
1 COURTHOUSE WAY
BOSTON, MASSACHUSETTS 02210**

Chambers of Judge Nancy Gertner

TO: Michael Courlander at pubaffairs@ussc.gov - U.S. Sentencing Commission
cc: Honorable Sim Lake

FROM: Judge Nancy Gertner

RE: U.S.S.C. PROTECT Act - Comments

DATE: August 5, 2003

The Commission has solicited comments with respect to how it might best implement the directive in section 401(M) of the PROTECT Act. That directive instructs the Commission to reform the existing permissible grounds of downward departures.

Before we respond to the directive, it is important to understand what the PROTECT Act changed and what is not changed. The premises of the Guidelines, as found in 18 U.S.C. § 3553(b), have not been amended by the Act. Those premises are:

- Departures play an important role in the Guidelines regime.
- "It is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision."¹
- "[C]ircumstances that may warrant departure from the guideline range cannot, by their very nature, be comprehensively listed and analyzed in advance."²
- As a result, the Commission refused to "limit the kind of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case."³
- Judicial departures play a significant role in evolving the Guidelines.⁴

¹ U.S.S.G. ch. I, pt. A, intro. comment 4(b).

² U.S.S.G. § 5K2.0.

³ U.S.S.G. ch. I, pt. A, intro. comment 4(b).

⁴ The Senate report asserts, for example, that the articulation and review of decisions to depart from the Guidelines will "provide case law development of the appropriate reasons for sentencing outside the guidelines [which], in turn, will assist the Sentencing Commission in refining the sentencing guidelines." S. Rep. No. 98-225, at 151 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3334.

But while the PROTECT Act did not amend essential portions of the statute, notably § 3553(b), provides an important opportunity to look afresh at the role that departures play in the system.

1. Departure Study

Plainly, the message of the PROTECT Act is that there are "too many" departures. However, the essential question is -- "Too many" relative to what? From the comments of the drafters, it is apparent that they believe there are "too many" departures relative to the Guidelines' goal of sentencing uniformity. But uniformity was but one statutory goal of the Sentencing Reform Act, along with rehabilitation, deterrence, and proportionality.

I think the Commission should update their studies of departures to determine (1) when they are given, i.e. the kinds of cases in some detail, (2) why, i.e. the rationale for the departure, and (3) how much, i.e. the size of the departure. We have done a preliminary report of this nature for the District of Massachusetts. We have concluded that the largest single category of departures is departures on account of problems with the criminal history, departures under § 4A1.3. As I understand Commission data, that conforms to the national average. Moreover, it makes sense as a departure. The Commonwealth of Massachusetts, for example, does not have sentencing guidelines. It is not always easy to meaningfully and fairly translate a Massachusetts criminal record into the federal categories. See United States v. Leviner, 31 F. Supp. 2d 23 (D. Mass. 1998); United States v. Shepard, 181 F. Supp. 2d 14 (D. Mass. 2002).

In addition, the Massachusetts study -- at least in our preliminary review -- suggests that the majority of departures are under two years, hardly the kind of major adjustment that the debate on the PROTECT Act suggested. (To be sure, our statistics were not able to identify the relationship between the departure and the Guideline sentence, i.e. whether this was a two year departure on a ten year sentence or a two year departure on a three year sentence.)

In a sense, a study of this sort will enable the Commission to do what the Sentencing Reform Act suggested -- use judicial departures as a way of determining whether the substantive provisions of the Guidelines should be amended. Do the aberrant conduct departures suggest that the Commission ought to revisit changes in category I of the Criminal History score? Should we revisit the issues raised in the Commission's excellent Working Paper on this subject from several years ago? Do departures on the grounds of post offense drug rehabilitation suggest that the Commission should revisit that issue in Chapter 5? Are there any judicial departures based on role in the offense issues? Should role adjustments be more substantial, and along a greater range, so that courts can titrate culpability with greater precision?

I understand that I am merely restating several of the questions that the Commission has asked, but I believe they cannot -- and should not -- be answered in the abstract.

2. Crime Control

While it is somewhat unfashionable to speak of this, I also believe that the Commission study should attempt to link departures, and the sentences that resulted from them, to crime control issues. When the Sentencing Reform Act was passed, scholars despaired of all efforts to study the relationship between sentencing and crime rates. There was little data; the categories under which the data was recorded differed from jurisdiction to jurisdiction.

The Guideline movement -- both federal and state-- has changed all of that. There is substantial information, much of it recorded in similar categories.

I understand that the Commission has begun this effort with respect to recidivism studies as part of their Fifteen Year review. I would like to see the effort broadened. What is the science of drug rehabilitation and propensity to commit crimes? What can we learn from the drug court efforts? Are there categories of offenders and offenses that we can target for drug treatment?

I cannot underestimate the importance of this effort. The departure categories of Chapter 5 would be easier to understand -- for the general public, for our legislators -- if they were linked to concrete crime control issues, rather than to unspoken premises about social policy and judicial behavior.

3. District Reports

I also believe that a study of departures within each District would be efficacious in and of itself. First, it serves a purpose internal to the court. Each judge reviews the study and uses it to correct or not correct his or her own practices. Second, it serves an external purpose. The debate on departures should not be about gross numbers, i.e. the rate of departures, but should be about substance, i.e. when judges depart and why.

4. Guideline Commentary

Departures from the Guidelines would be more limited -- and in my judgment, more rational -- if the following occurred:

- a) Courts spell out the grounds for their departures more explicitly than they have done before. The PROTECT Act emphasizes this as did the Sentencing Reform Act, but the importance of this goes beyond the statutory mandate. The public needs to understand why courts depart, that departures are not taking place willy nilly, that there are sound reasons for judicial departures. (I am reminded of the study that the Commission did several years ago, in which it concluded that public opinion on what sentences were appropriate for given crimes depended to a considerable extent on the information the public was given about the offense and the

offender. If the public had the information that judges had about offenders and their crimes, they would better understand sentencing outcomes.)

- b) District court opinions as well as the opinions of appellate courts should be circulated. I say this not simply because I am a zealot on the subject of writing sentencing opinions. (I write in virtually every case in which I depart.) I believe that it would be enormously helpful to other district court judges in defining when it is appropriate to depart to understand what other judges have done in comparable circumstances. Appellate court decisions, while helpful, are not adequate to the task, because they review only a fraction of the cases the district court sees. The more district court judges know about the practices of their colleagues, the more likely they will conform their behavior to those norms.

To be sure, similar efforts were less than successful in the pre-Guidelines era. Sentencing councils and institutes were not sufficient to create standards prior to the enactment of the SRA. I believe that the current atmosphere is quite different, and the exchange of this type of information is more likely to have a meaningful impact on judicial behavior.

- c) District sentencing reports or a Sentencing Information System (described below) -- describing the sentencing practices in the area-- should be widely circulated, for the same reasons as outlined in (b) above.
- d) The Commission should provide commentary to each Guideline and in particular, the policy statements in Chapter 5, more akin to legislative history. Legislative history could include summaries of hearings, Commission reports, etc. Alternatively, it could include commentary like the commentary to § 1B1.3, "Illustrations of Conduct for which the Defendant is Accountable." In that section, the Commission has provided courts with examples of relevant conduct to illustrate the Guidelines. It is essentially a series of narratives -- not unlike a body of case law -- which I, for one, find enormously helpful in elucidating the boundaries of the Guidelines.

5. Sentencing Information System

Our District has been working on creating a Sentencing Information System for the judges with a single searchable data base of a) opinions, b) sentencing transcripts, c) statements of reasons, d) presentence reports. If a given statement of reasons form is perfunctory, the judge reviewing it can go to the sentencing transcript or the presentence report to flesh out the details.

6. Conclusion

I understand that this letter is not directly responsive to each of the questions that the Commission asked. Moreover, I understand that it is not directly responsive to the "reduce departures" message of the PROTECT Act. In my judgment, however, the unique mission of the Commission will be undermined if it responded to the Act simply by closing this departure window, or that one, without further study and thought. Even in a Guideline regime ostensibly based on a "limited retribution" model, there is room for this kind of analysis. The Commission should use its considerable staff to determine what departures make sense in limiting recidivism or what offenders can be identified for example, for whom drug treatment is both meaningful and acceptable, to the public?

Moreover, providing judges with more of the data on which Commission guidelines are based, or legislative history, or narratives, will rationalize departures, create a more coherent body of law. That approach may also reduce departures, but as important, it will make the departures that result more understandable to the public we serve.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
500 CAMP STREET, ROOM C-556
NEW ORLEANS, LA 70130

CHAMBERS OF
HELEN G. BERRIGAN
CHIEF JUDGE

(504) 589-7515

Memorandum

To: United States Sentencing Commission

From: Chief Judge Helen G. Berrigan
U.S. District Court, Eastern District/Louisiana

Date: July 30, 2003

Subject: Comment regarding PROTECT Act

This memo is written on behalf of myself, not on behalf of my Court or any other judge.

As a prelude comment, I do not think the Sentencing Guidelines themselves need any alteration with regard to downward departures. In my own experience, virtually all the downward departures are initiated by the prosecution for 5K1.1 cooperation and are case-specific. Our judges, myself included, also frequently sit along the U.S./Mexican border where substantial reductions are offered defendants to plead guilty in order to process what is an overwhelmingly heavy criminal docket. If downward departures are to be "substantially reduced," then it is the 5K1.1 departures initiated by the government and the "fast track" departures along the U.S./Mexican border, also initiated by the government, that would have to be reduced.

Having said that, I do think the guidelines need some internal changes for downward adjustments within the guideline range, which are incorporated below.

These are my comments regarding the specific questions:

1. 5K2.0 Grounds for departure and commentary: I recommend no change other than that the Koon case has presumably been

overruled.

2. Chapter Five, Part H: To the extent they are not statutorily required, I think some of the offender characteristics listed as ordinarily not relevant should be legitimate grounds for a lower level adjustment within the guidelines or a downward departure. "Youth" for example. A younger person, not surprisingly, is less mature than an older one and hence arguably less able to make sound judgments, particularly when combined with poverty, and the temptation of easily making a "quick buck" through taking part in a drug deal. Borderline mental retardation and learning disabilities likewise impact both a person's opportunities and their judgment. We're sending legions of young people to prison in lieu of dealing with the adverse family, socio-economic, educational and racial circumstances in which they were raised. Downward adjustments would at least allow us to consider them in terms of sentence length.

With respect to the characteristics themselves, it would be helpful if there were some commentary beneath them to give specific examples of when the Commission would consider the fact not relevant and when they would consider it relevant. I have found the commentary very helpful in other sections of the guidelines to flesh out the details of the factors.

3. Departures based on criminal history: While I generally don't quarrel with the offense severity ratings (with some glaring exceptions, i.e. crack cocaine) I do have objections to aspects of the criminal history calculations. For example, relatively minor prior transgressions are counted. Section 4A1.1 provides for 2 points for imprisonments exceeding sixty days. As a practical matter, many offenders may be arrested on relatively insignificant offenses, misdemeanors or felonies, and remain in custody unable to make bond for more than 60 days prior to having a trial date and then "plead out" to "time served" just to be done with the matter. Misdemeanors and felonies for which imprisonment of 6 months or less is served should be counted as one point, at most. I also think the added two points for someone who is on probation, parole, etc. is unnecessary. As a practical matter, the person's probation/parole will be revoked and he will have to serve that time, usually consecutively. While I don't downward depart on that basis, I do sometimes run the new sentence concurrently to offset the added guideline range caused by the 2 point enhancement of the criminal history score. At a minimum, only

one point should be added to this status. As a practical matter, virtually everyone who commits a new offense on probation or parole does it within 2 years of release so you pick up the 1 or 2 additional points on that basis. These additional points become more disproportionate when the prior offenses are misdemeanors or relatively minor felonies. I have had the sense in individual cases that the criminal history score has been "piled up" by the above situations in a manner that over-represents the seriousness of the criminal history. I think if the guidelines for criminal history calculations were made more reasonable, then the need for downward departures on this basis would be alleviated.

4. Offense Conduct departures: I have a strong objection to statutory mandatory minimum sentencing in general and to the extent the guidelines incorporate those mandatory minimums as their threshold for sentencing, I also object to the offense conduct calculation. This exists primarily in the drug offense area, to a lesser degree with regard to weapons.

5. Downward adjustments in lieu of downward departures: I think this is a bulls-eye solution. 5K1.1 downward departures aside, my guess is that most downward departures are based on the perception that the guideline calculation result is simply too harsh under the individual circumstances. Whether it is because the offense severity rating is too high (crack cocaine being the prime offender) or the criminal history calculated as disproportionately severe or because the offender characteristics under Chapter Five, Part H, are too miserly, the result is the same. If the guidelines would modify those areas to authorize downward adjustments, then the pressure to downward depart would be alleviated.

6. Should any of the above downward departures be eliminated. My short answer is "no." My longer answer is that I think 5K1.1 departures need to be reviewed, particularly with respect to those offenders who are minor players, tell all they know, and are denied a 5K1.1 because what they know isn't of significant use to the government. I have had the not infrequent situation where a more culpable offender has a lower guideline range, as a result of a 5K1.1., than his co-defendants who are lesser players. The difference is because the more culpable offender also had more incriminating information about

others than did the less culpable offender. Since we are trying to impose a sentence that relates to culpability and acceptance of responsibility, the lesser offender should be a candidate as well.

7. 4-Point reduction for early disposition. I assume this relates to the so-called border courts. While I have served over there, I would defer to the full-time judges there on how that could be structure.

Thank you very much for asking our input.

Sincerely,

A handwritten signature in black ink, appearing to read 'Helen G. Berrigan', with a stylized, cursive script.

Helen G. Berrigan

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
CATHERINE C. BLAKE
UNITED STATES DISTRICT JUDGE

July 31, 2003

U.S. COURTHOUSE
101 WEST LOMBARD STREET
BALTIMORE, MARYLAND 21201
(410) 962-3220
Fax (410) 962-6836

Honorable William T. Moore, Jr.
United States District Court
Old Federal Building
125 Bull Street
Savannah, GA 31401

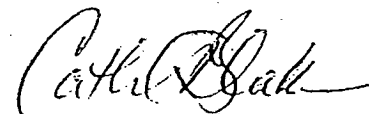
Dear Judge Moore:

Thank you for the opportunity to comment in connection with the implementation of the PROTECT Act, specifically with regard to the Sentencing Commission's responsibility to review the grounds for downward departure presently authorized by the Guidelines. It is our firm belief that the present structure permitting downward departures under the Guidelines is appropriate, well-justified, and not in need of any significant change. National statistics demonstrate that in the great majority of district courts downward departures (other than those for substantial assistance to the government) are relatively rare. District judges, guided by their circuits, are exercising discretion responsibly and should continue to be allowed to do so.

Accordingly, we believe the specific questions posed by the Commission should be responded to with a strong statement against elimination of any of the present bases for downward departure. Of particular concern is the area of overrepresentation of the defendant's criminal history. The present point system does not distinguish sufficiently among types, seriousness, and timing of past crimes. It is essential, on occasion and in appropriate cases, to allow the judge to evaluate a defendant's record in context: an individual defendant may have accumulated the same number of points but in fact represent much less of a threat to public safety than the majority of defendants in that same criminal history category.

All of my district judge colleagues join me in support of these comments. We appreciate your consideration of our position.

Sincerely yours,



Catherine C. Blake
United States District Judge

cc: Honorable Diana E. Murphy ✓
All U.S. District Judges
All U.S. Magistrate Judges
Felicia Cannon, Clerk

*United States District Court
Southern District of California
940 Front Street
San Diego, California 92101-8901*

*Chambers of
Marilyn L. Huff
Chief Judge*

*Phone:
(619) 557-6016
Fax: 702-9922*

August 1, 2003

Honorable Diana E. Murphy
United States Sentencing Commission
Attention: Public Affairs - Public Comment
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Re: Public Affairs - Public Comment

Dear Judge Murphy:

Thank you for the opportunity to provide public comment concerning the Sentencing Commission's implementation of the PROTECT Act, Public Law No. 108-21, 117 Stat 650 (2003). Due to the expedited nature of the public comment period, I asked for comments from our United States Attorney, the Federal Public Defender, and the coordinator of the Criminal Justice Attorney Panel in our district in order to give the Sentencing Commission the benefit of their considerable experience with sentencing issues in our district. Enclosed are the responses that the court received for the Commission's review.

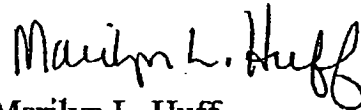
As the chief judge of a court with one of the highest number of felony cases in the nation, I emphasize the need of the Sentencing Commission to consider the unique circumstances and challenges faced by border districts when it addresses changes to a fast track disposition program or other departures not prohibited by the PROTECT Act.

The most recent published statistics for the Sentencing Commission indicate that the Southern District of California sentenced more guideline defendants (4,213) than the entire First Circuit (1,645), the entire Second Circuit (4,147), the entire Third Circuit (2,636), the entire Seventh Circuit (2,450), the entire Eighth Circuit (3,568), the entire Tenth Circuit (3,415) and the DC Circuit (276) in 2001. Despite the volume of cases, the Federal Court Management Statistics indicate that the Southern District of California in 2001 was the fastest in the nation for criminal dispositions while first in the nation in criminal felony cases. The Southern District of California faces geographical challenges in housing pretrial criminal defendants in several facilities,

United States Sentencing Commission
August 1, 2003
Page 2

marshal shortages in handling a large volume of defendants, interpreter needs for non-English speaking defendants, and other circumstances not faced in the majority of districts. These unique circumstances may warrant a flexible fast track disposition program and other sentencing discretion for the court to appropriately exercise its sentencing authority under the law.

Sincerely,



Marilyn L. Huff
Chief Judge

MLH:am

cc: District Judges, Southern District of California
cc: Mario G. Conte, Federal Defenders of San Diego, Inc.
cc: Carol Lam, United States Attorney
cc: Mark Adams, Esq.
cc: Hon. Sim Lake
cc: Hon. William Moore
cc: Hon. Wm. Fremming Nielsen
cc: Mr. Michael Blommer

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ADAMSBLAIRFERARRAWIN

PAGE 01/02

MARK F. ADAMS
ATTORNEY AT LAW
264 FIFTH AVENUE
SUITE 217
SAN DIEGO, CALIFORNIA 92101
TELEPHONE (619) 239-1344
FACSIMILE (619) 544-1429

VIA FACSIMILE & U.S. MAIL

July 30, 2003

Hon. Marilyn L. Huff, Chief Judge
United States District Court
940 Front Street, Rm. 4195
San Diego, CA 92101

Dear Judge Huff:

In response to the United States Sentencing Commission and Judicial Conference request for public comment concerning the implementation of the Prosecutorial Remedies and Other Tools to end Exploitation of Children Today Act of 2003, (The PROTECT Act; public law No. 108-21, 117 Stat 650 (2003)), I write on behalf of myself as a Criminal Justice Act Attorney and as this District's representative to the Administrative Office, Defender Services Division to comment on proposed implementation of the PROTECT Act and its impact on United States Sentencing Guidelines. I firmly believe that the Courts, in exercising their discretion in the most important aspect of the Criminal Justice System, that is, in imposing sentence, should be not be restricted in any further regard. Only the District Court can properly evaluate the individual accused standing before the court for sentencing, and the facts and circumstances of the case as filed against that accused. Accordingly, Section 5K2.0 and its commentary should not be revised. Rather than restrict District Court judges, the Commission should allow those District Courts to exercise their discretion in determining the circumstances which warrant a downward departure. The factors outlined in Chapters 2, 3 and 4 of the guidelines should remain unchanged, or if to be changed, should only be changed to permit the District Courts to exercise their sentencing discretion in determining when, and to what extent, a downward departure is warranted in a particular case.

When the Sentencing Commission and/or Congress seeks to impose more or more restrictive guidance on offender characteristics or on circumstances under which downward departures may be considered, the courts lose the ability to exercise their judgment in determining the appropriate sentence given a particular set of facts and circumstances involving both the facts of the case, the impact on a community and the offender to be sentenced. Whenever the Commission and Congress seek to restrict the discretion of the District Courts, they risk upsetting the balance of government in an inappropriate and,

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ADAMSBLAIRFERARRAWIN

PAGE 02/02

MARK F. ADAMS

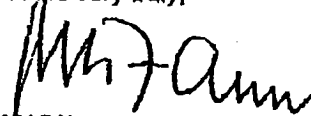
ATTORNEY AT LAW

Hon. Marilyn L. Huff
United States District Court
July 30, 2003
Page Two

indeed, perhaps unconstitutional fashion by placing more power in the hands of the executive with respect to the determination of the appropriate sentence and ultimately the sentence actually imposed. This is not healthy for a democratic society. In exercising sentencing discretion, the District Courts should be permitted wide latitude in deciding the appropriate sentence. With respect to downward departures and departures for the evaluation of criminal history, it is very important that the United States Sentencing Commission not further restrict the District Court's Sentencing authority. If any change is to be made, the Commission should recognize that downward departures pursuant to an early disposition (fast track) program should be recognized as an appropriate exercise of the court's sentencing authority.

I hope my comments are of assistance to the Court and to the commission considering this important issue. Should your Honor have any further questions, I am available at your convenience.

Yours very truly,



MARK F. ADAMS
Attorney at Law

MFAlerd

**FEDERAL
DEFENDERS
OF
SAN DIEGO, INC.**

The Federal Community
Defender Organization
for the Southern
District of California
www.fdsdi.com

August 1, 2003

Honorable Marilyn L. Huff
United States District Judge
940 Front Street
San Diego, CA 92101

Dear Judge Huff:

I have attached for your review the suggestions of this office to the questions for the Sentencing Commission.

Although the deadline was short, I believe we have made constructive as well as innovative proposals.

I want to thank you for giving us the opportunity to assist the court in this endeavor.

Very truly yours,

Mario G. Conte
Executive Director

MGC/mlk
Enclosure

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FAX (760) 335-3610

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CLARENCE C. NEWCOMER
JUDGE

13TH FLOOR, UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PENNSYLVANIA 19106-1778

July 23, 2003

Honorable Sim Lake, Chair
Committee on Criminal Law of the
Judicial Conference of the United States
9535 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, Texas 77002

Re: United States Sentencing Commission Request for Public Comment

Dear Judge Lake:

Pursuant to your request of July 18th, the following is my response to the questions proposed by the United States Sentencing Commission in the general order in which they were presented.

Personal Comment

1. There should be no revision of §5K2.0. Furthermore, the Commission should not provide additional or more restrictive guidance for mitigating factors that may warrant a downward departure, but instead, this guidance should arise from judicial opinions decided over the course of time.
2. The Commission has not attached excessive right to the departure factors. That should be an Article III judicial function not an Article I or Article II function.
3. Chapter 5, Part H, should be rescinded and the matter left to judicial discretion. Additional or more restrictive guidance on offender characteristics is not warranted.

4. Additional guidance as to offender characteristics is not warranted and this matter should be left to judicial discretion.

5. Guideline provisions governing downward departures for criminal history should not be made more restrictive but more leeway should be provided in the guidelines for judicial discretion.

Additional or more restrictive guidance in §4A1.3 regarding departure for the over-representation of the defendant's criminal history are not warranted.

6. While it is unclear what the Sentencing Commission is asking in its inquiry regarding the "downward departure adjustment in lieu of a downward departure for any factor or downward departure basis or for a combination of such basis or for any other mitigating factors..." I feel that any changes to the guidelines which restrict judges from imposing a sentence within judicial discretion is not warranted.

7. No additional prohibitions for a downward departure basis would be appropriate.

8. The sentencing function as encompassed by the United States Constitution is vested solely within the authority of Article III judges. The legislature is encroaching upon the judicial functions both in establishing sentencing guidelines and in imposing mandatory restrictions upon judges in the sentencing function. The guidelines themselves are a constructive effort to achieve greater uniformity and less disparity in sentencing throughout the United States. If they were made voluntary for the guidance of the judge instead of mandatory they would serve a very useful purpose.

I always have been and remain convinced that the establishment of the United States Sentencing Commission for the purposes of establishing guidelines, subject to the approval of the legislature, is a clear violation of the Separation of Powers provisions of the United States Constitution.

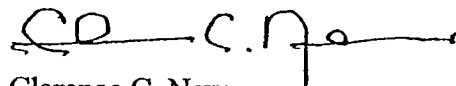
My response reflects that conviction.

As suggested in my opinion, the Guidelines could serve a very useful purpose in our attempt to avoid disparities in sentencing and at the same time to make present the administration of justice in a fair and even handed way if, instead of being mandatory they were made to be voluntary.

This would enable judges to perform their time-honored function of administering justice to all with mercy.

Thank you for the opportunity of expressing the above views based upon my 31 years as a United States District Judge.

Sincerely,



Clarence C. Newcomer

CCN:szq

cc: Honorable William Moore, Jr.
Unites States Sentencing Commission

Judge's Chambers
United States District Court
For the Southern District of Ohio
838 Potter Stewart U. S. Courthouse
Cincinnati, Ohio 45202

S. Arthur Spiegel
Senior Judge

(513) 564-7620
Fax (513) 564-7627

July 31, 2003

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002

Attention: Public Affairs-Public Comment

Re: Response to Request for Comment

To Whom It May Concern:

Section 401(m) of the PROTECT Act of 2003 demonstrates Congress' significant distrust of United States judges in sentencing criminal defendants. Not only does Section 401(m) increase the level of scrutiny on appeal for district court departures from the Sentencing Guidelines, the Act also calls for a "substantial reduction" in the incidence of downward departures from the Guidelines. This letter responds to the Commission's request for comment regarding changes to the availability of downward departures in the Sentencing Guidelines. Specifically, this letter addresses the Commission's general policy statement regarding departures set forth in § 5k2.0.

There is much to oppose in the PROTECT Act's attempt to limit judicial discretion in determining sentences. First, standardizing sentencing procedures limits a court's ability to issue an appropriate and individualized sentence. Second, eliminating downward departures in sentencing hinders judicial efficiency by discouraging plea bargaining.

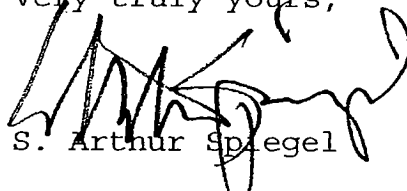
First, without the opportunity for judicial accounting for the various mitigating or aggravating circumstances that accompany each unique case, judges will not have the required discretion to issue an appropriate sentence. The Supreme Court of the United States has acknowledged the "wisdom, even the necessity, of sentencing procedures that take into account individual circumstances." Koon v. United States, 518 U.S. 81, 92 (1996). Trial courts must be left with sentencing discretion, to "make a refined assessment of

the many facts bearing on the [sentence], informed by its vantage point and day to day experience." Id.

Second, permitting judges downward departures in determining criminal sentences serves judicial efficiency by encouraging plea bargaining. Under the current guidelines, the court may accept an agreed sentence that departs from the applicable guideline range "for justifiable reasons." U.S. Sentencing Guidelines Manual § 6B1.2 (2002). Whatever changes result from the enactment of the PROTECT Act, judges must be permitted to depart from the guidelines in approving sentencing plea agreements.

While it has been the province of the legislature to prescribe conduct deemed criminal and to establish a range of penalties for punishment of that conduct, judges have historically had a role in setting the specific sentence responsive not only to the crime committed but also to the background of the defendant. The federal judiciary consists of individuals appointed by the President and Congress through the confirmation process. Individuals appointed to the bench are generally recognized for their scholarship, wisdom and experience. Discretion traditionally exercised by the judge in sentencing should not be further proscribed.

Very truly yours,



S. Arthur Spiegel



*United States District Court
District of South Carolina*

*J. Ross Anderson, Jr. Federal Building and U.S. Courthouse
Post Office Box 2167
Anderson, South Carolina 29622*

*8/4/03
COPY TO JUDGE MURPHY,
JUDGE LEE AND KIM
WHITNEY.
JRP*

*J. Ross Anderson, Jr.
United States District Judge*

July 29, 2003

*Telephone: (864) 226-3739
Facsimile: (864) 226-0412*

Judge William T. Moore, Jr.
United States District Court
Old Federal Building
125 Bull Street
Savannah, Georgia 31401

Re: United States Sentencing Commission Request for Public Comment

Dear Judge Moore:

After reviewing the Sentencing Guidelines in light of the United States Sentencing Commission's request for public comment on July 18, 2003, I have drafted the following suggestions.

1. Section 3E1.1. The court, not the government, should possess the authority to grant the additional point reduction for acceptance of responsibility.

The U.S. Sentencing Guidelines provide a three-point reduction for acceptance of responsibility. Currently, the government must move to allow a defendant to receive the additional point decrease before a criminal defendant receives the third point deduction. This places the discretionary decision-making power in the government's hands—not in the hands of the judge. (See generally, Frank O. Bowman, III, *Departing is Such Sweet Sorrow: "A Year of Judicial Revolt on Substantial Assistance Departures Follows a Decade of Prosecutorial Indiscipline"*, 29 STETSON L. REV. 7, 67 (1999) (Defendants in District A may very well receive different sentences than

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identically situated defendants in District B because of differing local substantial assistance practices.")) This should be changed. Obviously, it is difficult for the government to change roles from an adversary to an impartial decision maker within the same case.

Furthermore, this is subject to governmental abuse because it gives the government the final decision on whether a defendant "substantially" assisted the investigation. This problem is also evidenced by the differences in the frequency of substantial assistance departures being granted. Some commentators explain that the reason is "that requirements for receiving a substantial assistance departure are different among U.S. Attorney's Offices." Jon. J. Lambiras, *White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?*, 30 PEPP. L. REV. 459, 517 (2003). Each U.S. Attorney's Office may establish its own substantial assistance policy. "One commentator, a federal district court judge, has noted that 'there are no national Department of Justice guidelines governing either the amount of substantial assistance necessary to trigger a section 5K1.1 motion, or the degree of a downward departure to recommend.'" *Id.* If the authority was transferred to the court and the Sentencing Commission created a uniform definition for substantial assistance, its application would be neutral and the considerable gap will be narrowed.

Although this extra point should not be granted to every criminal defendant, the court – not the government – should possess the authority to ultimately decide when the defendant's assistance is substantial or extraordinary. And if the court finds the defendant's assistance extraordinary, it would grant the additional point reduction.

2. Section 4A1.2(d) should be amended to prevent a defendant's juvenile convictions in adult criminal court from being used to determine his criminal history.

The Sentencing Guidelines's use of a defendant's juvenile convictions in adult criminal court

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when computing his criminal history category fosters inequality. This inequality is evidenced in the Sentencing Commission's explanation for not using all of a defendant's juvenile convictions. The commentary to section 4A1.2 states that "[a]ttempting to account for every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records." However, there are other reasons why these disparities exist. In some jurisdictions, prosecutors have complete discretion in determining whether a minor will be tried in juvenile court system. Other jurisdictions allow juvenile judges to waive jurisdiction and allow juveniles to enter the adult judicial system. And some states completely exclude certain offenses from the juvenile system. See Melissa Sickmund & Howard N. Snyder, *Juvenile Offenders & Victims: 1999 National Report*, Washington, D.C. Office of Juvenile Justice & Delinquency Prevention, at 102.

To avoid this inequality when deciding whether to apply the defendant's juvenile conviction, the Sentencing Guidelines should base its decision on the following factors: (1) the type of sentence received; (2) the amount of time actually served; and (3) the type of proceeding used to convict the offender. *United States v. English*, 1999 U.S. App. LEXIS 3709, * 10 (citing *United States v. Pinion*, 4 F.3d 941, 944 (11th Cir. 1993)). (See also *United States v. Mason*, 284 F.3d 555 (4th Cir. 2002) ("Mason argues that the district court erred in using his 1981 conviction of a robbery offense, committed when he was sixteen, to classify him as a career offender. . . . We agree with Mason and hold that he should not have been classified as a career offender.")

This interpretation allows sentences that are consistent with adult sentences to be used as a predicate offense for the career offender provision; however, sentences that are more consistent with the juvenile sentence will not be used to determine the defendant's criminal history. (Cassandra S. Shaffer, *Inequality within the United States Sentencing Guidelines: The Use of Sentences Given*

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to Juveniles by Adult Criminal Court as Predicate Offenses for the Career Offender Provision, 8

ROGER WILLIAMS U. L. REV. 163, 166 (2002).)

3. The disparate treatment of crack cocaine when compared to powder cocaine should be altered to reflect the defendant's culpability and should not be based solely on form and amount.

Currently, the Sentencing Guidelines provides different consequences for possession of crack cocaine and powder cocaine. Although they are basically the same illegal drug, the Sentencing Guidelines makes a distinction. Defendants convicted of possessing 500 grams of powder cocaine receive a mandatory minimum sentence of five years in prison; however, defendants caught with crack cocaine receive the same mandatory five-year sentence for possessing just five grams. (Section 2D1.1; *see also* 21 U.S.C. §§ 841(b), 844.) This sentencing disparity is extreme and must be adjusted. Its effect is evidenced in the following scenario:

A supplier sells 250 grams (a quarter-kilo) of powder cocaine to a middleman, who in turn cuts (i.e. increases the quantity by adding adulterants) and sells smaller-ounce (28 grams) quantities of this powder to several street dealers. One of the street dealers mixes 5 grams of this powder cocaine with baking soda [and] cooks it, producing 5-plus grams of crack. If the street dealer gets arrested and charged federally, he faces a mandatory minimum sentence of five years. The supplier who is "up the ladder" of culpability, however, would have to get caught with 500 grams of powder cocaine to face that much time in a federal prison.

Kevin J. Cloherty & Dawn M. Perlman, *Powder vs. Crack: 100 to 1 Current Quantity Ratio Under Attack*, FEDERAL LAWYER, March/April 2003, at 50.

Despite the Sentencing Commission's previous attempts to justify the current 100 to 1 ratio, many of the justifications used to enforce the current ratio lack merit. The Sentencing Commission has found that the penalties exaggerate the harm of crack cocaine. This is evident because "[c]ocaine in any form produces the same physiological and psychotropic effects" U.S.

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Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002).

The 100 to 1 ratio also has a devastating effect on blacks when compared to whites. A 1996 study found that whites were more apt to use powder cocaine while a larger percentage of blacks and Hispanics were more likely to use crack cocaine. See U.S. DEP'T OF JUSTICE, *FEDERAL COCAINE OFFENSES: AN ANALYSIS OF CRACK AND POWDER PENALTIES* at 6 (March 19, 2002)(charting the usage of crack and powder cocaine defendants by percentage for 2000) (citing Marian Fischman & Dorothy Hatsukami, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality*, 276 JAMA 1580, 1582 (1996)). "Ninety percent of crack defendants are African American, and federal sentences in crack cases are between three and eight times longer than sentences for comparable powder offenses." Joseph Kennedy, *The New Data: Over-Representation of Minorities in the Criminal Justice System / Drug Wars in Black & White*, 66 LAW & CONTEMP. PROBS. 153, 170 (2003).

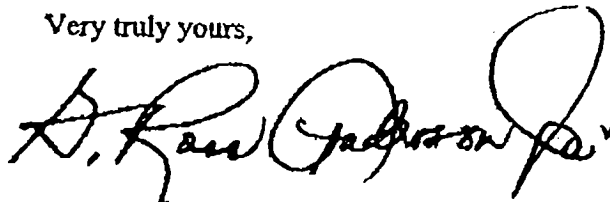
Justice Stevens addresses this devastating issue in *United States v. Armstrong*, 517 U.S. 456 (1996). He states that "it is undisputed that the brunt of the elevated federal penalties falls heavily on blacks." *Armstrong*, 517 U.S. at 479 (Stevens, J., dissenting). Justice Stevens also explains that blacks receive sentences that are 40% longer than whites because of the current 100 to 1 ratio. This creates "a major threat to the integrity of federal sentencing reform, whose main purpose was the elimination of disparity (especially racial) in sentencing." *Armstrong*, 517 U.S. at 480 (Stevens, J., dissenting). Moreover, crack cocaine neither affected youth as predicted nor chemically caused more addictions. (Cloherty & Perlman, *FEDERAL LAWYER* at 50.) In addition, "the negative effects from prenatal cocaine exposure are similar to those associated with prenatal tobacco exposure and less

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severe than the negative effects of prenatal exposure." (*Id.*)

Because of this new research and reports, the Sentencing Commission should alter the sentencing guidelines to reflect the defendant's culpability and not merely base the defendant's sentence on the form or amount of crack the defendant possessed. This could be done by using various mitigating and enhancing factors. Furthermore, the Sentencing Commission should also balance the punishment for crack cocaine and powder cocaine by raising the minimum sentence requirements for powder cocaine. These changes will create equal punishment regardless race and of the cocaine's form.

Very truly yours,



G. Ross Anderson, Jr.





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August 1, 2003

Paula J. Desio, Deputy General Counsel
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Michael Courlander, Public Affairs Officer
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Re: Request for Public Comment

Dear Commission:

The following sets forth our public comment relating to the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108-21 (the "PROTECT Act"):

Commentary to §5K2.0 Revision

"[t]he Commission does not foreclose the possibility that a case can differ significantly from the 'heartland' cases covered by the guidelines. Such a case must be significantly important to the statutory purposes of sentencing in a way that: (1) cannot be mitigated or negated during plea negotiations; and/or (2) cannot be mitigated or negated through the introduction of exculpatory evidence and/or offender characteristics and/or criminal history. In these instances, the Commission believes that judicial discretion and judicial review shall provide the proportionality and just punishment in sentencing necessary for such defendants and cases."

UNITED STATES SENTENCING COMMISSION
Page Two
August 1, 2003

Thank you very much for the opportunity to provide the above public comment.

Sincerely,

/s/

Lynzy Wright
Legal Criminalist/Consulting Expert

/law

richard crane

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June 3, 2003

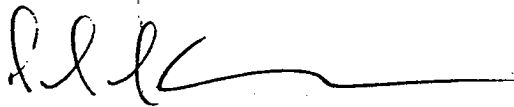
Mr. Lou Reedt
U.S. Sentencing Commission
1 Columbus Circle NE
Suite 2-500
Washington, DC 20002

Dear Lou:

I'm a member of the Practitioner's Advisory Group and we spoke very briefly after its meeting in Miami last week. I can appreciate the challenge in attempting to ascertain the reasons why a court has departed. I have the same problem trying to divine the court's reasoning when reading an appellate court decision. I suggest that you get the district courts to send you not only the judgment, but also any motions and memoranda filed by the parties addressing departure grounds. Reading those together with the judge's reasons might be helpful.

During the PAG meeting you indicated that the Commission was looking at reducing the percentage of sentences in which a downward departure was granted from 9% of the total cases to 8%. As you said, this would obviously be a 1% reduction. This is a matter of psychology; rather than talking about a 1% reduction from the total number of cases, why not talk about the reduction as a percentage of the total number of cases in which a downward departure was granted. Then, if 9% = 100% of those cases, 8% would represent an 8.9% reduction in the number of departures.

Sincerely,



Richard Crane

RC/mpf

cc: Barry Boss
Jim Feldman

31817-120/Apache B
P.O. Box 7007
Federal Correctional Institution
Marianna, FL 32447

July 11, 2003

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

Dear Chairman Murphy:

I am writing to provide pre-Federal Register public comment concerning the Feeney Amendment to the PROTECT ACT, Title IV of Pub. L. 108-21, and to comment in general relative to the Commission's statutory mandate to periodically review and revise the Sentencing Guidelines.

I am a federal inmate and also a paralegal who does extensive post-conviction work. My comments concern U.S.S.G. § 4B1.1 Career Offenders. I have researched and written a rather comprehensive legal treatise on this Guideline, including published judicial decisions and some expressions of dissatisfaction. However, my present comments are without citing judicial authority and I will simply relate my experiences in doing legal work for individuals who have been sentenced under § 4B1.1 and also general references to numerous judicial statements.

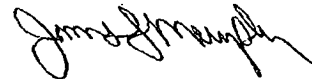
From what I have seen, supported by numerous District Court Judges' statements at sentencings, the Career Offender Guideline needs to be more circumscribed in order to avoid the inclusion of individuals who legally fit the § 4B1.1 criteria but are not "career offenders" as envisioned by the enabling legislation (i.e., 28 U.S.C. § 994(h)). Or, as envisioned by any rational and objective criteria for determining what it means to be a "career offender." For example, a defendant who has been convicted of selling small amounts of cocaine or marijuana at least twice in the last 15 years (the time limit for considering prior offenses under the Guidelines and also § 4B1.1), and presently is convicted for a similar small quantity sales, is not necessarily a "career offender," although that individual meets the § 4B1.1 criteria. Certainly, if "career offender" has a practical definition, it seemingly would encompass those individuals who over that same 15 year period have demonstrated involvement in drug trafficking as a lifestyle, perhaps with violence, and derived substantial income. Nevertheless, I have read numerous sentencing transcripts and published cases wherein a District Court Judge expresses dissatisfaction with having to sentence an individual as a § 4B1.1 Career Offender, when in reality that individual is no more than a street-level drug user who has sold small quantities. And, without citing cases, most Circuit Courts who have addressed the issue have held that the Career Offender Guidelines does not allow for a "street-level" user exception or as justification for a downward departure. Now, in consideration of the Feeney Amendment, any departures from § 4B1.1 may be effectively eliminated.

Page 2
The Honorable Diana E. Murphy, Chair

As a suggestion, perhaps § 4B1.1 could include a "trafficking" requirement, as distinguished from "simple sales." Presently, the line between the two is somewhat ambiguous. For instance, under 21 U.S.C. § 841(b)(1)(C), there is no minimum quantity requirement. A defendant not qualifying (based upon drug quantity) under 21 U.S.C. §§ 841(b)(1)(A) or (B), will fall under (C). This could be as small as a one-gram sale. However, that qualifies the person as a § 4B1.1 Career Offender (assuming the prior conviction requirement is met). Or, perhaps instead of the now qualifying prior conviction criteria of either two previous drug offenses, two previous crimes of violence, or any combination thereof, the Guidelines could be revised to require a crime of violence either past or present. This would be in accordance with at least one Senator's published legislative history comments in reference to the enactment of 28 U.S.C. § 994(h), the § 4B1.1 enabling legislation. I have the Congressional Record cite and Senator Kennedy was concerned with the relationship of drug trafficking and violent crime and commented that career criminals who use violence in drug dealing would be punished severely.

Finally, I would like to sincerely thank you for reading and considering my present comments. Hopefully something I have related will be of interest to you.

Respectfully,



James L. Murphy

From R. C'ZAR

1:16 PM

07/31/03

to:

DIANA MURPHY, Chair

MICHAEL COURLANDER, Public Affairs

In answer to "Request for Comments" – on downward departure from sentencing guidelines in the "Protect Act".

27 pages

To be backed with regular mail copy

bona fides

We established the *Imperial Pornography Commission* in 1985 – after the *MEESE Pornography Commission* undertook to repudiate the earlier federal pornography commission's finding that pornography was harmless.

As most government opposition to pornography currently falls on "child pornography" our focus has intensified there.

Research Field and Discipline "*0407108 Child Pornography*", is designated in *The Eighth Edition of the Grants Keyword Thesaurus* (Copyright 1982-1999). Initially funded by the federal government, the *Grants Keyword Thesaurus* is used by FEDIX's participating Federal Agencies, The *NIH Guide*, and *NSF Bulletin* as the government standard for designating a common research classification system to be used by the federal government for categorizing vocabulary for both federal agencies and grant applicants. The terms have been examined by professional library scientists to ensure consistency with leading discipline dictionaries in each research field listed.

We negotiated and secured our 501-(c) 1 tax exemption from the IRS in Los Angeles in 1985.

We were the principal legal defender of the now perished 50-year-old nudist colony, *Samagatuma*, which was extirpated in a government sanctioned pogrom, in 1982. The violence used to destroy the colony would today probably be recognized as terrorism. It was predicated upon *hate* for nudists.

The region has a long history of violence and intolerance for sex, nudity and pornography.

Counter Factuals

About the same era that TED TURNER established CNN, we traveled to Los Angeles to the cable television association's annual convention and endeavored to establish a nudist cable network. Had we been successful establishing a nudist

cable channel back then, today's hysterical Neo-puritan movement would probably not exist.

We also declared a moratorium on the war-on-sex, as the Neo-puritan movement continually misstates the facts. Their myriad fictions largely account for today's laws. Had the government observed this moratorium, draconian intrusions upon personal rights to sex, nudity, pornography, etc. would likely have never come to be.

Eliminating downward departures

The *Sentencing Commission* is being marched by forces into no-downward departure sentencing guidelines. We believe that this is preliminary to US Rep. TOM DELAY re-introducing his death penalty bill for sex crimes that he previously withdrew from the loaded-up *Amber Bill* legislation. We believe this is really about mandatory death sentencing.

We witnessed *Senate Judiciary Committee* member JEFF SESSIONS claim that the sentencing guidelines of the *Sentencing Commission* must be made uniform, with only the maximum sentence being allowed.

The *Sentencing Commission's* actual role in all of this reminds us of the anecdote of a man attending a political dinner: One of the waiters is going around the tables placing pats of butter on the plates. A gruff diner barks, "I want another butter, do you know who I am?" To which the waiter snaps, "Do you know who I am? I'm the guy who hands out the butter."

High road, low road

We have long believed that the government's ultimate goal is to eventually supplant the War on Drugs and the War on Terrorism with the War on Sex. We have been aware that there seems to be a secret central coordinator in the War on Sex. For instance, on Tuesday, May 20, 2003, there was a massive blitz of television stories on "sexual predators". The same day, the local county board of supervisors launched their day-long "Chairman's Conference on Sexual Predators". It included the law enforcement community, the prosecutors, and just about every one that has a financial stake in a War on Sex. The TV blitz and county conference timing seemed powerfully coordinated.

We guessed that the conference was funded by a massive OJJP grant that had been published in the *Federal Register*. We have since learned we were right. Their main objectives were to change the laws regarding minor offenses, to major felonies for "sexual predator" crimes (in which they included possession of child pornography), and to insure massive punishments, such as life imprisonment, as they asserted that "sexual deviants cannot be cured". They planned to pursue massive new grants for myriad programs under this cash-cow.

Yet commensurate with our moratorium on the War-on Sex, some 30,000 registered sex offenders failed to register in California. If the 400 victims per offender figure was real, we would have seen an enormous number of offences by those 30,000 ("incurables") in that time. We didn't. The number is obviously wholly exaggerated.

Back on August 29th 2001, the Scottish Rite Center hosted the "*First Bilateral Conference on Commercial & Sexual Exploitation of Minors*", a salient in the anti-sex, anti-nudism and anti-pornography pogroms.

Dr. RICHARD ESTES from the University of Pennsylvania was the chief attack-dog, introducing his *iatrogenics*. Dr. ESTES warned that there were probably pedophiles secretly in attendance, and he pronounced "pedophiles" with the same hate, loathing, animus and disdain as other bigots might intone the slur, "nigger-lover".

Dr. ESTES laid out conference goals as being to initiate fundamental change in the laws, including, raising the age-of-consent in all 50 states, and then around the world. He stressed the agenda of passing harsh criminal sanctions against child pornography and sexual relations involving minors.

To fail to do so, he insisted, was to invite acceptance, and "normalcy". We inquired at the conference, "what is the critical mass necessary to achieve 'normalcy'?"

We registered and provided our e-mail address and requested to be notified of the next conference. We returned home and later that day received a tax bill from the IRS despite our exemption. We were dis-included from notification of the subsequent conference date two years later, but on that same day received yet another such hit letter from the IRS.

County supervisors began broadcasting a tirade of anti-"sexual predator" cable television programming with copious amounts of factual distortion of upwards of around three hours a day, day in, day out. This was punctuated with the "need to" and strategies to "change the laws" at the state level. The constant guest from *Citizens for Community Values*, has the same last name as the woman administering the program at the Department of Justice.

Such deliberate and open politicking uses of those grant dollars was improper and probably illegal. Yet consider that the Inspector General's budget at DOJ next year is only \$56 million, yet Juvenile Justice receives some eight times that amount.

Similarly, someone took the low road for a retaliatory attack against our tax exemption. It is further improper to not include those many opposing

arguments to their War-on-Sex, etc. Throughout the legislative process, obstruction to opposing input has been the same. That is why it is exceptional conduct for the *request for comments* by the *Sentencing Commission*.

The local county supervisors generally embrace religious establishments, and have on several occasions referred to pornography as but "filth". Yet myopic vision can prove negligent:

oops

DAVID X. SWENSON Ph.D., in his compilation, "*The Ouroboros Effect: The Revenge Effects of Unintended Consequences*", writes:

"Solutions to problems are usually intended as final fixes, but more often than not, while solving one problem, they generate more problems. In some cases the new problems from the intended solution are bigger, worse, or more complicated than the original problem; in other cases, the intended solution feeds back into the original problem and simply exacerbates it. The German word, 'verschlimmbessern', can be interpreted as 'to fix something more broken,' or to worsen through attempts to make better. These unintended consequences have been called 'revenge effects' and are largely a function of limited scope in problem strategy conceptualization: most problem solving deals only with the problem (as defined) at hand, and does not consider the long term effects, ripple and spin-off effects (contingencies), or feedback effects in a larger system."

Even where planning includes professionals from several disciplines, professionals of limited disciplines often make the same error: they solve the problem only for the immediate situation, not considering the systemic implications of the overall picture.

In one of Dr. SWENSON's numerous examples:

"The purpose of the French Revolution was to rid France of the corruption and injustice of the old regime. To this goal Dr. JOSEPH IGNACE GUILLOTINE expanded on the plans for a new form of merciful execution using a large falling blade (the machine bearing his name), and even went to LOUIS XVI (who loved riddles and problems) for suggestions on the proper angle of the blade (which Louis later became intimately acquainted with). The device was promoted by ROBESPIERRE whose Jacobite committee dominated the new regime. His cold-hearted methods and new laws led to numerous beheadings--his included--as French crowds became caught up in rampant accusations, impulsive convictions, and summary executions. It was later estimated that a severed head retained consciousness for as long as 15 seconds--not so quick a death. The intent of a merciful execution

had unexpectedly fostered over two years of public butchery and cost an estimated 13,800 lives."

Reproductive Law

We understand that age-of-consent in this state was 10-years-old until towards the end of the late 19th Century. Age-of-consent laws are generally considered as part of *Reproductive Law*, which is regarded as one part of *Population Control*. MALTHUS held that short of the leveling-forces of war, famine, plague (disease), and pestilence, population would eventually outrun available sustenance. The period of relatively slow growth of a population is called the *lag phase*. The human population reached 6 billion in October of 1999. Today it is 6.3 billion. The human carrying capacity for earth is popularly estimated in the 10-12 billion range.

Low range estimates of sustainable world population, with the world at U.S. dietary standards, are 1.2 billion; at U.S. energy consumption, are less than 1 billion.

High range estimates of some 45 billion or more are envisioned as possible if we cultivate all arable land; mass convert to nuclear power and renewable resources and expand mining. This assumes technologies and solutions that do not yet exist. The upper *earth sustainable human population* figure is 157 billion if population shifts to grain diet.

The annual percentage growth rate of the world's population has remained relatively flat at 1.7% for the last 15 years. *The Doubling Time* for population is currently estimated at 41 years. The *True Doubling Time* is the Doubling Time adjusted for migration.

World Total Fertility Rate is 3.8 per women. In More Economically Developed Countries, TFR is 2.1. In Lessor Economically Developed Countries TFR is 2.7. Approximately 1/3 of the world population is currently under 15 years of age. Women younger than 15, represent the greatest impact on future growth, as they will be reproducing in subsequent years. And yet, despite increasing AGPR, the TFR is dropping.

Human population growth is affected by the same factors as other populations as well as philosophical and ethical considerations. We have heard of groups suggesting raising the age of consent for both sex and drinking to 25 years-of-age in this country. We found this to be a rather arbitrary age, yet learned that China has already set that delayed age for marriage. Couples must then wait another two years after marriage to have children. Couples must formally agree to have only one child. China offers free birth control, and abortions. If a woman gets pregnant with a second child, China offers incentives for termination, and penalties if she bears the child. The Chinese government has linked prosperity and

low growth rate in its citizen's minds. Overall, the world's average age that a woman has her first child is 20-years-of age.

India has had very little success in instituting reproductive laws. Japan handles high-density population well, but they obtain resources (ore, energy, food, etc) from low-density areas. Curiously, some of the world's most sensuous pornography, especially child pornography, comes from Japan. While some child pornography comes from India, the exploitation of children in that country is generally regarded as owing to menial labor.

Infectious disease is caused by biological organisms. Non-infectious diseases, i.e., those that lack an agent of transmission, include such diseases as cancer, hemophilia, diabetes, etc.

Bubonic plague killed 67% of Europe's population in 1348. 50% of its population then perished from the plague again, 13 years later.

Today, HIV is devastating Africa. Condoms have regained popularity as an effective barrier method to HIV, STDs and pregnancies. Other popular barrier methods against unwanted pregnancies include hormonal methods such as Norplant, the pill, and the morning-after-pill, (RU-486, which competes with progesterone for binding sites on placental cell membranes.)

Worldwide, abortion plays a significant factor in reducing births. Abortions, throughout the ninth month, are routine in China. Some estimate that China had performed 63 million abortions through 1986.

China also executes many prisoners, subtracting from population. Those in prison labor camps also reduce reproduction rates.

War and rumors of war, we are told, will always be with us. Wars seem to occur regularly throughout history as part of the human condition in order to reduce the human population. From an *Ethological* point of view- (*ethology is the study of animal and human behavior*), wars break out as part of the human animal's condition, and not as he expects - owing to religious or political disputes.

And yet as stated previously, human population growth is affected by the same factors as other populations as well as philosophical and ethical considerations.

abstinence schemes.

Conatus - is desire, the will to live. Optimum population, versus quality-of-life is an extremely subjective tradeoff. Human sexuality is a vital and necessary component in people of all ages for quality-of-life. Man often invents

institutions such as religion that impinge on areas like sexuality. Frequently, such institutions endeavor to substitute rigors, strictures and mortifications in place of sexuality. Challenges for abstinence are generally made to the postponing of intercourse – and not for choosing lifetime celibacy. Usually, other forms of sexuality may be substituted, allowing more of the whole-person to exist.

But sexual repression diminishes *conatus*. Despite the *Heritage Foundation's* clever attempt to correlate higher suicide rates to sexual activity in young girls, the actual will to live correlates to whole-personality. It is these extreme repressive morals which regularly give rise to a greater inclination to war. Repression similarly seems to exacerbate intolerance.

If a society is less inclined to war, it will probably be less repressive, more repressive – more inclined to war. This seems to be the religious component to population control.

Acculturation

Acculturation is the mingling and blending of cultures. It is the cross-fertilization of cultures. It is the acquiring understanding of other cultures or the revealing to a child, cultural traits or social customs.

Right-wing extremism frequently denies cultural diversity, cultural pluralism. RONALD REAGAN promptly withdrew the United States participation in UNESCO shortly after we announced we would turn to that source to fund our US Constitutional project, having met resounding opposition from federal funding sources under that administration.

Religious Fundamentalism, whether Islamic or Christian, frequently denies all tenets but its own. Religious Fundamentalism, frequently insists on a literal interpretation of religious tracts – but almost always its own literal interpretation – not those of others. The more extreme Religious Fundamentalism both in this country and elsewhere, have avowed Culture Wars, cultural cleansing, a “Jihad” against “society’s dirt”, a Holy War.

Frequently, these traits seem almost disingenuous, so as to conceal ulterior motives. Consider the *KEATING Syndrome*, named for CHARLES KEATING, of the Lincoln savings and Loan scandal. KEATING used the misdirection of *absolute moralism* against pornography, to cover his real activity of looting and plundering. It seems to serve as a model to this day for today’s Right-wing extremists.

The Christian Coalition, some years back, embarked on a strategy to capture the secular state and force its narrow tenets upon everyone else through law. One of the original items (#9) on the Christian Coalition’s “*Contract with America*” was the abolition of pornography. That general liberticide was later revised down to simply child pornography.

PAT ROBERTSON, the Christian Coalition's founder, and son a former senator, also attempted to run for president. ROBERTSON enlisted many powerful members of the Republican Party to join his "inner-circle" sponsorships. Strategy involved disguising true intentions and operating "under the radar" by stealth. When former Republican chairman and former Governor JAMES GILMORE expressed the party's strategy, he said it would be a stealth administration.

Christian Coalition's RALPH REED shared the Coalition's stealth political strategy. In an interview with Norfolk *Virginian-Pilot*, November 1991, Religious Right candidates were encouraged to conceal their religious agenda and to advocate popular issues such as lowering taxes. "I want to be invisible. I paint my face and travel at night. You don't know it's over until you're in a body bag."

In an interview with the *Los Angeles Times*, in March 1992, REED says, "It's like guerrilla warfare. If you reveal your location, all it does is allow your opponent to improve his artillery bearings. It's better to move quietly, with stealth, under the cover of night."

Some time ago we watched PAT ROBERTSON declare on his *700 Club*, that he had made the necessary arrangements to end pornography "once-and-for-all".

Immediately, House Judiciary Chairman JAMES SENSENBRENNER and along with fellow porn-fighters BOB GOODLATTE AND STEVE LARGENT, et al, called A.G. JOHN ASHCROFT on the carpet in the committee and demanded he crack down on pornography.

A flurry of activities ensued, culminating in where we are today. Now laws targeting pornography, (unlike other speech), allow professed "victims" to sue in court, and by showing a nexus to injuries, to collect damages.

Yet hidden right-wing, war-on-sex terrorist cells exist in America. Little effort is made to discourage these elements. We have written to newspapers and congressmen previously about these individuals, gone to the police and the prosecutors and the courts. Too many embrace religiosity and moral absolutism, and they frequently also conspire to deny the irreligious their own lives for living.

Moral Absolutism is an interesting concept. One essay we encountered explained it as thus. "If you were to stand up end-on-end, an infinite number of dominoes, with the last domino being marked with a letter 'X', knocking over the first domino, how long would it take for the toppling dominoes to topple over the one marked with an 'X'?"

The logical fallacy is that the author contradicts himself by defining a "last domino" in an infinite row. He then answers his question, "Never", and explains that this then proves the existence of God. Since the existence of God is proved,

then there must be Divine Law. Since there is Divine Law, he concludes, then there must be Absolute Moral Law, that is, moral absolutes which can never be changed.

DAVE DUFFY writes in his essay, "*Can America be saved from stupid people?*":

"There are a lot of taboos, that is, things we're not supposed to talk about, in modern society. If we do talk about them we are labeled a racist or worse. [Pedo?]... In the old days, ... [about the mid-17th century back], most people lived a bare subsistence existence. They spent their lives toiling to feed themselves and their families, then died young. All political and economic power was in the hands of an elite, usually a combination of clergy and aristocracy who were often the same people. Only this ruling elite was educated, and their power was typically inherited, entailing the power of life and death over poor people, who comprised 90% or more of the population. Poor people, for the most part, acquiesced in this situation, accepting that aristocrats and clergy somehow belonged in their elevated positions and that it was the poor's lot to be miserable, especially since the ruling elite assured them that heavenly reward awaited them in the afterlife. It was a great con game played by the aristocracy and clergy for hundreds of years, and it was enforced with the torture and execution of anyone who didn't go along.

"But beginning in the early 17th century, advances in knowledge, in particular scientific knowledge, began a renaissance of thought, at first among a few enlightened clergy and aristocrats, that said one didn't have to live a subsistence living, that one could better one's life through the application of this new technology, that one could grow more food, heal the sick, and in general understand and harness the natural world so that everyone, not just an elite, could enjoy life.

"Gradually this revolutionary idea took hold and technological advance turned into economic and political advance, and by the middle of the 18th century a significant portion of the world's civilized population, at least in western Europe, thought that every person had the right to a better life on this earth. Much of the aristocracy and most of the clergy fought bitterly against this idea, since it meant the loss of their power over poor people. But it won out anyway, with a few isolated pockets of aristocrats and clergy maintaining power over the very poorest places.

"In historical hindsight we refer to this time that ushered in a better life for everyone as the Age of Enlightenment. It spanned just about all of the 17th and 18th centuries and, in the latter half of the 18th century, led directly to America's founding with its wonderfully

enlightened Constitution that guaranteed the average person the right to seek happiness on this earth, in this life. This is important, because a lot of stupid people think America sprang into existence suddenly, out of a few people's heads. It did not. It was the result of a long process of people gradually becoming aware that this life was worth enjoying and pursuing happiness in. Early Americans like JEFFERSON were the product of this process and they wrote the best of it into America's Constitution."

Modern times have seen a reversion to top-heavy, control-down. The Aristocracy-Clergy resumes some of its former control with religious-slavery. Little-or-no attempt is presently made for the convention of *noblesse oblige*.

In SUZANNE PRESTON BLIER's essay, "*Crisis and Creativity: The Social and Cultural Roots of Artistic Florescence*", she notes,

"... [I]t is becoming increasingly evident that humanistic scholarship is on the brink of a major paradigm shift. In part this shift is generated by the new potentials of electronic media. It also is based on a growing desire to creatively move beyond existing research orientations and methodologies - positivist, materialist, deconstructionist, and otherwise. Equally important has been the sense of isolation that scholars in many disciplines have felt due to increased sub-field specialization. In art studies specifically, although researchers have brought to light massive new data on artists and art traditions around the world, to date, little if any attempt has been made at a synthesis of these findings. With early evolutionary and teleological models of art long held to be untenable, the time is right for a new scholarly orientation which seeks to locate broader patterns existing within art traditions in various settings.

"Recent writings of GILES DELBUZE and other Neo Formalist philosophers, have offered provocative paradigms for rethinking about art along more global lines. Rereading DELBUZE in the last few months, however has left me with a sense of frustration and sadness at the underlying evolutionism of its central nomadic trope, in which, it would appear, Africa is again positioned at the bottom, albeit here as a sort of reframed noble savage. A truly global historical model in art history delimited along these lines is clearly problematic because of ongoing issues of marginalization. Yet I also see striking potentials in the idea that form again might be addressed through the lens of what we have learned in the last three decades of scholarship on the social and political grounding of art. What better subject to take up in this regard than artistic innovation in its diverse social and global settings.

"Psycho-biological models ... may suggest that artistic talent or giftedness are readily passed down within a culture. Associated data run counter to both art historical and cultural exemplars. As the anthropologist A. L. KROEBER pointed out in the later 1940s (1948:390 ff) during certain key periods in history one finds a striking increase in the number of extraordinarily gifted individuals at work within a given area (the Italian Renaissance for example). If 'artistic genius' (his term) is a wholly (or predominantly) hereditary phenomena, one would expect to have roughly equal numbers across periods and even societies. And, say in 19th century Italy, we would expect that many of the great grandsons and daughters of key Renaissance artists would have gained similar fame. KROEBER argued in this light that the innovative potentials of fully 75-90% of all persons who had inherited such "gifts" had in some way lost or neutralized them. Things could be worse, in his view, however, for without some form of societal acceptance of innovation the loss would be 100%. Initially when I began working on this project I saw crisis as the most important factor in the promotion of artistic change, with issues such as internal and external war, religious proselytization movements, trade route changes, and technological shifts being of critical importance. Artistic innovation in this light might be seen to share important complements with theories of chaos and disorder. Associated crises offered the means of escaping what has called (1990:265) the 'coercive structure of order.' Creative individuals seem to be able not only to adjust to new socio-cultural forms but also to take advantage of the associated conditions of flux to bring into being dynamic new artistic models.

"That crisis plays such a critical role in artistic innovation also has been examined in several provocative studies on fashion. The first, an exploratory essay by the sociologist GEORGE SIMMEL, argued that (1971:302) 'The more nervous the age, the more rapidly its fashions change.' The more detailed fashion study by A. L. KROEBER showed similarly that fashion innovations often occurred in times of war, revolution, and social crisis. Two key moments of fashion change as defined by measurable shifts in hemlines, waist shapes and bust forms between the years of 1788 and 1936 were documented. According to him, the first great shift occurred around the French Revolution, leading up through the political concerns of 1830; the second coincided with political tensions surrounding the first world war. In Africa similarly anthropological studies in Ghana suggest that a shift to more flamboyant royal costume forms has tended to occur in periods in which power has significantly dissipated, most importantly the early era of colonialism.

"While I still maintain that crisis is central to the process of artistic change, it is also clear that crisis alone is not enough. What is

equally important is the coming together of several quite different cultures in contexts in which there are relatively comparable freedoms of expression. **When the established order, and specifically those in positions to effectuate change respond to major crises by interacting with competing cultures, creative breakthroughs are encouraged.** Artistic innovation in this way seems to be linked in vital ways to multi-cultural exchange, however unsettling or difficult such exchanges may at first appear to be. And if the modern and post colonial worlds are identified with particularly striking artistic innovations it is because of the ready access to new communication means which have encouraged strikingly different cultures to come together more often and in new ways.

"Scholars working in the comparative-civilizational approach ('the comparative study of total societies as social systems' -NELSON 1981:238) offer interesting models for related scholarship. NELSON notes (1981:239) with regard to the primary interests of this approach include that: 'All socio-humanistic patterns and processes are studied in historical-sociological psychological depth. Equal emphasis is given in principle to a) social structures in all institutional spheres, b) structures of consciousness, c) symbolic designs; and d) changes. However because of the underlying evolutionary focus of the above, related studies in my view often are problematic.'

"ROBERT A. NISBET notes key problems with the comparative method for similar reasons (1969:189; 190-1):

"Closely related to the theory of social evolution, inseparable from it indeed, is the system of culture classification known admirably in the nineteenth century under the name of Comparative Method....The Comparative Method is thought to be the consequence of the 'scientific' anthropology of the late nineteenth century. It is not....In fact...as we find it in the writings of the nineteenth-century social evolutionists and to a considerable degree at the present time, is hardly more than a shoring-up of the idea of progressive development generally, and more particularly, of the belief that the recent history of the West could be taken as evidence of the direction in which mankind as a whole would move and, flowing from this, should move. COMTE, MARX, SPENCE, TYLOR, MORGAN, without exception were convinced that the specific line of development which they thought they could see culminating in Western Europe was much more than Western development alone. They saw the West, and most especially England and France, as the vanguard in a mighty movement of historical development that would eventually encompass the rest of the world."

Enforcement

Chief Justice WILLIAM H. REHNQUIST, delivered the keynote address at the Dedication of the ROBERT H. JACKSON Center in Jamestown on Friday, May 16, 2003. Chief Justice REHNQUIST quoted Justice JACKSON from the famous 1943 case "*WEST VIRGINIA STATE BOARD OF EDUCATION et al. v. BARNETTE*" et al., No. 591. :

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

(Unless of course, one's very core beliefs and core values are being proscribed in the *Sentencing Commission*, in setting up an inflexible structure, intended to, and suited only for the institution and implementation of the ultimate application of the ultimate sentence – Death.)

Another interesting line from the *WEST VIRGINIA STATE BOARD OF EDUCATION . v. BARNETTE* case:

"Objections to the salute as 'being too much like Hitler's' were raised by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federation of Women's Clubs."

Two years later, Justice JACKSON was the lead prosecutor at the Nuremberg Trials in Germany following World War II, in 1945.

It wasn't until another two years in 1947, that the much and long sought after evidence was found, of the minutes of a conference held on January 20, 1942 at a villa in Wannsee, a district of Berlin. At this conference, the plans for the "Final Solution to the Jewish Question" were made.

In all, fifteen top Nazi and SS officials attended the conference at the Wannsee villa, (which now serves as a Holocaust Museum). Then 36-year-old ADOLF EICHMANN took down the 15 pages of minutes of the meeting. HBO Films/BBC Films co-produced has award winning documentary "*Conspiracy: The Meeting at Wannsee*", on this meeting.

The excerpt of *part one* (those in attendance) reads as follows:

Minutes of discussion.

I.

[116]

The following persons took part in the discussion about the final solution of the Jewish question which took place in Berlin, am Grossen Wannsee No. 56/58 on 20 January 1942.

SS-Obergruppenführer REINHARD HEYDRICH
Chief of the Reich Security Head Office (RSHA), and Chief of the Protectorate of Bohemia and Moravia

Gauleiter Dr. MEYER and
Reichsamtleiter Dr. LEIBBRANDT
Reich Ministry for the Occupied Eastern territories

Secretary of State Dr. STUCKART
Reich Ministry for the Interior

Secretary of State NEUMANN
Plenipotentiary for the Four Year Plan

Secretary of State Dr. FREISLER
Reich Ministry of Justice

Secretary of State Dr. BÜHLER
Office of the Government General

Under Secretary of State Dr. LUTHER
Foreign Office

SS-Oberführer KLOPFER
Party Chancellery

Ministerialdirektor KRITZINGER
Reich Chancellery

SS-Gruppenführer HOFMANN
Race and Settlement Main Office

SS-Gruppenführer MÜLLER
Reich Main Security Office

SS-Obersturmbannführer EICHMANN
Security Police and SD

SS-Oberführer Dr. SCHÖNGARTH
Commander of the Security Police and the SD in the Government General

SS-Sturmbannführer Dr. LANGE

Commander of the Security Police and the SD for the General-District Latvia, as deputy of the Commander of the Security Police and the SD for the Reich Commissariat "Eastland".

REINHARD HEYDRICH, chose the lovely, serene setting by Lake Wannsee, for a conference, surrounded by a library, swimming pool, flower gardens and bird houses. Of those in attendance, most were well educated, and several had law degrees.

While the actual minutes contained euphemisms, "transportation to the east" or "evacuation to the east" (*nach dem Osten abgehoben*) of the 11 million Jews in Europe, the actual meaning was understood to denote murder.

HITLER's own comments, as dutifully recorded by his secretary during his "table conversations", fall, 1941:

"From the rostrum of the Reichstag, I prophesied to Jewry that, in the event of war's proving inevitable, the Jew would disappear from Europe. That race of criminals has on its conscience the two million dead of the First World War, and now already hundreds and thousands more. Let nobody tell me that all the same we can't park them in the marshy parts of Russia! Who's worrying about our troops? It's not a bad idea, by the way, that public rumor attributes to us a plan to exterminate the Jews. Terror is a salutary thing"

The United States Sentencing Commission looms very close to such a meeting. No doubt, minutes will be kept. We are unaware of even any SCHINDLER's List type exceptions being made in the current punishment guideline proposals.

Defective, ultra vires, anathema

The First Amendment could not be clearer that "Congress shall make no law... abridging the freedom of speech, or of the press..." There is simply no room for ambiguity. Yet starting with *Redrupp*, and continuing with *Miller*, the High Court has done just that, favoring religious strictures, rigors and mortifications.

In 1928, the Supreme Court held in *Olmstead v. United States*, that wiretapping involved no "search" or "seizure" within the Fourth Amendment's "unreasonable searches and seizures" prohibition. The court held that the Fourth Amendment "shows that the search is to be of material things - the person, the house, his papers or his effects". When a suspect's phone was tapped "there was no searching" as the Constitution's wording "cannot be extended and expanded to

include telephone wires reaching to the whole world from the defendant's house or office." Connecting wires "are not part of his house or office any more than are the highways along which they are stretched."

The notion that signals on a wire were somehow ethereal so that no tangible (material) interest involves, runs counter to today's notions of electronic communication. By such reasoning, how can downloaded pornography be proscribed until it has actually been printed?

Olmstead had been sold to the court on the notion of those rare exigencies where there was a kidnapping victim or some such exceptional circumstance, where a wiretap might lead to a successful rescue of someone and save a human life. In such a case, that part of the evidence should have been excluded from the actual prosecution as *fruit from the poison tree*. And yet as always, when such legal fictions are advanced, and as exceptions to the inalienable rights are carved out, the envelope gets pushed and pushed and pushed and now wiretaps have become quite routine, even for myriad minor transgressions.

Of Heresy:

Socrates

The discipline of *PHILOSOPHY* contains the five fields: *logic, esthetics, ethics, politics* and *metaphysics*. (From WILL DURANT's multi-tomes *Story of Civilization*)

Logic, is the study of ideal thinking. Logic approaches research through observation and introspection, deduction and induction, hypothesis and experimentation.

Esthetics, is the study of ideal beauty, often of form and figure or art.

Ethics, is the study of ideal conduct.

Politics, is the study of ideal social organization (*and not of capturing and keeping office*).

Metaphysics, is the study of final causes, (teleology). It encompasses ontology,

cosmology and epistemology. Metaphysics forms the bases for religion.

SOCRATES held that the highest knowledge was that of good and evil, the very *wisdom* of life.

SOCRATES lived in Athens, Greece, the cradle of democracy. 469?-399 BC.) SOCRATES chose death over the censorship of his teachings. Most intellectuals regard him as the first individual to formulate the philosophy of intellectual freedom. He pioneered the marketplace-of-ideas as supreme public service.

SOCRATES propounded a philosophy of self-knowledge of purely objective understandings of such concepts as justice, love and virtue.

In 399 BC, SOCRATES was charged with corrupting the morals of the young and neglecting the gods of the state as well as introducing new divinities, such as the *daemonion*.

He fulfilled his sentence by calmly drinking a cup of hemlock, according to the custom of the day.

A.D.

Emperor JUSTINIAN, (483-565; reigned 527-566), born PETRUS SABBATIUS to village peasants in what was eventually to become the former Yugoslavia. JUSTINIAN envisioned a scheme by which to unite with forces of Christianity, and consolidate his power.

With the help of his two great generals, BELISARIUS and NARSES, he spanned empire across Africa, Spain, and Italy. He rebuilt the eastern capital at Constantinople. With a fertile imagination, he found his power in ideas.

He located a talented lawyer, TRIBONIAN, (died 545), and slashed the multitude of laws and enactments to but one twentieth of their original bulk. He retained only the best of the legal ideas. These resulted in the *Codex* and the *Digest*. Together we get the *Corpus Juris Civilis*, remaining unsurpassed for thirteen hundred more years.

His *Pandect*, his *Compendium*, held that justice consists of rendering every man his due.

About that same time, BOTHIUS, (480-524), JUSTINIAN's coeval, compiled the *Quadrivium*, consisting of four hard sciences, the disciplines of arithmetic, music, geometry and astronomy. He translated and modernized these from the Greek texts, thus saving "the first elements of the arts and sciences of Greece".

These gave rise to the *Trivium*, which was produced in the Middle Ages, defining the verbal disciplines of grammar, rhetoric and logic. Taken together, the *Quadrivium* and *Trivium* comprise the seven Liberal Arts.

In 1209, in the first documented genocide in modern European history, some thirty thousand troops eradicated at least fifteen thousand men, women and children in wholesale slaughter.

The famous line attributed to one of Pope INNOCENT'S III's officers, when asked how to tell the difference between heretics and true believers was, "kill them all, God will recognize his own." The same officer later declared, "Neither age, nor sex, nor status was spared".

About this same time in England, the *Charta Liberatum* was enacted. It consisted of the *Magna Charta* and the *Charta De Foresta*.

The *Magna Charta*, or Great Charter, was granted by King JOHN of England in 1215. Its 38 chapters formed the foundation for personal liberty, the administration of justice, setting distinctions between temporal and ecclesiastical jurisdictions, securing rights of property and defining the limits of taxation.

The *Charta De Foresta* was issued and granted by HENRY III. Having originally appeared within the *Magna Charta*, it defined grants of property and liberty for the woodland population. While both were held inviolable, Lord COKE observed that they needed to be confirmed some thirty times, interregnum.

In 1833, two committees were formed to publish suppressed documents of the history of France. Among those scholars gracing the committees, were VICTOR HUGO and JULES MICHELET. MICHELET compiled the voluminous *Le Procès des Templiers*, detailing records of the trials of the Knights Templar in the Inquisition.

This was anathema to the Church, which, due to Darwinism, was already experiencing a crisis of faith.

California Senator Joseph Dunn recently observed that the history of this country is one recurring cycle of group after group being denied their rights. The *California Senate Select committee on Citizen Participation* has already held hearings on the numerous Mexican-American citizens that were rounded up and expatriated simply because they had brown skin.

Another senate committee recently examined California's shameful legacy with the early eugenics movement, and forced sterilization.

Still others examined the Japanese-Americans internment, have looked at the shameful period of lynching, have discussed the virtual eradication of indigenous peoples - California Indians. Others have addressed the shameful period of slavery.

Many in California have called for a *Truth and Reconciliation Commission*, to address these shameful series of wrongs. The obvious fact is that in real time, that is, while the outrages are occurring, they seem appropriate and proper. It is only in historical perspective that the egregious injustice comes clear.

These things we do know however: The marginalized and the target groups lack critical-mass to fight back. Further, all opinion advanced in defense of the group is stilled and silenced. In today's age, a constant, unending blitzkrieg of demagoguery pours out of the radio, television and print media, which deny any voice to the target group, the socially disfavored. Owing to going unchallenged, gross exaggerations are then advanced and the group is further demonized, vilified, and dehumanized.

While the *Miller* decision pretended to Community Values, (a ruse; witness the pogrom at Samagatuma or the California Proposition 215), at least *Miller* respected literary, artistic, political, and scientific value. *New York v. Ferber*, fails dismally in that regard. Without the multi-disciplinary examination of a social current or group, then what we have with *Ferber*, is a grotesque caricature of early human sexuality pathologically perverted to the narrow purview of police mostly operating in their self-interest.

Intellectual CHRISTOPHER HITCHENS observed that there exists a "pornographic element" to law enforcement. We concur, by watching the way police frequently denigrate and abuse women they arrest for prostitution and other sex offenses. On *Cops*, one cop named "JACKSON", in Oregon, stopped a young female that he had previously targeted and accused her of street walking. She became distraught and panicked at his antics. He hog-tied her and displayed her like that with her dress hitched up fully revealing her brief underwear, to other laughing officers.

The "Long Island Lolita" (AMY FISHER), reported that she was repeatedly raped by prison guards.

California used to have *Penal Code 4030*, which was said to have allowed police to accuse women of an offense (such as soliciting), and then to body-cavity search them. Allowing cops to essentially molest females, practically at will, virtually amounted to a pornographic sexual police "perk"

Recently on TV, a *Cops* program showed cops in a room, with a naked female, her arms pinned behind her by one cop, thus forcing her naked breasts to thrust forward while the other cops jeered. She begged them to allow her to at least put on her brassiere and one finally brought her bra extended at arms-length and on the end of a stick, with the cop acting as if the bra was poisonous.

We know of human behavior, that slavery took a civil war to end. Like owning pets, owning other human beings is a powerful sense of might and

control. That explains another reason that kidnappers, even after having been paid ransoms, sometimes kill their captives. It explains why prison wardens don't like to release their wards.

When police are given such total power over other human beings, it is this pornographic element that often comes in to play. They frequently toy with people because of this. They often only reluctantly release them.

When NYPD Officer JUSTIN VOLPE violently sodomized Haitian immigrant ABNER LOUIMA, with a wooden stick, and in so doing, actually ruptured LOUIMA's internal organs, it was a brutal sexual act. We understand such use of the "night stick" is a long-running joke amongst many cops. One finally acted out on it.

A San Diego County sheriff's deputy was recently dismissed for exacting sex from a woman he went to investigate, and where he found her at home intoxicated. She filed charges of rape, which we understand were dismissed.

When the FBI presented evidence to the judiciary committee on child pornography, during Senator GRASSLEY's bill, it was of their own material that they put up on the Internet. It brought the FBI \$30 million. More money! More Power! cf. *Operation Starburst*; *Innocent Images*; *Candyman*; *Hamlet*; et. al. The FBI poses as both purveyor and seeker of porn. Original strategies included controlling access to adult materials. Past efforts include the EXON Amendment (aka Communications Decency Act), COX/WYDEN bill, LEAHY bill, and spurred on by the now discredited Carnegie-Mellon study by student MARTY RIMM, the *Child Pornography Protection Act of 1995*, (S. 1237), sponsored by HATCH, ABRAHAM, GRASSLEY, and THURMOND. criminalized even virtual imagery. Upheld U.S. District Judge SAMUEL CONTI of San Francisco, that opinion cited secondary effects chargeable to the very imaginations of artists.

The CDA challenge of AMERICAN CIVIL LIBERTIES UNION,; CIVIL ACTION et al., : v. : JANET RENO is a clear example of splitting hairs. It could as easily be called "How Many Angels Can Dance on the Head of a Pin?" It exemplifies compound error. *The American Psychological Association* issued a report debunking the belief those children having sex (even with adults), leads to long-term psychological problems. Yet there is a huge multi-million-dollar child sex abuse industry which has its own momentum. One has to wonder what the Founding Fathers would have thought about the First Amendment's explicitly clear language "no law", admitting exceptions, and then the perpetually escalating sophistry by which such rationale would of necessity have to compound error of legal fictions. And yet ACLU v. RENO is considered a victory by many for overturning the CDA.

In the hot-button, witch-hunt hysterical climate, numerous false assumptions abound, yet are just plain wrong. Because they have been purposely

repeated so often, they have become accepted as factual. These are far too many to list and one-by-one, here, but by way of example, the term "pedophile" regularly gets used (albeit inaccurately) interchangeably with "molester" and "predator", and always in the pejorative. (*the DSM IV* defines a "pedophile" as someone whose predominate sexual interest favors children.)

In another example, FBI Agent DEBORAH DANIELS, the Justice Department spokesperson appearing on C-SPAN stumping for HATCH's "Protect Act", revealed that the actual number of kidnappings of children resulting in murder in a particular year was 44. The irate citizen caller on the phone line disputed her and insisted that she was wrong. He insisted that the real number was 700 thousand. People want to believe that!

We believe that this notion came about because an organized effort to distract from *Enron's* multi-billion dollar crime wave, which funded much the president's candidacy, as well as that of the attorney general in his race in Missouri.

When it became apparent that Enron and others were looting California for *themselves*, we let out a cry of indignation and soon, many others followed suit.

Congressional hearings soon followed, and those hearings rapidly captured the country's spotlight. The President's chief benefactor and buddy, KEN LAY, claimed his 5th Amendment rights against self-incrimination. Enron's CLIFF BAXTER agreed to cooperate with investigators with full disclosure. He ended up dead before full disclosure was made, killed by "RAT SHOT".

In testifying about J. CLIFFORD BAXTER's death, JEFFREY SKILLING announced that BAXTER had complained, "They're calling us CHILD MOLESTERS!"

Upon the uttering of that remark, the media went off in a seriously organized red-herring feeding frenzy against "child molesters", and Enron thereafter, was largely ignored. The red herring soon reified into all-out media frenzy against the Catholic Church. Hardly new, incidents occurring even 30 years ago, were called "news" and yet that story took over the cable news programs and newspaper front pages. We kept hearing that 700,000 kids disappeared a year and that one-third were killed within the first 3 hours. They repeated that over and over and over. The thing is, it's just not true.

We were told by media that Catholic priests were the worst of the worst. But allegations surrounding priests had been reported since 1996 on the *Fresh Petals* web site when it was run by IANTHE. The hysteria generated was an all-out a red-herring.

The worst priest incident we heard was that the actual worst case was 40 victims. Yet the sex abuse industry insists that the average is 400 per offender.

The language is suspect as well. JEFFREY DAMER was accurately labeled a "sexual predator". However, the police and media began to apply that pejorative to all sexual offenders. A predator is an animal that kills and eats other animals. A *natural predator* selects out the sick and weak and feeble from herds, for instance. "Top-Line Predators", such as human being hunters, tend to select-out the largest, healthiest trophy animals, usually in their prime-of-life.

If we accept the malapropism of human predators for something other than killing-and-eating, then perhaps "Top-Line Predating" explains assassinations of the best leaders. We recently saw a quote from the *Talmud* instructing to target and kill the enemy's top leaders.

Interestingly, the Jews have historically been a tragic target group. They now boast the *ADL*, in defense. Jews represent approximately 3.5% of America's population. Blacks now account for about 12.5 %; homosexuals, approximately 5%. Apparently, the US Supreme Court believed that that group had achieved critical mass. *Lawrence vs. Texas* offers some amazing insights into the court's mindset. Justice Stevens' declared "*the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.*"

In Justice SCALIA's dissent he faults "A law against public nudity targets 'the conduct that is closely correlated with being a nudist,' and hence 'is targeted at more than conduct'; it is 'directed toward nudists as a class'". He says, "It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."

Such a position accepts that there are always socially disfavored groups under attack. It does nothing to shore up the rights of those being marginalized until the dust settles.

When PAT ROBERTSON heard the court's decision in *Lawrence*, he went apoplectic. ROBERTSON immediately initiated "Operation Supreme Court Freedom" and inveigled imprecations and deprecations from his followers, taking the low road to influence the court. Apparently, ROBERTSON had had other plans in the works for those he socially disfavors, The Coalition's *Christian American* magazine was promoting and selling a book called *Legislating Immorality*, which says the Bible requires the death penalty for homosexuals. (January 1996)

Congressman TOM DELAY recently accepted the 2002 Distinguished Christian Statesman Award. He is recorded as saying, "As individuals and as a nation, we are what we believe. Our collective convictions about life's most

important issues can't be divided from the condition of our country. The strength of American society rests on a set of fundamental values that begins with faith in God . . .

: "Now I think we all remain disturbed by the dirt of our society. We can all see distressing signs that our popular culture is at odds with our very core of beliefs . . . it is obvious that healing our culture will require all of our work and all of our help."

The Washington Post ran an in depth story on Rep Delay, (by PERL), revealing that DELAY holds a literalist interpretation of the Bible (that the Word *really is* the thing). We are informed that he has disowned his own 3 siblings and his own mother. While they are all devoutly religious, apparently they do not accept a literal interpretation of the Bible. So what would Tom DELAY do to those he cares nothing about, that do not submit to his literalist interpretation of the Bible?

Back in 1999, Congressman DELAY undertook to undermine the Scientific Community and force them to retract their position, substituting, instead, his own religious convictions:

H. CON. RES. 107

Expressing the sense of Congress rejecting the conclusions of a recent article published by the American Psychological Association that suggests that sexual relationships between adults and children might be positive for children.

IN THE HOUSE OF REPRESENTATIVES

May 12, 1999

Mr. SALMON (for himself, Mr. DELAY, Mr. PITTS, and Mr. WELDON of Florida) submitted the following concurrent resolution; which was referred to the Committee on Education and the Workforce

CONCURRENT RESOLUTION

Expressing the sense of Congress rejecting the conclusions of a recent article published by the American Psychological Association that suggests that sexual relationships between adults and children might be positive for children. ...

Those religious strictures have evolved far beyond that position, now. Legislators everywhere seem to be one big Society for the Perpetual Increase of Punishment. That is one of the side-effects of repression. And yet bills dealing with sex or nudism or pornography are sexy. Lawmakers simply cannot refrain from revisiting them again and again with every legislative session, in order to ratchet-up and ramp-up increasing penalties. Even when existing penalties are already Draconian.

If there is one absolute certainty, it is that lawmakers will again and again introduce more such legislation with ever-escalating penalties.

No matter that it is settled law, already. For example, when the US Supreme Court overturned prohibitions on virtual child porn, the Attorney General grew incensed and held a press conference and announced that he would not accept that decision. He declared that he would simply charge such works as obscenity until he could arrange for legislators to vote down the court's decision. (*Marbury v.?*)

On the Senate side, despite our moratorium, ORRIN HATCH contrived SB51 the "Protect Act" which loaded up religion and Draconian punishments into an otherwise sensible AMBER Bill, that presumes to overrule the court's ruling on virtual porn.

We trace this barbarism to HATCH's religious roots, known as "Blood Atonement". His church has voluminous historical records of its founders and leaders insisting that only by the spilling of blood, can an immoral sinner (such as an adulterer), be "forgiven and gain entry to heaven". Many tracts indicate that those founders of his religion believed that they were doing sinners a favor by killing them by spilling blood, so that they could "gain entry into heaven". We have read reports of Mormon strategies to place as many politicians into office as possible, so as to force universal compliance with their moral strictures.

We have heard ORRIN HATCH refer to pornography in general as simply "filth".

Other developments as a result of increasing repression include a recent movement to institute torture into society. The High Court's recent Miranda ruling in *Martinez* suggests some rather disturbing regression towards torture, especially where Justice THOMAS comments that the Oxnard police detective's methods were "not egregious".

The High Court is slated to hear 3 more Miranda related cases next term.

The Court upheld state sex offender's registry requirements and also California's 3-Strike Law. The court found that proportionality was not one of the requirements of the 8th Amendment. Balderdash. That is *law-as-a-disease*, or *religion masquerading as law*. Such want of proportionality is nothing less than *barbarism*. As such, it portends disturbing trends.

Where we know that scapegoat groups of the socially disfavored are denied a voice with which to protest, let alone advocate, how does one persevere?

Where is the difference between "rule-of-law" and "authoritarianism"? If, as Senator ARLEN SPECTER claims, "rule-of-law" is the highest ideal, (coming from the mouth of a law-maker), why was ROSA PARKS accorded the Medal of Honor? Wasn't all that ROSA PARKS risked being a \$100 fine?

What about defending one's very essence and core values where the penalties are life imprisonment or even death? But then, America seems to prefer dead heroes. That way their heroics are fixed, and they can no longer be "troublemakers".

And if it takes one to know one then it seems to us that more often than not, latent pedophiles will insinuate themselves into those jobs ostensibly attacking or policing child pornography, but secretly allowing cover for access to indulge in an appetite for the material.

We long ago recommended that ERNIE ALLEN at the *National Center for Missing and Exploited Children*, in Arlington Virginia, maintain a perpetual archive of known child pornography for referencing.

Since then, as reported by *AP*, the *US Justice's Department Child Victim Identification Program* plans to catalogue thousands of thousands of pornographic pictures seized from suspects and those harvested from the Web, making the Justice Department archives the world's largest collection of child pornography.

America has lots of demagogues. Nudists are aware that MARK FOLEY has made his career on persecuting Social Nudism. FOLEY's predecessor, former Florida Rep. BILL MCCOLLUM, was also a demagogue and had declared on the floor of the House that no professionals would be allowed to find that marijuana had any medical use or was safe. He lost his House seat.

FOLEY's political opponent states on his web site that "Former U.S. Rep. BILL MCCOLLUM looks like Howdy Doody, and current U.S. Rep. MARK FOLEY has earned most of his name recognition by holding news conferences to announce: A) he won't comment on whether he's gay or B) he's steadfastly against nudist camps."

FOLEY led a recent crusade to outlaw minor models wearing bathing suits on web sites, as child pornography. He is currently strong-arming Florida's Governor JEB BUSH to outlaw 6th Grade nudist camps. Foley first objects to minors in nudist camps because there are also adults there and then he objects because there are *not* enough adults there.

This week it was a tirade by FOLEY against former nudist association president WALT ZADANOFF for offering nudist videos on his web site featuring minor nudists made overseas. Yet:

In *UNITED STATES OF AMERICA v. VARIOUS ARTICLES OF MERCHANDISE*, SCHEDULE NO. 287, the UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, reversed the District Court's order of December 30, 1999 and directed the District Court to enter judgment for

Alessandra's Smile and to take all necessary steps to restore seized materials to *Alessandra's Smile*.

Circuit Court Judge LEONARD I. GARTH ruled: "*The photos portray people involved in a variety of outdoor activities, all of which are natural and expected for healthy and active children, teenagers, and adults. The only unusual aspect is that almost all of the subjects are nude.*"

The three-judge panel of SLOVITER, SCIRICA and GARTH, Circuit Judges, unanimously reversed a decision by a federal judge in New Jersey that the magazines - *Jeunes et Naturels* and *Jung und Frei* - violated federal law against importing obscene materials.

Alessandra's Smile web site was owned and run by LAWRENCE ALLEN STANLEY, who also ran the "MiniModels" web site under the well-known professional name of L.A. STANAMAN, which featured professional models, primarily girls of ages 8 to 14.

FOLEY objected to these bathing suit web sites ostensibly because the models appeared to strike sensuous poses.

The renowned STANAMAN, was arrested June 8, 2002 in Brazil after police there were tipped to the photographer's web site. They said they found more than 1,000 photographs and more than 100 videos of young girls in swimsuits and underwear.

To serious collectors of child pornography, commercial sites generally offer the best fare. Models are generally photographed in "sets", including clothed, states-of-undress, and nude. They are photographed by leading world photographers accomplished in the genre. The highest prized value is in the collection of complete sets, each image with its original name, i.e., not renamed. The studio's individual logo left intact on the image is paramount, as the studio itself is what lends specific prestige to each artwork.

Most collectors shun child pornography depicting actual sex acts, preferring child erotica instead. Some acknowledge that most average jurors are incapable of making any such distinction, and it's all kiddie porn to them. Some argue that virtually anything can be labeled violative of child porn laws.

Most *Linguists* understand about Semiotics, that the word, (or picture) is *not* the thing. Despite all of the convolutions of logic that opponents of pornography propound, that irrefutable logic remains the same: the word, (or picture) is *not* the thing.

The Ukraine currently produces the bulk of the finest studio porn. The United States has been attacking them regularly on myriad fronts over a variety of

pretexts. A recommended aid package of \$92 million was challenged last week and zeroed out until Rep KAPTUR, (who interestingly opposes child pornography), made an impassioned plea on the floor of the House to restore the amount.

The state department issued a report in June attacking "sex-trafficking" and concluded that the (vastly inflated number estimates) included willing participants because they hadn't been educated as to what they were doing was "wrong". Unfortunately, these women were often leaving regions which simply could not provide for them. Instead of addressing world slavery in general, which includes, more common forms of slavery such as chattel slavery and state slavery (prison labor camps) the report of sexual slavery bolsters the push to War-on-Sex.

Former Oklahoma Governor FRANK KEATING looked for a while like he wanted to be the secret central coordinator behind the War-on-Sex. KEATING scrambled to spearhead the Catholic Church flagellation, after having been passed over to head the Department of Homeland Security. Yet presidential Executive Order 13257 of February 13, 2002, now subjects those engaging in "underage" consensual relations, (now deemed a "violent crime" equating to terrorism), to the jurisdiction of the Department of Homeland Security when travel is involved. Further, The DPS has arrogated itself "Operation Predator" to enter the War-on-Sex. Vast new resources have already been allocated by government to fund "public service announcements" targeting "child abuse", already contending with the ubiquitous War-on-Drugs spots. They should begin appearing soon in vast quantity.

We notice these perennial pogroms mostly flare during the cold winter months and generally subside during warm summer months, when skimpy clothing is much more prevalent. This year has been a notable exception, as the Neo-puritan moralists have barely subsided at all yet this summer. Perhaps Doctor NORMAN ROSENTHAL's book, "*Winter Blues*" may explain some of the chemistry and biology at work in this seasonal phenomenon.

Annotatio,



H.I.M. C'ZAR

July 15, 2003

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

Dear Judge Murphy,

I am a member of Families Against Mandatory Minimums (FAMM) writing to urge you to hold the line and strongly support judicial discretion in your upcoming work to comply with the PROTECT Act mandate to review, and substantially limit the incidence of, downward departure.

As you know, judicial discretion is a hallmark of American justice. Recent attacks on judicial departures from sentencing guidelines threaten to undermine the tradition we've enjoyed since the founding of the country. Judges - not lawmakers, prosecutors, or defense attorneys - should determine the appropriate sentence based on the facts of each case they consider. Departures are necessary to a guided sentencing system. Without them, we fear the guidelines will become no more than the mandatory minimums complete with the disparities and injustice that plague them.

I hope you will point out that although judges are criticized for inappropriately departing from federal sentencing guidelines, prosecutors seek the largest share of departures. If prosecutors disagree with a judge's decision to depart, they can appeal the decision. In this way, the system is designed to correct unwarranted departures without stripping discretion from all judges in all cases.

We ask that you hold hearings as part of your review, not just in Washington, but around the country so that judges, prosecutors, defense lawyers and people like me can tell you what departures mean to sentencing. We urge you to explore amending guidelines that invite large departure rates and design adjustments for frequently used departures so that the guidelines can accommodate them. Above all, when you amend the guidelines, please do so in a way that preserves judicial discretion and departure authority.

Sincerely yours,



Harry L. Dantzler 94391-071
L. S. C. I. - Durham A
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July 31, 2003

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: 2004 Priorities (Response to Request for Comment)

Dear Judge Murphy:

As we begin a new amendment cycle, we write on behalf of the Practitioners' Advisory Group to address the notice of proposed priorities published in the Federal Register notice and to suggest a number of additional priorities we would like to see the Commission address. As always, we view our primary role as assisting the Commission by drawing on our expertise as defense attorneys to provide comment on the issues identified by the Commission as its priorities. We hope we can also be of assistance in a secondary manner by bringing potential issues to the Commission's attention for possible addition to its priorities.

1) Sentence Reduction under 18 U.S.C. § 3582(c)(1)(A)

Initially, we commend the Commission for including consideration of guideline amendment proposals relating to compassionate release programs as proposed priority #9. As a follow-up on a recommendation we made last year, we continue to believe that the issue of sentence reduction under 18 U.S.C. § 3582(c)(1)(A) warrants Commission action. As Professor and former commissioner Michael Goldsmith noted in his letter to you in October of 2001, the Sentencing Reform Act of 1984, in a provision codified at 28 U.S.C. 18 U.S.C. § 994(t), specifically directed the Commission to describe the criteria to be applied by a court in considering sentence reduction motions under 18 U.S.C. § 3582(c)(1)(A), including specific examples of "extraordinary and compelling circumstances" warranting sentence reduction. Although it has been nearly twenty years since the 1984 legislation, the Commission has not yet responded to this directive. We urge that the Commission develop policy guidance to

The Honorable Diana E. Murphy
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implement 18 U.S.C. § 3582(c)(1)(A) as specified in § 994(t) during the current amendment cycle. In doing so the Commission will provide the guidance Congress intended to courts considering sentence reduction motions under this provision, and to the Bureau of Prisons in making them.

2) Drug Offenses

We continue to believe that the drug guidelines are overly punitive and, thus, strongly oppose any reconsideration of the limitation on the base offense level that was enacted less than a year ago (in November of 2002), and which the Commission has identified as proposed priority #12. The PAG remains convinced that the current drug guidelines place undue emphasis on the quantity of the drugs involved and not enough emphasis on other factors such as role in the offense and violence. At the same time, we are obviously concerned that a measure as limited, well reasoned, and technical as the "mitigating role cap" has been identified for reconsideration by the Commission. Depending on the reaction to these issues in the Congress, the PAG is hopeful that additional steps can be taken to tailor drug sentences more closely to the true severity of offenses and culpability of offenders.

3) Criminal History.

The Commission has again identified criminal history as an area for review during the upcoming amendment cycle, proposed priority #13. The PAG agrees that this is an important issue requiring Commission attention. We are particularly concerned that in some cases criminal history may be overstated through the inclusion of relatively minor matters which do not serve the predictive or punitive functions of criminal history well. It is also our understanding that variations in state and local sentencing practices cause ambiguity and uncertainty in the application of the current criminal history guidelines, giving rise to disparity and unfairness in some cases.

The Commission's mandate in the PROTECT Act to reduce the number of departures makes reconsideration of criminal history categories particularly appropriate, since overstatement of criminal history has been identified as one of the most frequent grounds for departure.

Finally, criminal history issues play an important role in determining the availability of alternatives to incarceration for first-time non-violent offenders. The PAG continues to believe that the availability of alternatives to incarceration for first-time non-violent offenders should be increased, and we are concerned about new limitations that have recently been placed on the ability of the Bureau of Prisons to designate offenders to serve their sentences in a community corrections setting. While we have previously suggested accomplishing this through an expansion of Zones B and C within criminal history category I of the sentencing table, the same goals could be achieved through the creation of a new criminal history category 0.

The Honorable Diana E. Murphy

July 31, 2003

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In the course of its ongoing recidivism study, the Commission should obtain and review data regarding recidivism by first-time offenders punished by alternatives to incarceration. The PAG believes such data would demonstrate the success of alternative punishments at greatly decreased cost to the criminal justice system. Indeed, we are aware that recent studies have refuted, at least in the white collar context, the notion that extensive terms of incarceration have a general deterrent effect. Rather, the deterrent effect is best achieved by certainty and swiftness of punishment. See Sally S. Simpson, *Corporate Crime, Law, and Social Control* 6, 9, 35. (Cambridge University Press) (2002). In addition to these positive policy considerations, the creation of a criminal history category 0 would better effectuate the original Congressional intent expressed in 28 U.S.C. Section 994(j).

4) **Recommendation to the Federal Rules Advisory Committee.**

As we have mentioned to the Commission before, the PAG believes that the existing Federal Rules of Criminal Procedure could be improved to better reflect practice under the sentencing guidelines. Although the Rules are not within the Commission's scope of authority, they greatly impact the manner in which the guidelines are applied. For this reason, the PAG believes that it is appropriate for the Commission to consider making a formal recommendation to the Federal Rules Advisory Committee to study and potentially revise rules which directly affect sentencing practice and procedure. In addition, the Commission could suggest such practice and procedure matters through an amendment to its policy statements in Chapter 6.

Specifically, the PAG believes that sentencing practice and procedure would benefit from greater disclosure of facts affecting guideline calculation between and among the parties. More than 95% of cases are disposed of by a guilty plea. At present, the government is not required to disclose any facts affecting the application of the guidelines to the defense prior to the entry of a guilty plea. Perhaps even more remarkable, the government is not required to disclose any facts affecting the application of the guidelines to the defense *after* the entry of a guilty plea. Instead, both the government and the defense begin the litigation of guidelines application through the presentation of evidence to the court – in the person of its agent, the probation officer – on a strictly *ex parte* basis. Although the Court ultimately hears evidence in the presence of both parties at a sentencing hearing, by that time there is a presentence report which is often afforded deference approaching a presumption of correctness. This process of dueling *ex parte* submissions is foreign to any conception of an appropriate adversarial system. The rules should, at a minimum, require any party wishing to present evidence to the court's probation officer to disclose such evidence to the opposing party.

The Sentencing Commission is in a unique position to assess and evaluate the interplay of its guidelines with the Rules of Criminal Procedure. Because the current rules hamper the most efficient execution of the guidelines in practice, the PAG believes the Commission should recommend to the Federal Rules Advisory Committee that these issues receive consideration. The Commission should also address these issues in its policy statements in Chapter 6.

The Honorable Diana E. Murphy
July 31, 2003
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5) **Relevant conduct**

A long term project deserving of the Commission's attention are questions relating to the use of relevant conduct, and particularly the use of acquitted conduct, to punish criminal offenders. In reference to the larger question of relevant conduct, we strongly endorse a paper published by the American College of Trial Lawyers entitled "Proposed Modifications to the Relevant Conduct for the Provisions of the United States Sentencing Guidelines." This paper recommends eliminating consideration of acquitted conduct, limiting the increases for uncharged and dismissed conduct, eliminating the application of certain cross references, clarifying and narrowing the definition of liability for the conduct of others, utilizing no less than a clear and convincing standard of proof to all relevant conduct sentencing elements, and requiring full notice of all relevant conduct before the entry of a guilty plea. While some aspects of a real offense sentencing process appear essential, these limited but compelling reforms would provide considerably greater fairness in the difficult and still evolving process of sentencing by means of "relevant conduct."

In closing, we realize that not all of our priorities will be able to be addressed. We hope that as the Commission sets its agenda for the upcoming amendment cycles, it will do its best to try to incorporate at least some of these suggestions. As always, we appreciate the opportunity to provide input regarding potential Commission priorities, and look forward to working with the Commission through the coming cycle.

Sincerely,



James E. Felman
Barry Boss

JEF/elm

cc: Hon. William K. Sessions
Hon. John R. Steer
Hon. Rubin Castillo
Hon. Ricardo H. Hinojosa
Hon. Michael E. Horowitz
Hon. Michael O'Neill
Hon. Eric Jaso
Hon. Edward Reilly
Charles Tetzlaff, Esq.
Timothy McGrath, Esq.

August 1, 2003

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: Issue for Comment: Proposed Priorities for 2004

Dear Judge Murphy:

Families Against Mandatory Minimums writes in response to the Commission's request for comment on its proposed priorities for the amendment cycle ending May 1, 2004.

Level 30 Cap for Defendants Receiving a Mitigating Role Adjustment

FAMM supports without reservation the 2002 amendment to subsection (a)(3) of §2D1.1 that caps offense levels for defendants receiving mitigating role adjustments. The level 30 cap effectively protects low-level drug offenders from exposure to inappropriately harsh sanctions. It lessens reliance on drug quantities alone in sentencing these offenders. We fear that eliminating the cap will result in sentences disproportionate to low-level defendants' actual culpability. Our files contain the stories of many low-level defendants who receive lengthy guideline sentences driven by quantity. The level 30 base offense level cap for defendants who receive mitigating role adjustments ensures that the severity of penalties will reflect such defendants' blameworthiness by giving due consideration to their role in the offense, something we have long supported. We also oppose revisiting the amendment in light of the fact that the cap was unanimously approved and has been in operation less than a year. The issue for comment does not explain why the Commission is considering revisiting the unanimous decision and given that it has been in place less than a year, we argue that it is simply too soon to evaluate how it is being applied. We urge the Commission not to reopen the issue or consider repealing the cap.

Sentence Reductions under 18 U.S.C. § 3582(c)(1)(A)

FAMM commends the Commission for identifying sentence reduction under § 3582(c)(1)(A) as a possible priority area for guideline amendments. Currently, the Bureau of Prisons has interpreted section 3582(c)(1)(A) narrowly to permit motions only in cases of impending death or profound illness or disability. FAMM contends that the statute should be read broadly to permit prisoners to seek compassionate release for non-medical extraordinary and compelling reasons. FAMM has long supported the formulation of criteria, content, and examples to guide judges in interpreting section 3582(c)(1)(A). See Letter to Diana E. Murphy, June 25, 2001. Such guidance may provide the Bureau of Prisons the confidence to refer more cases to the courts.

The Honorable Diana E. Murphy
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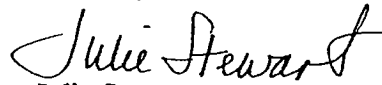
We have appended *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, published in the Federal Sentencing Reporter in 2001 to further explain and support our position. The article reviews legislative history in support of our position and recommends specific language for a policy statement.

3. Cocaine Sentencing Policy

FAMM urges the Commission to reconsider cocaine sentencing policy as a priority area in the upcoming amendment cycle. As the Commission's excellent 2002 report *Cocaine and Federal Sentencing Policy* emphasizes, the current penalties for crack cocaine are unsupported and should be lowered. FAMM remains committed to advocating for a reduction in the penalties imposed on defendants sentenced for crack cocaine offenses, and we look forward to further action from the Commission.

Thank you for considering our opinions. We look forward to working with you this year.

Sincerely,



Julie Stewart
President



Mary Price
General Counsel

Enclosure

The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)



MARY PRICE

General Counsel,
Families Against
Mandatory Minimums
Foundation (FAMM).

While many people are familiar with the Guidelines safety valve, a lesser-known provision tucked away in the federal criminal code has the potential to be an even more powerful way to relieve the incarceration pressure. Title 18, Section 3582(c)(1)(A) allows a court, upon the motion of the Director of the Bureau of Prisons, to reduce a sentence for "extraordinary and compelling" reasons. The Sentencing Commission has an important, but unfilled, role to play in this process. If it follows Congress's intent, the Commission can breathe life into § 3582(c)(1)(A) and make it a meaningful safety valve in a wide range of cases.

On June 25, 2001, Families Against Mandatory Minimums (FAMM), urged the Sentencing Commission to promulgate a policy statement, pursuant to 28 U.S.C. § 994(t), to guide judges considering sentence reduction motions based on "extraordinary and compelling reasons" under 18 U.S.C. § 3582(c)(1)(A). FAMM took this action after learning that such sentence reduction are quite rare, and are generally made only when the prisoner is close to death.

Today, the absence of a guided post-sentencing safety valve means that many cases presenting compelling reasons for sentence reduction are not brought to the courts, but funneled, if pursued at all, through the executive clemency process. Reliance on the President's commutation power to handle such cases is no longer necessary since Congress established in § 3582(c)(1)(A) a method by which the Bureau of Prisons and the courts can address them. That section authorizes courts, with guidance from the Commission, to grant relief in appropriate cases. FAMM's proposal that the Commission provide such guidance is appended to this article.

A. Authority for Post-Conviction Sentence Modification under the SRA

The Sentencing Reform Act (SRA) and the guideline sentencing system it established are premised upon the view that judicial sentencing discretion should be structured and not eliminated. Congress was not seeking to establish a mechanical system devoid of human judgment, but a system in which the exercise of discretion was guided and controlled. While one of Congress's goals was to ensure the finality of sentences, Congress also recognized that sometimes other considerations are important enough to warrant changing a sentence that has otherwise become final.

The SRA provides several ways of modifying an otherwise final sentence. It amended Rule 35 of the Federal

Rules of Criminal Procedure to authorize the court, upon motion of the government, to reduce a sentence to reflect substantial assistance to the government rendered by a defendant after imposition of sentence. It also provides two methods for modifying an otherwise final sentence requiring some action by the Commission. One, set forth in § 3582(c)(2), authorizes the court to reduce a sentence where the Sentencing Commission has reduced the guideline range applicable to the defendant. The motion for reduction of sentence may be made either by the defendant or by the Director of the Bureau of Prisons (BOP), and any reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." The Commission is independently required to issue such guidance by 28 U.S.C. § 994(u), and it has complied with that mandate by promulgating and from time to time amending § 1B1.10.¹

The second method for modifying an otherwise final sentence that involves the Commission is set forth in § 3582(c)(1)(A). That provision authorizes the court, upon motion of the Director of the Bureau of Prisons, to reduce a sentence if the court finds that "extraordinary and compelling reasons warrant such a reduction."² As under its companion provision (c)(2) discussed above, the court must find that the reduction is consistent with "applicable policy statements issued by the Sentencing Commission." The Commission is similarly directed to issue such guidance by 28 U.S.C. § 994(t). To date, the Commission has not done so.

B. Criteria for Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)

Although 18 U.S.C. § 3582(c)(1)(A) speaks of "extraordinary and compelling reasons," in practice the Director of the Bureau of Prisons has moved for a reduction on behalf of terminally ill prisoners, or, in recent years on behalf of some whose "disease resulted in markedly diminished public safety risk and quality of life."³ We believe that Congress intended a broader application than that. The plain language of 28 U.S.C. § 994(t) and the legislative history of 18 U.S.C. § 3582(c)(1)(A) evidence a congressional intent that the statutory term "extraordinary and compelling" should embrace a variety of circumstances arising after a sentence becomes final, including not simply changes in an inmate's circumstances but also changes in the law.

The congressional mandate in 28 U.S.C. § 994(t) calls for a policy statement that must contain "the criteria to be applied and a list of specific examples." The

only limitation placed upon the Commission by this section is that "rehabilitation alone shall not be considered an extraordinary and compelling reason." Clearly Congress intended that rehabilitation was a legitimate consideration to be taken into account in deciding whether a case presented extraordinary and compelling reasons, even if it had to be combined with some other factor or characteristic. There is nothing to suggest that the other factor had to be a terminal illness, or indeed illness of any sort.

The Senate Judiciary Committee's Report on the SRA—the authoritative source of legislative history for the SRA—states:⁴

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.... The bill ... provides ... for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described.

The distinction in the Senate Report between "severe illness" and "other extraordinary and compelling reasons" demonstrates that non-medical considerations may constitute appropriate grounds for release, consistent with the overall congressional goal that these provisions act as a safety net held by the court.

The value of the forms of "safety valves" contained in this section lies in the fact that they assure the availability of specific review and reduction of a term of imprisonment for "extraordinary and compelling reasons" and to respond to changes in the guidelines. The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations.⁵

C. Bureau of Prisons Policy and Practice under 3582(c)(1)(A)

Despite the broad authority contemplated by Congress, in the absence of guidance from the Commission, the Bureau of Prisons, as noted above, has generally limited motions under § 3582(c)(1)(A) to cases where the death of the prisoner is imminent.⁶ There is no requirement, however, in the BOP's own policies and regulations that such motions be so limited.

In 1994 the BOP revised its internal guidance to

executive staff, expanding the classes of cases eligible for early release consideration.⁷ The Bureau had previously confined its motions to those on behalf of terminally ill inmates within six months of death. In the memorandum, Director Hawk advised the staff that the BOP had extended the outer limit of life expectancy to twelve months. Of greater significance, she noted that estimated life expectancy was "a general guideline, not a requirement."

As we have further reviewed this issue, it has come to our attention that there may be other cases that merit consideration for release. These cases still fall within the medical arena, but may not be terminal or lend themselves to a precise prediction of life expectancy.

The BOP Memorandum sets forth factors to consider when evaluating which cases to present to the court (*i.e.*, nature and circumstance of the crime, inmate characteristics and propensity to reoffend, the inmate's age, risk to the public, etc.). It also presents some guidance based on the nature and severity of the prisoner's illness and sets out three, presumably non-exhaustive examples. They include prisoners with debilitating diseases that clearly limit daily activity and for which conventional treatment is insufficient, those whose condition is terminal but not calculably so, and those who require organ transplantation. This more expansive reading of the power, while still narrower than Congress intended, is consistent with congressional intent as revealed in the legislative history of § 3582(c)(1).

Bureau of Prisons published regulations contemplate that sentence reduction motions may be brought in cases not involving medical considerations. The Bureau of Prisons regulation setting out the procedures for seeking and submitting requests under § 3582 and its "old law" predecessor, 18 U.S.C. § 4205(g), discusses grounds other than the prisoner's health for seeking a BOP motion to reduce sentence for extraordinary and compelling reasons. For example, under 28 C.F.R. § 571.61, entitled "Initiation of request—extraordinary and compelling circumstances," the Bureau directs that the prisoner's request include, *inter alia*, proposed plans upon release, including the proposed residence, how the prisoner will support him or herself, and "if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment." The regulation thus assumes that some extraordinary and compelling circumstances warranting a motion need not be based on the prisoner's health. The BOP process for handling such motions seems to confirm that sentence reduction motions under § 3582(c)(1)(A) may be made on non-medical grounds. The applicable regulations provide for the review of

such motions by the Warden, the Regional Director, the General Counsel, "and either the Medical Director for medical referrals or the Assistant Director, Correctional Programs Division for non-medical referrals" Clearly, if medical and terminal considerations were the only permissible bases for sentence reductions, the specific provision for alternative routing of "non-medical referrals" would be superfluous.

D. Conclusion

The legislative history and the plain language of the SRA amply demonstrate that Congress intended the courts to entertain motions under 18 U.S.C. § 3582 (c)(1)(A) for a variety of circumstances considered so extraordinary and compelling that they warrant a reduction of sentence. The BOP regulations recognize that, despite current practice, such extraordinary and compelling reasons are not limited to medical concerns. But a policy statement from the Commission is needed to provide courts considering motions for sentence reduction with the guidance that Congress directed. That policy statement should embrace a definition of "extraordinary and compelling" flexible enough to account for a variety of post-sentence developments that merit relief. That is what Congress intended.

Notes

¹ § 1B1.10, p.s. authorizes a reduction in the term of imprisonment when the Commission has determined that a particular amendment to the Sentencing Guidelines is retroactively applicable. Such retroactive amendments are listed in subsection (c), and only those listed amendments can be the basis for a motion seeking a reduction in sentence under 18 U.S.C. § 3582 (c)(2).

² 18 U.S.C. § 3582 (c)(1)(A) also authorizes a sentence reduction motion for a prisoner who is at least 70 years old, has served at least 30 years on a sentence imposed under 18 U.S.C. § 3559(c), and the Director of the Bureau of Prisons has determined that the prisoner is no longer a danger to the safety of any other person or the community. This provision, specifically applicable only to "three strikes" offenders, was added to § 3582(c)(1)(A) in 1994 by Pub. L. 103-322.

³ See Chart: Bureau of Prisons Compassionate Releases, 1990-2000 (attached as Exhibit II), prepared by the Bureau of Prisons Office of Congressional Affairs (on file with the author.)

⁴ "The most important legislative history for the Act [SRA] is found in the report of the Senate Judiciary Committee on the Comprehensive Crime Control Act of 1983 [S.Rep. No.225, 98th Cong., 1st Sess. 37-150, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220-3373]." Criminal Div., U.S. Dep't of Justice, Prosecutors Handbook on Sentencing Guidelines and Other Provisions of the Sentencing reform Act of 1984, at 83 (Nov. 1, 1987), reprinted in THOMAS W. HUTCHISON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE SUPPLEMENTAL Appendix 11 (1989). The quote in the text appears at page 55 of the Senate Report.

⁵ *Id.* at 121.

⁶ As John Steer & Paula Biderman point out in their article: "[w]ithout the benefit of any codified standards, the Bureau [of Prisons], as turnkey, has understandably chosen to file very few motions under this section." John Steer and Paula Biderman, *Impact of the Federal Guidelines on the Presidential Power to Commute Sentences*, 13 FED. SENT. REP. 155 (2001).
⁷ Memorandum from Kathleen M. Hawk, Director, Federal Bureau of Prisons (July 22, 1994) (BOP Memorandum) (on file with author).

⁸ 28 C.F.R. § 571.62 (a) (emphasis supplied). See also 28 C.F.R. § 571.62 (a)(3) (directing that the General Counsel "solicit the opinion of either the Medical Director or the Assistant Director . . . depending on the nature of the basis of the request") and 28 C.F.R. § 571.62 (c) (stating that "[i]n the event the basis of the request is the medical condition of the inmate, staff shall expedite the request at all levels.")

Exhibit I

FAMM Proposal for Policy Guidance under 18 U.S.C. § 3582 (c)(1)(A)

§ 1B1.13

Reduction in Term of Imprisonment as a Result of Motion by Director of the Bureau of Prisons (Policy Statement)

(a) Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment if the court determines that—

(1) either—

(A) an extraordinary and compelling reason warrants the reduction; or

(B) the defendant (i) is at least 70 years old, (ii) has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned, and (iii) the Director of the Bureau of Prisons has determined, after considering the factors set forth in 18 U.S.C. § 3142(g), that the defendant is not a danger to the safety of any other person or to the community; and

(2) such reduction is consistent with this policy statement and the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

(b) An "extraordinary and compelling reason" is a reason that involves a situation or condition that—

(1) was unknown to the court at the time of sentencing;

(2) was known to or anticipated by the court at the time of sentencing but that has changed significantly since the time of sentencing; or

(3) the court was prohibited from taking into account at the time of sentencing but would not

longer be prohibited because of changes in applicable law.

An "extraordinary and compelling reason" may consist of several reasons, each of which alone is not extraordinary and compelling, that together make the rationale for a reduction extraordinary and compelling.

Commentary

APPLICATION NOTE:

The term "extraordinary and compelling reason" includes, for example, that—

- (A) the defendant is suffering from a terminal illness that significantly reduces the defendant's life expectancy;
- (B) the defendant's ability to function within the environment of a correctional facility is significantly diminished because of a permanent physical or mental condition for which conventional treatment promises no significant improvement;
- (C) the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process;
- (D) the defendant has provided significant assistance to the government to a degree and under circumstances that was not or could not have been taken into account at the time of sentencing or in a post-sentencing proceeding;
- (E) the defendant would have received a significantly lower sentence had there been in effect a change in applicable law that has not been made retroactive;
- (F) the defendant received a significantly higher sentence than other similarly situated codefendants because of factors beyond the control of the sentencing court;
- (G) the death or incapacitation of family members capable of caring for the defendant's minor children, or other similarly compelling family circumstance, occurred.

Rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason.

Background: Under 18 U.S.C. § 3582(c)(1)(A), the court, upon motion of the Director of the Bureau of Prisons, can reduce the term of imprisonment if the court determines that (1) the reduction is warranted by extraordinary and compelling reasons or (2) the defendant is at least 70 years old and has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(c) for the offense for which the defendant is imprisoned and the Director of the Bureau of Prisons has determined that the defendant is not a danger to the safety of another person or the community. The Commission is directed by 28 U.S.C. § 994(t) to "describe what should be con-

sidered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A), including the criteria to be applied and a list of specific examples." This policy statement implements 28 U.S.C. § 994(t).

Exhibit II

Bureau of Prisons Compassionate Releases 1990–2000

Year	Number	Summary of Releases of Releases Granted
1990	11	Inmates with life expectancy less than twelve months
1991	10	Inmates with life expectancy less than twelve months
1992	16	Inmates with life expectancy less than twelve months
1993	28	Inmates with life expectancy less than twelve months
1994	23	Inmates with life expectancy less than twelve months
1995	22	Inmates with life expectancy less than twelve months
1996	23	Inmates with life expectancy less than twelve months
1997	13	Inmates with life expectancy less than twelve months
1998	22	Included inmates with life expectancy of less than twelve months, or with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and quality of life (i.e. Significant Mental Impairment secondary to attempted suicide)
1999	27	Included inmates with life expectancy of less than twelve months, or with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and quality of life (i.e. advanced cirrhosis of the liver, total care stroke patient)
2000	31	Included inmates with life expectancy of less than twelve months, or with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and quality of life (i.e. Alzheimer's Disease, Significant Mental Impairment)

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August 1, 2003

The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 2002-8002

Re: Notice of Proposed Priorities for Cycle ending May 1, 2004

Dear Judge Murphy:

I am writing in my capacity as chair of the ABA Criminal Justice Section's Corrections and Sentencing Committee, to commend the Commission for proposing the issue of sentence modification under 18 U.S.C. § 3582(c)(1)(A) as a priority during the coming amendment cycle. This issue has long been of particular concern to this Committee, and we have written twice in recent years to urge the Commission to take up this important piece of unfinished business. We are gratified that it has now apparently decided to do so. (Copies of our letters of October 10, 2001, and June 15, 2002, are attached.)

Since we last wrote to the Commission on this subject in the spring of 2002, the ABA House of Delegates adopted in February 2003 new ABA policy on sentence modification mechanisms. This new ABA policy speaks directly to the issues implicated by § 3582(c)(1)(A) and the Commission's mandate under 28 U.S.C. § 994(t), and provides further support for the argument that the Commission should give a generous construction to the open-ended language of § 3582 (c)(1)(A). We attach that resolution and accompanying report for your consideration.

The report speaks to the importance of having some "safety valve" in a determinate sentencing scheme to permit the government to address "extraordinary and compelling" situations that arise after sentencing:

If a safety valve was considered an essential component of a sentencing scheme prior to the advent of

determinate sentencing, today it is even more essential, because rule-based sentencing may preclude or limit a court's ability to take into account at sentencing the potential for extraordinary developments in a particular case. For example, a prisoner sentenced while in the early stages of a serious chronic illness may have no possibility of release if the progress of his disease makes his sentence more onerous than anticipated or intended. Similarly, when a mother must leave behind young children in the care of family members, there may be no way to ensure that intervening events do not leave them effectively orphaned. Particularly where a sentencing court is permitted to take into account serious health problems and exigent family circumstances in determining an offender's sentence in the first instance, it would seem reasonable to provide a means of bringing these circumstances to the court's attention when they develop or become aggravated unexpectedly mid-way through a prison term.

Report at 3.

As to what may constitute an "extraordinary and compelling" situation, the report takes the position that government should not "restrict use of a 'safety valve' mechanism to cases involving medical or health-related concerns." Report at 5. Rather, "[w]e hope that jurisdictions will want their criteria to be sufficiently broad and elastic to allow consideration of such non-medical circumstances as old age, changes in the law, heroic acts or extraordinary suffering of a prisoner, unwarranted disparity of sentence, and family-related exigencies." Report at 5.

The ABA report specifically discusses the federal "safety valve" mechanism in § 3582(c)(1)(A), noting the breadth and flexibility of the statutory language. Moreover, "the legislative history of this statute indicates that Congress intended its authority to be used broadly, if not routinely, to respond to a variety of circumstances that exceed the burdens normally attendant upon incarceration." Report at 4, citing Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 Fed. Sent. Rptr. 188 (2001). For example, the Senate Report accompanying the statute states:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 55, *reprinted in* 1984 U.S.C.C.A.N. 2338-39.

That Congress intended § 3582(c)(1)(A) to be used in a variety of non-medical circumstances is further evidenced by the admonition to the Commission in the final sentence of § 994(t) that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reasons." This sentence shows that Congress expected rehabilitation to be a relevant if not determinative criterion in some cases, and thus that terminal illness and medical disability would not be the only circumstances in which sentence modification might be appropriate under this section. In fact, the predecessor "old law" analogue to § 3582(c)(1)(A), 18 U.S.C. § 4205(g), whose authority Congress professed to be continuing unchanged, was used to reduce sentences in a variety of non-health-related circumstances. *See, e.g., U.S. v. Diaco*, 457 F. Supp. 371 (D.N.J., 1978)(federal prisoner's sentence reduced on motion under § 4205(g) because of unwarranted disparity among codefendants); *U.S. v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977)(same).

The Bureau of Prisons, which is charged with the gate-keeping function of bringing motions under § 3582(c)(1)(A), has interpreted its mandate under this statute very narrowly, reserving it for cases of terminal illness and profound disability. In the ten years between 1990 and 2000, only 226 prisoners had their sentences reduced pursuant to this authority, almost exclusively on grounds that they were near death. *See Price, supra*, at 189. Lack of policy guidance from the Commission may in part account for the Bureau's conservative interpretation of its statutory mandate. *See, e.g., John R. Steer and Paula Biderman, Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 Fed. Sent. Rptr. 154, 157 (2001). The Commission is thus in an excellent position to ensure that the statutory authority can be utilized as intended by Congress, by providing criteria, content, and examples on which the BOP may rely in bringing cases to the attention of courts.

Thank you for considering our comments. We stand ready to assist the Commission in any way we can in this very important matter.

Sincerely,



Margaret Colgate Love
Chair, Corrections and Sentencing
Committee

Enclosures

cc: All Commissioners
Charles Tetzlaff, Esq.
Timothy McGrath, Esq.
Albert J. Krieger, Chair, Criminal Justice Section

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October 10, 2001

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

Dear Judge Murphy:

As co-chairs of the Committee on Corrections and Sentencing of the American Bar Association's Criminal Justice Section, we have been authorized to write to reiterate an earlier request from this Committee that the Commission adopt a policy statement regarding sentence reduction motions pursuant to 18 U.S.C. § 3582(c)(1)(A) in the upcoming amendment cycle.

ABA policy provides that procedures relating to compassionate release should be "fully integrated into the law of sentencing, especially with respect to issues such as eligibility for such release." ABA House of Delegates, February 1996, Report 113B. We are concerned that in the absence of guidance from the Commission it has been difficult to identify substantive bases for sentence reduction motions under 18 U.S.C. § 3582(c)(1)(A), and develop appropriate procedures for obtaining judicial consideration of deserving cases.

For your convenience, we enclose a copy of a letter sent to you last June by Professor Michael Goldsmith, our immediate predecessor as chair of this Committee. As Professor Goldsmith's letter points out, the Sentencing Reform Act of 1984, in a provision codified at 28 U.S.C. § 994(t), specifically directed the Commission to describe and give examples of "extraordinary and compelling circumstances" warranting early release under 18 U.S.C. § 3582(c)(1)(A). However,

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The Honorable Diana E. Murphy

October 10, 2001

Page 2

the Commission has not yet responded to this directive. We urge that the Commission develop policy to implement 18 U.S.C. § 3582(c)(1)(A) during the current amendment cycle. In doing so the Commission will provide the guidance Congress intended to courts considering sentence reduction motions under this provision, and to the Bureau of Prisons in making them.

We have reviewed the Commission's current list of priorities, and we recognize that the development of policy for compassionate release motions could be undertaken in conjunction with the 15 Year Study the Commission plans to begin this year, as Professor Goldsmith notes in his letter. Alternatively, it could be made a goal for the upcoming amendment cycle, and we believe this would be preferable for the need is urgent. We therefore hope that the Commission will consider this request at its upcoming meeting.

Thank you very much for your consideration.

Sincerely,

Margaret C. Love, Co-Chair
Corrections & Sentencing Committee

Jeffrey G. Shorba, Co-Chair
Corrections & Sentencing Committee

cc: The Honorable John R. Steer
Professor Michael Goldsmith

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June 15, 2001

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

Dear Judge Murphy:

I enjoyed visiting with you briefly at the recent PLI conference on corporate compliance programs. As you may know, I serve as Chair of the Corrections and Sentencing Committee of the American Bar Association's Criminal Justice Section. The Committee recently voted to urge that the U.S. Sentencing Commission give high priority in the next amendment cycle to the development of guidance for the issuance of sentence reduction orders under 18 U.S.C. § 3582(c)(1)(A), as required by 28 U.S.C. § 994(t).

In 18 U.S.C. § 3582(c)(1)(A), Congress recognized that "extraordinary and compelling" circumstances may warrant a prisoner's early release. Upon motion of the Director of the Bureau of Prisons, the court may reduce a sentence if the reduction is consistent with "applicable policy statements issued by the Sentencing Commission." In 28 U.S.C. § 994(t), Congress directed the Commission to "describe what shall be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." The Commission has not yet responded to this directive.

In an article to be published in a forthcoming issue of the Federal Sentencing Reporter, Commissioner John Steer notes that, without benefit of guidance from the Commission, the Bureau of Prisons has interpreted § 3582(c)(1)(A) narrowly and implemented it cautiously:

Although the Bureau has no formal criteria, the few motions filed each year have been on behalf of inmates who are terminally ill, with a prognosis of having less than a year to live.

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The Bureau takes into account the nature of the defendant's criminal activity and a proposed written release plan. Before the Director of the Bureau considers whether to file a motion, a request for compassionate release is subject to multiple levels of review; the warden, the regional director, the General Counsel, and then a Bureau medical professional must approve the request.

Because the statute grants absolute discretion to the Director, the decision to file a motion is not subject to review. If a motion is filed, there is no meaningful review of a court's refusal to grant the motion, because, at least at this time, there are no policy statements applicable to modification of a sentence under 18 U.S.C. § 3582(c)(1).

Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section. It is not unreasonable to assume, however, that Congress may have envisioned compelling and extraordinary circumstances to encompass more than a terminally ill individual with a nonviolent criminal record.

See John Steer and Paula Biderman, "Impact of the Federal Sentencing Guidelines on the President's Commutation Power," 13 Fed. Sent. Rptr. ____ (2001)(forthcoming).

Commissioner Steer's observations are consistent with the legislative history to this provision. In pertinent part, the accompanying Senate Report states:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 55, *reprinted in* 1984 U.S.C.A.A.N. 2338-39 (emphasis added).

The issue of what constitutes "extraordinary and compelling" grounds for sentence reduction is an important and timely one, in light of (a) the growing number of aged and ill inmates in the federal system, (b) the economic costs of incarceration, and (c) the Congressionally recognized need to respond appropriately to equitable considerations arising after the imposition of sentence. Accordingly, the Committee respectfully urges the Commission to make the

development of standards for the implementation of § 3582(c)(1)(A) a priority matter during the coming year.

Sincerely,

Michael Goldsmith
Chair and Professor of Law

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES
RECOMMENDATION

1 RESOLVED, That the American Bar Association urges federal, state,
2 territorial and local governments to evaluate their existing laws, as well as their
3 practices and procedures, relating to the consideration of prisoner requests for
4 reduction or modification of sentence based on extraordinary and compelling
5 circumstances arising after sentencing, to ensure their timely and effective
6 operation.

7
8 FURTHER RESOLVED, That the American Bar Association urges these
9 jurisdictions to develop criteria for reducing or modifying a term of
10 imprisonment in extraordinary and compelling circumstances, provided that a
11 prisoner does not present a substantial danger to the community. Rehabilitation
12 alone shall not be considered an extraordinary and compelling circumstance.

13
14 FURTHER RESOLVED, That the American Bar Association urges these
15 jurisdictions to develop and implement procedures to assist prisoners who by reason of
16 mental or physical disability are unable on their own to advocate for, or seek review of
17 adverse decisions on, requests for sentence reduction

REPORT

In the 1980s, rehabilitation of prisoners fell out of favor and "truth in sentencing" movements swept through Congress and state legislatures. The federal Sentencing Reform Act of 1984 and similar state laws abolished parole and required defendants to serve a fixed term in prison, without hope for early release from a parole board based on their good behavior. Release dates under such a sentencing regime are now largely determined at the time of sentencing.

One of the consequences of the movement to determinate sentencing was the restriction or elimination of "safety valve" mechanisms once available to seek mid-term reduction of sentence. In some jurisdictions there is no authority for courts or prison officials to modify a sentence once it has become final, even when unforeseen post-sentence developments made a prisoner's continued incarceration inappropriate or unjust. Other jurisdictions rely upon ad hoc and necessarily arbitrary mechanisms to deal with various compelling situations that may present themselves from time to time. Jurisdictions that do have a sentence reduction authority tend to construe it narrowly, invoking it only in cases of imminent death or total disability.

The absence of an accessible mechanism for making mid-course corrections in exceptional cases is a flaw in many determinate sentencing schemes that may result in great hardship and injustice. Executive clemency, the historic remedy of last resort for cases of extraordinary need or desert, cannot be relied upon.

That the new sentencing regimes make no provision for handling extraordinary post-sentence developments seems less an expression of political will than simple oversight. Determinate sentencing simply swept out all early release mechanisms, without considering the need to address those later-developing circumstances not contemplated at the time of sentencing. As a result, people whose continued confinement no longer makes legal or moral sense may languish for years without a way to draw attention to their situation. There should be a way of examining such cases and, if appropriate, dealing with them equitably and compassionately.

The American Bar Association therefore urges jurisdictions to evaluate their current laws and practices relating to sentence modification and reduction, and to establish or reinvigorate "safety valve" mechanisms to deal with cases involving extraordinary and compelling post-sentence developments that make a prisoner's continued incarceration inappropriate or unjust. The resolution

contemplates that jurisdictions will take a broad view of any existing authority to reduce sentences, that they will enact new laws where necessary, and that they will ensure that these laws are administered in a timely and effective fashion.¹ The measures we advocate are not intended to inaugurate any general across-the-board sentence reduction measures, or substitute for more general sentencing reform.² Rather, they are intended to serve the limited function of dealing with truly exceptional cases under existing determinate systems.

The resolution also urges jurisdictions to develop specific criteria by which decision-makers can determine when it will be appropriate to reduce or modify a term of imprisonment. Historically, post-conviction sentence reduction measures have provided a safety valve to deal not only with such circumstances as severe illness or impending death, and physical or mental disability, but also with extreme old age, subsequent changes in applicable law, extraordinary assistance to the government, compelling changes in personal or family circumstances, or some combination of these. They have also proven useful to effect a promised but undelivered consideration for assistance to the government, to correct unjustifiable disparity of sentence among similarly situated co-conspirators, or to cure mistakes in a sentence not discovered in time for the court to correct in the ordinary course.³

¹ These measures are especially timely in light of the increasing pressure on prison budgets posed, in part, by the enormous cost of incarcerating so many people. At the same time, it bears emphasis that our recommendations are not so much about prison economies as they are about the proper working of the justice system.

² The "safety valve" authority we recommend may thus be contrasted with the risk review committees recently established by the State of Louisiana to review the cases of, and consider for early release, all non-violent offenders originally sentenced under mandatory minimum sentencing laws that were subsequently relaxed. See Ryan S. King and Marc Mauer, *State Sentencing and Corrections Policy in an Era of Fiscal Restraint*, The Sentencing Project, February 2002; Judith Greene and Vincent Schiraldi, *Cutting Correctly: New Prison Policies for Times of Fiscal Crisis*, Justice Policy Institute, February 2002. This is not to say that subsequent changes in the law might not be grounds for reduction of an individual prisoner's sentence, particularly if it were combined with other circumstances such as old age or ill health.

³ See, e.g., *U.S. v. Diaco*, 457 F. Supp. 371 (D.N.J., 1978)(federal prisoner's sentence reduced because of unwarranted disparity among codefendants); *U.S. v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977)(same).

If a safety valve was considered an essential component of a sentencing scheme prior to the advent of determinate sentencing, today it is even more essential, because rule-based sentencing may preclude or limit a court's ability to take into account at sentencing the potential for extraordinary developments in a particular case. For example, a prisoner sentenced while in the early stages of a serious chronic illness may have no possibility of release if the progress of his disease makes his sentence more onerous than anticipated or intended. Similarly, when a mother must leave behind young children in the care of family members, there may be no way to ensure that intervening events do not leave them effectively orphaned. Particularly where a sentencing court is permitted to take into account serious health problems and exigent family circumstances in determining an offender's sentence in the first instance, it would seem reasonable to provide a means of bringing these circumstances to the court's attention when they develop or become aggravated unexpectedly mid-way through a prison term.

A comprehensive review conducted on behalf of this Committee in 1995 found that only about half the states made formal provision for release of terminally ill prisoners.⁴ Moreover, statutes providing for early release of ill and disabled prisoners, including so-called "medical parole" statutes, are seldom used. In 1996, a study of state and federal early release provisions by the U.S. Justice Department's Office of Justice Programs found that only 20 jurisdictions had actually released any prisoners pursuant to these authorities.⁵

In the federal system, the sentencing court has statutory authority to reduce an imposed term of imprisonment, upon motion of the Director of the Bureau of Prisons (BOP), if the court finds that "extraordinary and compelling reasons"

⁴ See *Compassionate Release of Terminally Ill Prisoners*, Draft Report of the ABA Corrections and Sentencing Committee's Compassionate Release Working Group, October 1995. Other states rely upon executive clemency, administrative leave or furlough, and parole. See *Incarceration of the Terminally Ill, Current Practices in the United States*, The Grace Project, Volunteers of America 5 (2001). See also Marjorie P. Russell, "Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners - Is the Cure Worse than the Disease?," 3 *Widener J. Pub. L.* 799, 836 n.10 (1994).

⁵ See Office of Justice Programs, U.S. Department of Justice, *Update: HIV/AIDS, STDs and TB in Correctional Facilities (1996-1997)* at xiv. A total of 153 prisoners were released in 1996 nationwide for medical reasons. California, with a prison population of some 150,000, grants an average of 28 compassionate releases annually N.N. Dubler, & B. Heyman, *End-of-life care in prisons and jails*, in M. Puisis (ed.), *Clinical Practice in Correctional Medicine* 355-364 (1998). New York's 1992 Medical Parole Law resulted in a total of 215 releases in the seven years ending in 1998. See J.A. Beck, *Compassionate release from New York state prisons: Why are so few getting out?*, 27 *Journal of Law, Medicine, & Ethics*, 216-233 (1999).

warrant such a reduction. *See* 18 U.S.C. 3582(c)(1)(A). The legislative history of this statute indicates that Congress intended its authority to be used broadly, if not routinely, to respond to a variety of circumstances that exceed the burdens normally attendant upon incarceration.⁶ In practice, however, BOP invokes the statute only in cases of imminent death or severe mental illness or physical incapacitation. In the ten years between 1990 and 2000, only 226 prisoners were released pursuant to this authority.⁷

It seems apparent that, as currently designed, most sentencing systems cannot routinely accommodate the variety of post-conviction developments that may warrant revisiting a sentence after it has become final. That is why the ABA urges jurisdictions to design flexible review mechanisms that will permit sentence reduction in the rare and deserving case.⁸ Recognizing that there are many different forms that an effective sentence reduction mechanism might take,

⁶ *See* Mary Price, *The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)*, 13 *Fed. Sent. Rptr.* 188(2001).

⁷ *See* Price, *supra* note 6 at 191. Under current BOP practice, requests for reduction of sentence must be approved at an institutional level by the prison warden, and then at a regional level, and finally at the national level by the Director herself. Because BOP does not keep a record of requests for sentence reduction that are not approved at the institutional level, it is impossible to tell what percentage of the total number of requests are subsequently brought to the attention of the court. The paucity of sentence reduction motions under 18 U.S.C. § 3582(c)(1)(A) may reflect a lack of guidance to BOP, rather than a lack of political will or failure of compassion. *See* John R. Steer and Paula Biderman, *Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 *Fed. Sent. Rptr.* 154, 157 (2001) ("Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section."). Without direction about what situations might warrant revisiting a sentence, corrections officials are reluctant to expand the reach of "extraordinary and compelling reasons" much beyond the clearly identifiable case of imminent death. The United States Sentencing Commission has recently undertaken to develop substantive guidance for a court in considering motions under 18 USC § 3582 (c)(1)(A), including examples of circumstances that are sufficiently "extraordinary and compelling" to warrant reduction, in accordance with 28 U.S.C. § 994(t).

⁸ We do not extend our recommendations to any particular decision-making procedure. However, we note that prison officials have from time to time expressed concern about being placed in a position of deciding which cases are meritorious and which are not, even where a court has the ultimate authority to reduce a sentence. This concern seems particularly well-founded where the grounds advanced by a prisoner for sentence reduction relate to some non-medical circumstance outside the expertise and interest of prison officials. Accordingly, we recommend that jurisdictions consider alternative ways of administering sentence reduction mechanisms that would relieve prison officials of a gatekeeper function that they evidently regard as inappropriate and even compromising. In addition to placing actual authority to reduce a sentence in a court or separate administrative body, consideration should be given to allowing individuals direct access to the decision-making authority.

including a return to the sentencing court, an administrative review procedure, and even executive clemency, the ABA encourage jurisdictions to experiment to find processes that work effectively and efficiently. Whatever form the mechanism takes, it ought to be easily engaged by prisoners and their outside advocates.

Similarly, the grounds for sentence reduction may vary from jurisdiction to jurisdiction. This resolution aims only to return to governments the tools of compassion, not to dictate how they will be used. That said, however, we do not believe that governments should restrict use of a "safety valve" mechanism to cases involving medical or health-related concerns. While specialized medical furlough and geriatric release procedures may provide some guidance for how to administer sentence reduction authority, we hope that jurisdictions will want their criteria to be sufficiently broad and elastic to allow consideration of such non-medical circumstances as old age, changes in the law, heroic acts or extraordinary suffering of a prisoner, unwarranted disparity of sentence, and family-related exigencies.⁹

The resolution specifically states that "rehabilitation alone shall not be considered an extraordinary and compelling circumstance," underscoring the special-purpose nature of the sentence reduction mechanism we are

⁹ The legislative history of the federal sentence reduction statute describes it as a "safety valve" to be used

in unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.

S. Rep. No. 225, 98th Cong., 1st Sess. 37, 55. Regulations published by BOP implementing this authority contemplate that it will be used in non-medical cases. See 28 C.F. R. §§ 571.61, 571.62. Regulations implementing an earlier formulation of this sentence reduction authority, 18 U.S.C. § 4205(g), specifically provide that BOP could use the statute "in particularly meritorious or unusual circumstances which could not reasonably have been foreseen by the court at the time of sentencing," such as "if there is an extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill." 28 C.F.R. §§ 579.40(a), (b). See also *Turner v. United States Parole Commission*, 810 F. 2d 612, 617 (7th Cir. 1987) (§ 4205(g) regulations "only very loosely identifi[y] the classes of cases that the Bureau may review for possible motions," and "reveal the Bureau's retention of the entire discretion granted to it under the statute."). The legislative history of § 3582(c)(1)(A) indicates that its authority was intended to be at least as broad as the authority in § 4205(g), and perhaps broader. See S. Rep. No. 225, *supra*. This seems appropriate in light of the limitations placed by the guidelines on a sentencing court's ability to consider a defendant's personal circumstances, and the elimination of parole.

recommending.¹⁰ At the same time, it also indicates that a prisoner's rehabilitation may legitimately be considered in combination with other factors in deciding whether the a prisoner's situation presents "extraordinary and compelling" reasons for sentence reduction.

The ABA also recommends that jurisdictions implement measures to ensure that physically and mentally challenged prisoners have access to assistance, from family members or other advocates, when seeking sentence reductions or appealing adverse decisions. This is particularly important in systems that require prisoners to initiate requests personally or to maintain active advocacy, which are ill-suited for persons nearing death or otherwise too ill or incapacitated to engage the process meaningfully.

This resolution represents a significant extension of existing ABA sentencing policy. The ABA Sentencing Standards authorize reduction of sentences that have otherwise become final in only two circumstances, both of which are time-limited: Standard 18-7.1 contemplates that a court may revisit and reduce a sentence within a specified period of time following its imposition; and, Standard 18-7.2 addresses sentence modification only while a case remains under the jurisdiction of the sentencing court, which the commentary makes clear does not include situations involving confinement. The instant resolution contemplates a sentence reduction authority that by definition is open-ended, permitting mid-course corrections whenever significant post-sentence developments not anticipated by the sentencing court present themselves.

The resolution also expands on the criteria for sentence reduction in existing ABA policy. The resolutions on compassionate release adopted in 1995 and 1996 addressed only terminal illness and physical incapacity as grounds for sentence reduction. In August of 2002 the House adopted a policy encouraging jurisdictions to "adopt and fully implement" mechanisms for the early release of terminally ill and incapacitated inmates, and also to "assess the desirability of applying such mechanisms to elderly or other prisoners in specified circumstances." The instant resolution would encourage jurisdictions to make use of the tools of compassion in a wider variety of circumstances, though it would leave each jurisdiction to decide for itself exactly what circumstances are so "extraordinary and compelling" as to warrant early release.

¹⁰ This phrase is taken almost verbatim from the statutory provision directing the United States Sentencing Commission to develop policy guidance for sentencing courts in considering motions made by the Director of BOP under 18 U.S.C. § 3582(c)(1)(A). See 28 U.S.C. § 994(t).

U.S. Sentencing Commission
Public Affairs Office
Attention: Michael Courlander
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Re: Fed Reg. Notice-Proposed Priorities for amendment cycle May 1, 2004., due by Aug 1, 2003

Issue: Priority Number (12) listed on tentative priorities list (limitation on the base offense level for minor players for narcotics offenses) as compared to the **nonexistent** corollary limitation for defendants convicted of pseudoephedrine crimes for the same offense.

Relevant guidelines: §2D1.1(a)(3) allows a cap of level 30 if a defendant is convicted of a narcotics offense and receives a minor role. §2D1.11, the guideline equivalent for defendants convicted of pseudoephedrine offenses, has no corollary cap of level 30. §2D1.11 (c)(1) cross references §2D1.1 BUT ONLY if the offense involves narcotics and carries a greater penalty.

Discussion: Currently, in *United States vs. Mohammed Salem* (2001 EDCR62 RT in the Central District of California, the defendant was convicted of distributing pseudoephedrine. The government agrees he is eligible for a minor role. However, since the guidelines only have a limitation for narcotics defendants, defendant Salem is facing a base offense of 38. This is unfair and unreasonable. If defendant Salem had been distributing methamphetamine, he would have been eligible for the limitation of 30. There are other defendants like this one currently and more in the future.

Reason to make it a priority: The commission already is tentatively reviewing the limitation of §2D1.1(a)(3) as stated in (12) of its tentative priorities. Therefore, it would be a good use of resources to review the omission and/or non application of the limitation that is currently found in §2D1.1(a)(3). In cases where guideline §2D1.11 applies, there is no such limitation and there should be. Narcotics offenses are far more serious and have life statutory maximums where pseudoephedrine only have a twenty year statutory maximum. In addition, prior to the May 1, 2001 "emergency" increase, pseudoephedrine crimes had a base offense cap of level 30. The base offense was increased without much public comment to 38 at the same time the MDMA guidelines were increased on the drug quantity table from 1 to 35 to 1 to 500.

The commission needs to immediately address this unequal treatment and approve a limitation for listed chemical defendants so the minor players in those cases don't end up with worse sentences than defendants who traffic in narcotics. I would be happy to address the commission in person on these issues.

Sincerely,

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July 31, 2003

Food and Drug Administration
Rockville MD 20857

The Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, NE
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Washington, DC 20002-8002

Attention: Public Affairs-Priorities Comment

Dear Judge Murphy:

I am writing in response to the United States Sentencing Commission's Federal Register Notice published July 1, 2003, requesting public comment on the Commission's proposed priorities for the amendment cycle ending May 1, 2004. For the reasons explained in this letter, the United States Food and Drug Administration, an agency of the Department of Health and Human Services, respectfully requests that the Commission amend its tentative list of priorities to include consideration of amendments to the guidelines that govern violations of the Federal Food, Drug, and Cosmetic Act (FDCA). Following the discussion of our concerns, we also propose specific suggestions on how we believe the guidelines may be amended to address our concerns.

FDA regulates the manufacture and distribution of food, human and animal drugs, medical devices, biologics, and cosmetics. Assuring the purity, integrity, and safety of these products, which account for over 20 percent of every consumer dollar spent in this country, is critical to the well-being of the American people. Most criminal violations of the FDCA are not technical, regulatory offenses. Rather, they are serious criminal acts that pose significant risks of harm to large segments of the public. Defendants in FDCA cases have voluntarily assumed a role in the distribution and manufacture of critical commodities such as food, drugs, biologics, or medical devices. With this role comes the responsibility to act in a manner that is not detrimental to the health and safety of the American public. Courts have observed that the products governed by the FDCA "touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." United States v. Dotterweich, 320 U.S. 277, 280 (1943). This is even more the case today than when the Court originally made this observation in 1943.

Recently, FDA has seen a disturbing increase in particularly dangerous criminal violations of the FDCA, including distribution of counterfeit drugs, prescription drug diversion, and mass distribution of prescription drugs without the supervision or intervention of a physician. The distribution of counterfeit drugs, which appear to be genuine product but often contain no active ingredient and sometimes contain harmful ingredients, poses a significant health risk to patients who may be harmed by the very medications that they are taking to treat their diseases. Diverters of prescription drugs operate outside of legitimate distribution channels and obtain drugs from questionable and often illegal sources. These diverters may handle and repackage the drugs

incorrectly, which can result in the dispensing of substandard, ineffective, or harmful drugs to American consumers. When prescription drugs are dispensed without the supervision of a licensed practitioner, consumers may take inappropriate and dangerous medications without proper medical diagnosis. This conduct threatens the safety and integrity of the nation's drug supply and, if left unchecked, could cause not only an erosion in the public's confidence in these vital products but also substantial public harm and even death. In addition, rising concerns about terrorism make close oversight of the food, drug, and biologics supplies especially critical.

The current sentencing guidelines do not treat criminal violations of the FDCA as significant threats to the public health and are ineffectual to deter such conduct. Convictions under the FDCA typically result in little, if any, prison time.¹ As a result, prosecutors are reluctant to take FDA cases, and, even when convictions are obtained, consequences are trivial. The unscrupulous perceive that the potential gains of adulterating and misbranding foods, drugs, and other products outweigh possible punishment, and FDA's ability to protect American consumers is severely hampered. Accordingly, amendment of the guidelines to ensure that criminals who put the public health at risk by violating the FDCA are punished appropriately should be a priority of the Commission.

A Brief Overview of FDCA Offenses and the Existing Sentencing Scheme

The FDCA prohibits a variety of conduct, including the manufacture and distribution of counterfeit drugs; the distribution of drugs (human and veterinary), biologics, and medical devices that are not FDA-approved; and the distribution of misbranded and/or adulterated food, drugs, biologics, and medical devices. See 21 U.S.C. § 331. A violation of any of these prohibited acts is a strict liability misdemeanor punishable by a maximum prison term of one year.² 21 U.S.C. § 333(a)(1). If, however, the offense is committed with the intent to defraud or mislead,³ or is a second conviction under the FDCA, it is a felony with a maximum prison term

¹ U.S. Sentencing Commission statistics for fiscal year 2001 indicate that only 24.3 percent of Food & Drug offenders received sentences of imprisonment, the lowest percentage of any primary offense category. 2001 Sourcebook of Federal Sentencing Statistics, Table 12. Similarly, in fiscal year 2000, only 23.4 percent of Food & Drug offenders received imprisonment, again the lowest percentage of any primary offense category. 2000 Sourcebook of Federal Sentencing Statistics, Table 12.

² See United States v. Dotterweich, 320 U.S. 277, 281 (1943) (misdemeanor liability under the FDCA "dispenses with the conventional requirement for criminal conduct – awareness of some wrongdoing"); see also United States v. Park, 421 US 658, 672-73 (1975) (same).

³ "Intent to defraud or mislead" can be demonstrated by evidence of intent to defraud or mislead consumers, FDA, or some other identifiable government agency. See, e.g., United States v. Andersen, 45 F.3d 217, 220 (7th Cir. 1995) ("a deliberate attempt to mislead the FDA should be considered as clearly a fraud as are attempts to mislead customers or other individuals");

of three years. 21 U.S.C. § 333(a)(2). Certain FDCA offenses that involve diversion of prescription drugs are ten year felonies. 21 U.S.C. § 333(b)(1). In addition, offenses involving the distribution of human growth hormone are punishable by up to five years in prison, 21 U.S.C. § 333(e)(1), or up to ten years if the offenses involve distribution to a person under 18 years of age. 21 U.S.C. § 333(e)(2).

FDCA crimes are governed by two sections of the guidelines, Sections 2B1.1 and 2N2.1. United States Sentencing Commission, Guidelines Manual, App. A (Nov. 2002). Section 2N2.1, entitled "Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product," applies to FDCA violations that do not involve fraud. The base offense level in Section 2N2.1 is 6, and there are no enhancements for specific offense characteristics. Accordingly, most sentences calculated under 2N2.1 are very low. A defendant in Criminal History Category I would have a guideline range of 0-6 months. Section 2N2.1 provides that, if the offense involved fraud, Section 2B1.1 ("Larceny, Embezzlement, and Other Forms of Theft; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States") applies. Section 2B1.1 applies to any fraudulent violation of the FDCA, regardless of whether the victim is a consumer or the government.⁴ Like Section 2N2.1, Section 2B1.1 provides for a base offense level of 6.⁵ Section 2B1.1, however, includes various enhancements for specific offense characteristics, including incremental increases of the base offense level for crimes involving pecuniary losses that exceed \$5,000.

United States v. Arlen, 947 F.2d 139, 143 (5th Cir. 1991) ("intent to defraud or mislead" can be established by showing that "the defendant intentionally violated § 331 with the specific intent to defraud or mislead an identifiable government agency"); United States v. Micheltree, 940 F.2d 1329, 1350-51 (10th Cir. 1991) ("intent to defraud or mislead" can be established by showing that "a defendant consciously sought to mislead drug regulatory authorities such as the FDA or a similar governmental agency"); United States v. Cambra, 933 F.2d 752, 755 (9th Cir. 1991) (intent to defraud or mislead is established by showing that the defendant tried to hide his activities from FDA); United States v. Bradshaw, 840 F.2d 871, 874 (11th Cir. 1988) ("intent to defraud or mislead" can be shown by evidence that the defendant took actions to avoid detection by FDA and state law enforcement authorities).

⁴ See United States v. Andersen, 45 F.3d 217 (7th Cir. 1995) (holding that fraud on a regulatory agency was sufficient to invoke Section 2F1.1, the predecessor guideline to 2B1.1); United States v. Arlen, 947 F.2d 139, 146 (5th Cir. 1991) (same). See also United States v. Mitcheltree, 940 F.2d 1329 (10th Cir. 1991); United States v. Cambra, 933 F.2d 752 (9th Cir. 1991); United States v. Bradshaw, 840 F.2d 871 (11th Cir. 1988).

⁵ The Commission has proposed an amendment to the guidelines that would increase the base offense level under Section 2B1.1 to 7 for offenses with statutory maximum terms of imprisonment of 20 years or more. This amendment would not affect FDCA offenses, which have statutory maximum prison sentences of between one and ten years.

Why the Existing Scheme is Inadequate

I. Counterfeiting

In recent years, FDA has seen an increase in counterfeit drug activity and a corresponding increase in counterfeit drug investigations.⁶ In fact, the number of counterfeit drug investigations conducted by FDA's Office of Criminal Investigations has quadrupled since 2000. The distribution of counterfeit drugs creates a significant public health risk. Counterfeit drugs, while often visually indistinguishable from genuine product, may contain no active ingredients, be sub- or super-potent, and may even contain bacterial contaminants or other harmful ingredients. Consumers who ingest or inject counterfeit drugs are at risk of therapeutic failures, exacerbation of health problems, and potentially disastrous adverse effects from toxic

⁶ It is unlawful to cause a drug to be counterfeit, to sell or dispense a counterfeit drug, and to hold a counterfeit drug for sale or dispensing. 21 U.S.C. §§ 331(i)(3) and 333(a). A counterfeit drug is defined as:

a drug which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, or device, or any likeness thereof, of a drug manufacturer, processor, packer, or distributor other than the person or persons who in fact manufactured, processed, packed, or distributed such drug and which thereby falsely purports or is represented to be the product of, or to have been packed or distributed by, such other drug manufacturer, processor, packer, or distributor.

21 U.S.C. § 321(g)(2).

ingredients. The dangers of counterfeiting are magnified by the fact that counterfeiting is most prevalent in expensive drugs, which often are intended for use by vulnerable patients, such as those suffering from cancer and AIDS.

Recent cases investigated by FDA's Office of Criminal Investigations demonstrate the dangers of counterfeiting. An investigation of counterfeit Procrit, an injectable drug used by cancer and AIDS patients, revealed that the counterfeit product contained non-sterile tap water, which could have caused a serious infection in immune-compromised patients. Another investigation involved counterfeit Serostim, a growth hormone used to treat wasting in AIDS patients. The counterfeit product contained no active ingredient.

The statutory maximum penalty for drug counterfeiting offenses committed with intent to defraud or mislead is three years in prison. 21 U.S.C. §§ 331(i) and 333(a)(2). Other violations are misdemeanors with a maximum penalty of one year in prison. 21 U.S.C. § 333(a)(1). Under the current guidelines, if FDA can identify the person who actually manufactured the counterfeit drugs, it is usually possible to obtain a significant sentence under Section 2B1.1, because it is not difficult to show fraud or significant pecuniary loss. This only applies when FDA convicts the actual counterfeiter, which rarely happens because many counterfeit drugs are received from unknown overseas sources.

Because of the difficulties in locating the actual counterfeiters, FDA's ability to prosecute those who facilitate the distribution of counterfeit drugs by turning a blind eye to the source of their drugs is critical to FDA's success in combating the counterfeit drug problem. However, as a practical matter, it is often difficult to prove that criminals who acted as purveyors, rather than manufacturers, of counterfeit drugs knew that the drugs were counterfeit and, therefore, to demonstrate that the offenses involved intent to defraud or mislead. Without proof of fraud, the base offense level for distributing counterfeit drugs in violation of 21 U.S.C. § 331(i)(3) is 6. USSG § 2N2.1. FDA believes that the guidelines should be amended to provide for more significant sentences for those offenders who claim ignorance that the prescription drugs they were distributing are counterfeit but who are, nevertheless, highly culpable because they failed to verify the legitimacy of the drugs under circumstances where the source was highly suspect.⁷

II. Prescription Drug Diversion

In addition to increasing penalties for counterfeiting violations, FDA believes that strengthening the guidelines for offenses involving prescription drug diversion should be a priority. Drug manufacturers typically distribute drugs to primary wholesale distributors (with whom they typically have contractual relationships) who, in turn, sell the drugs to retail

⁷ Those who distribute counterfeit drugs but act in good faith and have no reason to believe that the drugs are counterfeit are not subject to criminal penalties under the FDCA. See 21 U.S.C. § 333(c)(5).

pharmacies, hospitals, and health care entities that dispense the drugs to patients. However, a significant and increasing quantity of prescription drugs are handled by smaller, secondary wholesale distributors that generally are not authorized distributors for the manufacturer. Sometimes, these secondary wholesalers obtain their drugs from legitimate sources. For example, a secondary wholesaler can purchase drugs that are being sold at a discounted price because of a short expiration date, to reduce overstocked inventories, or to meet periodic corporate sales targets. Other sources are illegal: the drugs can be stolen; illegally purchased from hospitals, clinics, or charities; purchased on the street from Medicaid patients who choose profit over treatment; obtained from health care practitioners who sell drug samples provided at no cost to them by the manufacturer; or illegally imported from other countries where the drugs are sold at lower cost.

The illegal diversion of prescription drugs threatens the integrity of the nation's drug supply in several ways. Many secondary wholesalers operate outside the legitimate distribution system, do not have a license to engage in wholesale distribution of prescription drugs, and lack the training, facilities, and motivation to store and handle prescription drugs properly. Improper storage and handling of prescription drugs can affect the drug's potency, stability, and even effectiveness. In addition, diverted prescription drugs often are repackaged and relabeled to conceal that the drugs came from an illegal source. Relabeling removes the original expiration date, which can result in the dispensing of expired drugs to consumers. Relabeling also removes the lot number, which is critical to an effective recall if a problem with the drug is discovered. Sometimes drugs are repackaged into containers that bear the wrong drug name or the wrong strength.

In addition to these potential dangers, the very existence of an unregulated wholesale submarket provides a ready path by which counterfeit, adulterated and expired drugs can enter the distribution chain. Unscrupulous wholesalers are more concerned with their profits than the integrity of their suppliers and the purity of the products. Drug counterfeiters can easily find a corrupt purchaser that will turn a blind eye and ask no questions. Terrorists could also exploit the diversion market as a means to introduce tainted or poisoned prescription drugs into the marketplace. Once the drugs enter the secondary wholesale market, they eventually make their way to the shelves of local pharmacies, hospitals, and clinics, and are dispensed to unwitting and often vulnerable patients.

Congress recognized the dangers of prescription drug diversion and the secondary wholesale market when it enacted the Prescription Drug Marketing Act of 1987 ("PDMA") to deter prescription drug diversion.⁸ Congress found that the mere existence of the wholesale drug diversion market "prevents effective control over or even routine knowledge of the true sources of prescription drugs in a significant number of cases." H. Rep. No. 100-76 at 2 (1987).

⁸ Pub. L. No. 100-293, 102 Stat. 95 (1988), codified as amended at 21 U.S.C. §§ 331(t), 333(b), 353(c)-(e), and 381(d).

Congress concluded that the various forms of prescription drug diversion created an "unacceptable risk that counterfeit, adulterated, misbranded, subpotent, or expired drugs will be sold to American consumers." Id.

The PDMA, as amended by the Prescription Drug Amendments of 1992, places strict controls on the distribution of prescription drugs and prohibits, among other things, the unlicensed wholesale distribution of prescription drugs; the sale, purchase, or trading of prescription drug samples and coupons; and the reimportation by anyone other than the manufacturer of prescription drugs manufactured in the United States. Because of the seriousness of these offenses and the importance of protecting the integrity of the nation's prescription drug supply, Congress provided that these offenses are felonies upon a showing that the violations were done "knowingly" and without necessitating proof that the defendants acted with intent to defraud or mislead, as is required for most other FDCA felonies.⁹ And, unlike other FDCA violations that have a maximum penalty of three years in prison, Congress provided for a maximum prison sentence of ten years for these PDMA offenses¹⁰

⁹ The PDMA also criminalizes other conduct, such as the distribution of drug samples in violation of 21 U.S.C. § 353(d) and the failure to provide a pedigree prior to the wholesale distribution of drugs in violation of 21 U.S.C. § 353(e)(1)(A). These other PDMA offenses carry the same penalty as traditional FDCA offenses under 21 U.S.C. § 333(a).

¹⁰ The enhanced penalty provisions for certain PDMA offenses are set forth at 21 U.S.C. § 333(b)(1), which provides:

any person who violates section 331(t) by-

(A) knowingly importing a drug in violation of section 381(d)(1) of this title,

(B) knowingly selling, purchasing, or trading a drug or drug sample or knowingly offering to sell, purchase, or trade a drug or drug sample, in violation of 353(c)(1) of this title,

(C) knowingly selling, purchasing, or trading a coupon, knowingly offering to sell, purchase, or trade such a coupon, or knowingly counterfeiting such a coupon, in violation of section 353(c)(2) of this title, or

(D) knowingly distributing drugs in violation of section 353(e)(2)(A) of this title,

shall be imprisoned for not more than 10 years or fined not more than \$250,000, or both.

Despite Congress's express mandate that these PDMA violations be punished more severely than other FDCA violations, the guidelines treat all FDCA violations the same and provide for a base offense level of 6.¹¹ The higher maximum penalties for these PDMA offenses come into play *only* when there is evidence of fraud *and* significant pecuniary loss under Section 2B1.1(b)(1). In FDA's view, the current guidelines do not carry out the intention of Congress to provide for significant penalties without requiring a showing of fraud.

These guidelines would not be problematic if these PDMA offenses frequently involved both fraud and significant pecuniary loss. However, FDA's experience has shown otherwise. One of the most frequently charged PDMA violations is the distribution by unlicensed wholesalers of prescription drugs in violation of 21 U.S.C. §§ 331(t), 333(b)(1)(D), and 353(e)(2)(A). In many unlicensed wholesale distribution cases, the distribution takes place under circumstances where both parties to the transaction clearly are aware of the illicit nature of the distribution - either because the transaction takes place on the street or because the price of the drugs is so low. Thus, it is often difficult to prove that the seller's failure to obtain a state license amounts to a fraud on the immediate purchaser(s) of the drugs. It is equally difficult to show that the unlicensed transaction amounted to a fraud on the ultimate consumers, because the lack of a state license has no direct effect on consumers. And, unless there is evidence that the defendant took affirmative steps to conceal his conduct from FDA or state licensing authorities, it is difficult to prove a fraud on the government. Even assuming that the government could persuade the sentencing court that the offense involved fraud, it is difficult to quantify the loss involved in unlicensed wholesale drug distribution, because the offense generally does not involve a traceable pecuniary loss to anyone. Nevertheless, the lack of a license should be treated as a serious public health violation because of the dangers created by the distribution of prescription drugs by those without proper credentials.

The lack of stricter guidelines for these PDMA offenses undermines FDA's ability to protect the integrity of the prescription drug distribution system. These PDMA offenses are FDA's primary tool for combating prescription drug diversion and counterfeiting. FDA urges the Commission to amend the guidelines to treat these PDMA offenses as serious offenses warranting prison time. As explained, the very existence of this illegal diversion market creates numerous opportunities for substandard drugs to enter the marketplace and presents a significant risk to the public

¹¹ By way of contrast, other statutes for which Congress prescribed a ten-year statutory maximum prison sentence are treated more strictly by the guidelines. For example, under 18 U.S.C. § 1365(a), it is a crime, punishable by up to ten years in prison, to tamper with a consumer product with reckless disregard for risk of death or bodily injury. The corresponding guideline provides for a base offense level of 25, as compared to a base offense level of 6 for the PDMA offenses. USSG §§ 2N1.1(a) and 2N2.1. Also, violations of 18 U.S.C. § 1505 (obstruction of justice), which have a statutory maximum term of imprisonment of only five years in prison, currently have a base offense level of 12, twice that of PDMA offenses. USSG § 2J1.2(a).

health, regardless of whether the government can prove in a particular case that the diverted drugs were actually counterfeit, adulterated, or misbranded.

III. Other FDCA Violations

In addition to counterfeiting and prescription drug diversion, the FDCA prohibits a wide range of other conduct that affects the public health. For example, FDA investigates the distribution of drugs, biologics, and medical devices that have not been approved by FDA. In the most egregious cases, these offenses involve the sale of unproven, potentially dangerous drugs to seriously ill patients who may forego FDA-approved treatments. Other cases involve the dispensing of prescription drugs without a valid prescription, which presents a health risk to consumers who may not be aware of potentially dangerous drug effects and interactions and may forego diagnosis by a licensed physician.

The current guidelines treat FDCA violations as relatively minor regulatory offenses with a base offense level of 6, with no enhancements for specific offense characteristics in the primary guideline. By contrast, the guidelines provide for a base offense level of 12 for tampering with intent to injure a *business* in violation of 18 U.S.C. § 1365(b). This tampering offense, like most FDCA offenses, has a statutory maximum prison term of three years. In fact, the guidelines treat food and drug offenses on par with odometer fraud, which also has a base offense level of 6 and a cross-reference to 2B1.1.¹² USSG § 2N3.1. FDCA offenses, which involve danger to the public health, should be treated more seriously than odometer fraud, an economic crime, and should have a higher base offense level than 6.¹³ The current guidelines, however, treat potential monetary harm more seriously than potential widespread harm to victim's health posed by FDCA crimes.

The problem with the low base offense level is compounded by the lack of enhancements for specific offense characteristics under Section 2N2.1. FDCA cases frequently arise in which prosecutors cannot prove intent to defraud or mislead to establish felony liability. In these cases, the sentence will be governed by Section 2N2.1, and prosecutors are likely to decline the case because the base offense level is 6 and there are no enhancements for specific offense characteristics. Despite the lack of fraud, the conduct addressed in these cases fully warrants

¹² Odometer fraud also has a statutory maximum sentence of three years in prison. 49 U.S.C. § 32709(b).

¹³ Under the guidelines, even offenses involving fish, wildlife, and plants, which also have a base offense level of 6, have several specific offense characteristics that increase the offense level by as much as four levels. USSG § 2Q2.1. Most of the offenses covered by this guideline have lower statutory maximum sentences than FDCA offenses, and it would seem that the American consumers would merit as much protection as endangered species, yet the guidelines appear to treat fish, wildlife, and plant offenses more seriously.

prosecutorial attention and meaningful redress by the courts. FDA-regulated products are vital to society, and consumers expect, even assume, that the products will be safe, pure, and effective. The current guidelines should be amended to provide for stiffer sentences for offenses that, while not involving fraud, involve a cognizable risk to the public health.

In addition, the cross-reference in Section 2N2.1 to Section 2B1.1 is not satisfactory in all cases because the latter section is intended to address economic fraud crimes.¹⁴ The application of Section 2B1.1 is sufficient for crimes where the major offense conduct involves only pecuniary harm. FDCA offenses often cause pecuniary harm, but the major factor in determining the sentencing range should be the degree of risk to the public health involved in the offense, not the pecuniary harm. This is especially true when the defendant has evinced a clear disregard for the welfare of consumers but has caused minimal or no pecuniary harm.

Also, when the offense involves fraud on a government agency, the determination of loss under Section 2B1.1 states that gain should be used as an alternative measure of loss only if there is a loss but the loss "reasonably cannot be determined." USSG § 2B1.1, comment. (n.2). In FDA cases, fraud on a government agency is generally based on the defendant taking affirmative steps to hide his or her conduct from the agency. In such cases, there typically is no pecuniary loss to the government, but there is a risk of harm to the public health. Some courts have departed upward based on the substantial non-monetary harm caused or risked by the offense.¹⁵ See USSG § 2B1.1, comment, (n.15). Although the upward departure may result in an appropriate sentence for the defendant's conduct, there should be a specific enhancement in the guidelines, not just a provision for upward departure, to account for the significant but non-pecuniary risks frequently posed by FDCA offenses.

One final issue warrants mentioning. Under 21 U.S.C. § 333(e), it is unlawful knowingly to distribute, or to possess with intent to distribute, human growth hormone for any use not approved by FDA. The statutory maximum penalty for violating this provision is five years in prison. 21 U.S.C. § 333(e)(1). If, however, the offense involves distribution to a person under age 18, the statutory maximum increases to ten years in prison. The Commission has not yet

¹⁴ Section 2B1.1 was created to "provide similar treatment for similar offenses for which pecuniary harm is a major factor in determining the offense level and, therefore, decrease unwarranted sentencing disparity that may be caused by undue complexity in the guidelines." USSG App. C, amend 617.

¹⁵ See United States v. Kimball, 291 F.3d 726 (11th Cir. 2002) (defendant was convicted of offenses involving the distribution prescription drugs without a prescription with intent to defraud or mislead government agencies; the district court found no loss to the government and declined to use the defendant's gain as an alternative for loss; the district court departed upward because the guidelines did not adequately account for the non-monetary loss caused by the risk of public harm; the Court of Appeals affirmed).

promulgated a guideline to cover these human growth hormone offenses. See USSG § 2N2.1, comment., (n.4). As a result, United States Attorney's Offices are reluctant to prosecute these offenses, because it is unclear how the offenses will be treated under the guidelines. FDA has noticed an increase in the distribution of human growth hormone for unapproved uses and requests that the Commission promulgate a guideline to address such offenses.

Proposals for A New Sentencing Regime

To account for the variety of FDCA crimes and the different statutory maximum prison sentences for certain PDMA and human growth hormone offenses, FDA believes that the Commission should amend the guidelines for FDCA offenses to provide more flexible, more realistic, and more effective sentencing options. Preliminary suggestions include:

- providing a base offense level of 10 for felony offenses with a three year statutory maximum (those governed by 21 U.S.C. § 333(a)(2));
- providing a base offense level of 12 for PDMA offenses with a ten year statutory maximum (those governed by 21 U.S.C. § 333(b)(1));
- adding specific offense characteristics to Section 2N2.1, including enhancements for offenses that involve reckless or intentional conduct that presents a potential risk to the public health and a specific enhancement, providing for a minimum offense level of 12, for offenses involving the distribution or manufacture of counterfeit drugs;
- revising the enhancement at Section 2B1.1(b)(11) for offenses involving conscious or reckless risk of serious bodily injury to provide that the enhancement applies to defendants who knowingly divert prescription drugs in violation of the PDMA or distribute counterfeit drugs in violation of 21 U.S.C. § 331(i)(3);
- revising Section 2B1.1 to provide an increase in the offense level to a minimum of 12 for FDCA offenses that involve fraud but do not involve significant monetary harm
- revising the application notes to Section 2B1.1 to provide that, for the purposes of calculating loss for offenses involving FDA-regulated products that are adulterated or misbranded within the meaning of the FDCA, loss includes the amount paid for the product, with no credit provided for the purported value of the product;
- promulgating a guideline to address human growth hormone offenses in violation of 21 U.S.C. § 333(e), with a starting offense level of 10, with incremental enhancements based on the amount of human growth hormone involved in the offense, and an additional enhancement for offenses that involve a person under 18 years of age;

providing enhancements for terrorism-related offenses, including the use of select agents to adulterate FDA-regulated products or the use of proceeds from FDCA offenses to finance terrorist organizations or criminal enterprises.

Conclusion

For the above reasons, the FDA believes that amending the guidelines applicable to FDCA offenses should be a Commission priority for the amendment cycle ending May 1, 2004. At the Commission's request, FDA will provide any necessary assistance and input to help the Commission draft appropriate amendments to strengthen FDA's criminal enforcement and ensure adequate protection of the public health. If you have any questions regarding this matter, please contact Associate Chief Counsel Sarah Hawkins at (301) 827-1130.

Sincerely,

A handwritten signature in black ink, appearing to read 'John M. Taylor, III', with a long horizontal line extending to the right.

John M. Taylor, III
Associate Commissioner for Regulatory Affairs

cc: Michael Courlander, U.S. Sentencing Commission

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August 1, 2003

U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500
South Lobby
Washington, D.C. 20002-8002
Attn: Public Affairs-Priorities Comment

Re: Comment on Notice of Proposed Priorities

Dear Commissioners:

The Washington Legal Foundation (WLF) hereby submits these comments, with the attachments, to the U.S. Sentencing Commission in response to the Commission's solicitation of public comment on possible priority policy issues for the amendment cycle ending in May 2004 and possibly for the cycle ending in May 2005. The Commission is also soliciting suggestions from the public on "short- and long-term research issues."

While the Commission has listed 13 categories of issues that the Commission has identified as "tentative priorities," WLF requests for reasons discussed more fully below and in the attached documents that the Commission consider as one of its priorities amending Part Q- Offenses Involving the Environment, particularly §§2Q1.1, 2Q1.2, 2Q1.3 and 2Q2.1. At a minimum, the Commission should conduct a study of these guidelines (and application notes) to see how they have been implemented and/or appoint an advisory committee to conduct a study and make recommendations to the Commission.

Interests of WLF

WLF is a national non-profit public interest law and policy center organized under Section 501(c)(3) of the Internal Revenue Code. WLF is based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and filing *amicus curiae* briefs in the U.S. Supreme Court, this Court, and other federal courts promoting a limited and accountable government, and opposing overreaching by those administrative agencies and courts which act contrary to intent of Congress as reflected in the substantive statutes.

WLF has also served as counsel in environmental cases, including those involving criminal application of the Clean Water Act. See, e.g., *United States v. Pozsgai*, 897 F.2d 524 (3d Cir. 1990) (27-month prison sentence imposed on first offender for placing topsoil and clean non-hazardous fill on defendant's own property containing marginal wetlands zoned for industrial use). WLF has also appeared as *amicus curiae* in support of the defendants in

criminal prosecutions under the Clean Water Act arguing that the requisite intent or mens rea for imposing criminal liability was not sufficiently proven. See, e.g., *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996); *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001), cert. denied, 555 U.S. 1111 (2002).

In addition, WLF's Legal Studies Division has published numerous papers and monographs on these topics. See, e.g., Bartman & Gaynor, *Strict Intent Standard In Environmental Cases Protects Civil Liberties* (WLF Working Paper Series, June 1997); Ellsworth, *Scientific Evidence Under Daubert: Utilizing The New Standards At Trial* (WLF Contemporary Legal Note, No. 16, Sept. 1995); Onsdorff & Mesnard, *Criminalizing Environmental Law: Can America Afford Jailing Honest Businessmen?* (WLF Legal Backgrounder, July 10, 1992).

Comments

The application of the Commission's environmental guidelines over the last 16 years have produced what most observers would regard as unjust and excessive prison sentences, and thus, violative of the principles of punishment and the intent of Congress. The primary flaw with the guidelines is that they produce lengthy prison terms even when the environmental harm is minimal and/or the culpability of the defendant is low. Thus, the guidelines do not adequately reflect the actual level of harm to the environment from the offense.

For example, in *United States v. Mills*, 817 F. Supp. 1546 (N.D. Fla 1993), a father and son were each sentenced to 18 months in federal prison for placing some 15 piles of clean building sand on a quarter-acre lot of their own property in order to build a home. Their "crime" was that they did not obtain a permit from the Corps of Engineers due to the questionable finding that the lot contained wetlands. Of course, the presence of the sand was so harmful to the environment that the government was perfectly willing to allow the sand to remain there while the men serve their prison sentence. For first offenders, where the government has more than ample administrative and civil remedies available for this kind of regulatory offense,¹ an 18-month prison sentence meted out to first offenders for what would otherwise be an administrative or civil matter is clearly excessive. Yet, a strict application of the guidelines call for such a sentence. Under §2Q1.3, the base offense level is 6, but the specific offense for discharging a "pollutant" (clean sand) is 4; and if it is done without a permit, §2Q1.3(b)(4) requires another 4 levels, for a total of 14. But the "base offense" in the indictment was discharging sand without a permit, and yet elements of the basic charge were included or double-counted in the additional offense characteristics.

In yet another father and son case, *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001), cert. denied, 555 U.S. 1111 (2002), the father was sentenced to 108 months in federal

¹ WLF submits that federal prosecutors are more apt to bring criminal charges for minor regulatory offenses that would otherwise have been handled administratively or civilly, precisely because they know that the Sentencing Commission's flawed guidelines will produce excessive sentences and also force defendants into making unjust plea bargains.

prison and his son 46 months for operating a chemical plant in the course of which a worker was exposed to a chemical that did not result in any injury to the worker. Yet, they were convicted of "knowing endangerment" under the Resource Conservation and Recovery Act (RCRA). Not only was their conviction questionable as a matter of law under the responsible corporate officer doctrine, but the sentence imposed on them and the plant manager was draconian. WLF's amicus brief in the Hansen case is attached hereto which discusses in greater detail the inherent and structural flaws of the environmental guidelines. In addition, a subsequently habeas corpus motion in the Hansen case which was recently filed is also submitted herewith to highlight how the "culpability" issue is not taken into account in these guidelines. Both of those documents are hereby incorporated by reference in these comments.

In a recent Lacey Act prosecution, three seafood importers were sentenced to 97 months in federal prison because approximately 6 percent of the lobster tail shipment from Honduras contained lobster tails that were less than 5.5 inches, which violated a Honduran regulation (not a U.S. law) which the Honduran courts have ruled to have been invalid. *United States v. McNab*, 2003 U.S. App. LEXIS 10708.

Why do these guidelines produce such truly bizarre sentences? As WLF explains more fully in its *Hansen* brief, the answer is that the Sentencing Commission simply did not do its homework before drafting the guidelines. The Commission ignored Congress' mandate that before the Commission was to set guidelines for any category of crime, it was to review past sentencing practices in order to determine "average sentences imposed in [each] category of cases" as the "starting point" before the Commissioners were allowed to exercise their independent (and informed) judgment as to whether or not it made any penological sense to depart from such past practice in devising the new guidelines for that category of crimes. 28 U.S.C. § 994(m) (emphasis added). The source material primarily used by the Commission in determining past sentencing practices was a 1,279 page report indexing and categorizing some 40,000 sentences imposed by federal courts from January 1, 1984 to February 28, 1985. Federal Judicial Center, Punishments Imposed on Federal Offenders (1986).

Conspicuously absent from this otherwise comprehensive study covering numerous categories of federal offenses is any data describing the sentences and fines imposed for violations of the Clean Water Act, the Clean Air Act, and the host of most other environmental laws on the books. Perhaps this was due to the paucity of such prosecutions, with administrative and civil remedies found to be more than adequate to punish, deter, and remedy the violations. After all, with respect to malum in se crimes like bank robbery, society cannot bring the robber before an administrative law judge to assess a fine, or file a civil suit for injunction and civil penalties. Criminal prosecution for such crimes is the only method that society has to deal with malum in se crimes. On the other hand, for malum prohibitum offenses, that is, conduct that is prohibited by statute or regulation, society has successfully used a number of remedies available to it short of criminal prosecution. Consequently, because almost any violation that is brought civilly could also be brought criminally, the more appropriate universe of determining what punishments society metes out for environmental offenses should take into account *all* the remedies used, i.e., administrative, civil, and criminal, to get an accurate picture of what the proper punishment should be.

4

Conclusion

WLF submits that it is long overdue for the Commission to re-examine the environmental guidelines.² WLF would be more than willing to assist the Commission and its staff in this endeavor

Respectfully submitted,

Daniel J. Popeo
Chairman and General Counsel

Paul D. Kamenar
Senior Executive Counsel

² WLF notes that the Commission attempted to address some of the double-counting problem at a Commission meeting on April 14, 1992, agenda item #10, but the motion failed by a divided vote of 3-2.

No. 99-11638DD

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

UNITED STATES OF AMERICA,

Appellee,

v.

CHRISTIAN A. HANSEN, RANDALL W. HANSEN,
AND ALFRED R. TAYLOR,

Appellants.

On Appeal from the United States District Court
for the Southern District of Georgia
Brunswick Division

**BRIEF OF THE WASHINGTON LEGAL FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF APPELLANTS
SEEKING REVERSAL**

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C. The interests of WLF are more fully presented in the accompanying motion for leave to file

this brief.

STATEMENT OF THE ISSUES

Amicus hereby adopts by reference the Statement of the Issues as presented in the various briefs of the appellants. For purposes of this amicus brief, amicus will address the following issues:

1. Whether the District Court erred in denying the defendants' request for a *Daubert* hearing with respect to the government's expert witness, and whether it was error for the witness to testify about matters of law.

2. Whether the sentences must be vacated because they were imposed in violation of law inasmuch as the applicable guidelines were unlawfully promulgated and are otherwise arbitrary, capricious, and unreasonable.

STATEMENT OF THE CASE

In the interests of judicial economy, amicus hereby adopts the Statement of the Case as presented by the appellants in their respective briefs. In brief, the three defendants were convicted of several counts of violating the Clean Water Act (CWA) and the Resource Conservation and

Recovery Act (RCRA), including a "knowing endangerment" count under RCRA, due to exceedances of mercury discharges and related environmental matters occurring at the LCP chemical plant in Brunswick, Georgia. The regulatory offenses occurred at the time the company was in bankruptcy, and while the defendants were doing their best to operate the plant in a safe and environmentally sound manner under the circumstances.

Although no employee was harmed by these violations, and while the discharges of mercury were relatively minor, the trial court applied the Sentencing Guidelines and sentenced the defendants -- all first offenders and solid law-abiding citizens with families to support -- to draconian sentences ranging from four to nine years. Christian Hansen, the founder of the company, was sentenced to 108 months in prison; his son, Randall Hansen -- who dutifully helped his father by putting his own promising career on hold and served briefly as the acting CEO in 1993 after the company was in bankruptcy, and who lived in New Jersey for the most part during the relevant time period in question -- was sentenced to 46 months; and Alfred Taylor, a plant manager who assumed the duties for a limited period of time, was sentenced to 78 months.

SUMMARY OF ARGUMENT

The trial was riddled with reversible errors from beginning to end. While amicus supports all the arguments made by the parties, this brief argues that this Court should reverse the convictions and order a new trial because of the impermissible testimony of the government's so-called "expert," and because the jury instructions concerning mens rea and intent were fatally flawed. Finally, amicus submits that the draconian sentences imposed pursuant to the Sentencing Guidelines for environmental violations must be set aside because those particular guidelines were unlawfully promulgated, patently unreasonable, and fatally flawed.

ARGUMENT

I. IT WAS REVERSIBLE ERROR TO ALLOW THE GOVERNMENT'S "EXPERT" WITNESS TESTIFY AS TO MATTERS OF LAW AND TO PRESENT "JUNK SCIENCE" IN VIOLATION OF *DAUBERT*

WLF supports appellants' well-founded objections to the testimony of government witnesses as to their view of the law and technical matters that were not scientifically demonstrated. R. Hansen Br. at 42 (citing *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990); C. Hansen Br. at 15-22. The interpretation of a criminal statute is

strictly within the province of the court; the self-serving views of the law by the government or their so-called paid "experts" have no place in a criminal trial. As the Supreme Court made clear on this point:

The law in question, a criminal statute, is not administered by any agency, but by the courts. * * * The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute, but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference [under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984)].

Crandon v. United States, 494 U.S. 152, 177 (1990).

Expert witnesses are generally precluded from testifying at civil trials as to their views of what the law means. See *Reich v. Monfort, Inc.* 144 F.3d 1308, 1328 (10th Cir. 1998) ("Generally, an expert may not state his or her opinion as to legal standards nor may he or she state legal conclusions drawn by applying the law to the facts."). See also *Specht v. Jensen*, 853 F.2d 805, 807-08 (10th Cir. 1988) ("it is axiomatic that the judge is the sole arbiter of the law and its applicability"). Accordingly, it was clear and reversible error for the trial court to rule that the government witness in this case was free to testify about "his impression of what he feels like his view is with respect to this law." R21-8.

This error was particularly egregious and compounded where the government's chief expert witness, Daniel J. Teitelbaum, had been discredited by other courts in prior cases for providing similar "speculative" testimony without a proper scientific basis as required by *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579 (1993). The government's attempt to foist this "expert" upon the jury without apprising the trial court of the witness's credibility problems before other courts on similar scientific and worker safety issues constitutes reprehensible and unethical prosecutorial misconduct. The trial court's refusal to grant the defendant's pre-trial request to conduct a *Daubert* hearing was clear and reversible error. See C. Hansen Br. at 15-21.

It is bad enough when "junk science" finds its way into civil trials where a defendant's *property* interests are at stake; it is totally unacceptable and should not be tolerated in the least when it is used, as here, in a criminal case to deprive defendants of their *liberty* interests by incarcerating them for periods of four to nine years. Indeed, with respect to Mr. Christian Hansen, who is 73-years old and suffering from rheumatoid arthritis, more than his liberty interests are at stake: his nine-year sentence is effectively a death sentence. In short, the conviction of the defendants on the basis of

the testimony of the government's "expert" witnesses is a manifest injustice which this Court should not tolerate.

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO PROPERLY INSTRUCT THE JURY THAT THE PROSECUTION MUST PROVE THAT THE DEFENDANTS POSSESSED THE REQUISITE "KNOWING" MENS REA FOR ALL ELEMENTS OF THE OFFENSES CHARGED

A. The Prosecution Is Required to Prove Mens Rea for Each Element of the Offense

Amicus agrees with the appellants' argument that the trial court erred by not instructing the jury that it must find that the defendants acted knowingly with respect to all elements of the offense, including the existence of a permit. See R. Hansen Br. at 32-34 (citing *United States v. Hayes International Corp.*, 786 F.2d 1499 (11th Cir 1986); *U.S. v. BayTank, Inc.*, 934 F.2d 599 (5th Cir. 1991); *United States v. Johnson & Towers, Inc.* 741 F.2d 662, 669 (3d Cir. 1984). See also *United States v. Ellen*, 961 F.2d 462, 466-67 n.2 (4th Cir. 1992) (jury instruction stated that "actual knowledge" is required, not mere "ignorance," and that "the Government must prove that the defendant acted knowingly" as to "all four

elements of the offense," including knowledge of the "absence of a permit"); *United States v. Wilson*, 133 F.3d 251, 263-65 (4th Cir. 1997) (prosecution must prove mens rea as to "each essential element of the substantive offense").

Similarly, amicus agrees with appellants that the trial court's "responsible corporate officer" jury instruction compounded this error by impermissibly diluting or eliminating the mens rea or knowing requirement that Congress inserted in both the CWA and RCRA, and is contrary to the weight of judicial authority. R. Hansen Br. at 34-40, citing *United States v. McDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51 (1st Cir. 1991); C. Hansen Br. at 28-36. See also *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (the Court reversed the conviction of a shop owner who had been found guilty of contributing to the delinquency of a minor for selling her lewd merchandise since he did not personally sell the merchandise, although he controlled the store).

In addition to this compelling judicial authority, there are sound policy reasons why it is important that the prosecution must prove mens rea in this growing and complex field of environmental regulations.

B. The Dilution of the Standard of "Knowing" Violation

**Ignores the Complexity of the Law and Threatens
 Prosecution of Innocent Conduct.**

**1. *Environmental Laws and Regulations Are Highly
 Complex.***

The Supreme Court has stated that "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *United States v. Cheek*, 498 U.S. 192, 199-200 (1991). Noting that Congress had set a higher intent standard for proof of violations of tax laws, the Court acknowledged that it as well had accorded "special treatment of criminal tax offenses . . . largely due to the complexity of the tax laws." *Id.* at 200.

Environmental regulations now rival the tax laws in their coverage of individuals and businesses. Regulations under the Clean Water Act, Clean Air Act, and RCRA alone number over 9,000 pages in the Code of Federal Regulations. See 40 C.F.R. parts 100-149, 400-503 (Clean Water Act); 40 C.F.R. parts 50-99 (Clean Air Act); 40 C.F.R. Parts 240-299(RCRA). At the same time, environmental laws and regulations are stringent and

complex. EPA Administrator Carol Browner has candidly admitted that the existing regulatory framework is "a complex and unwieldy system of laws and regulations and increasing conflict and gridlock." "New EPA 'Common Sense' Approach Cautiously Welcomed By Industries," *Air, Water Pollution Report* at 30 (July 25, 1994). Meanwhile, courts have variously noted a "regulatory hydra" and use of regulatory terms suggestive of "Alice In Wonderland," *United States v. Mills*, 817 F.Supp. 1546, 1548 (N.D. Fla. 1993), *aff'd* 904 F.2d 713 (11th Cir. 1994)¹

Even a former EPA Assistant Administrator acknowledged that RCRA is a "regulatory cuckooland of definition...[and] is very complex." *United States v. White*, 766 F. Supp. 873, 882 (E.D. Wash. 1991)(quoting comments of Don R. Clay).² See also *Inland Steel Co. v. EPA*, 901 F.2d

¹ The literary reference to *Alice in Wonderland* in *Mills* is particularly apt in this case: the government's "expert" witness, Mr. Tietlebaum, began testifying about the dangers of mercury with references to its role in the genesis of the term "Mad Hatter" in *Alice on Wonderland*. See C. Hansen Br. at 20-21.

² As a good example, EPA has given an interpretation regarding RCRA requirements in

1419, 1421 (7th Cir. 1990) (describing RCRA as a "statutory cloud cuckoo land"). At the same time, the Clean Water Act extends to many waste materials that are not actually hazardous or are even innocuous, such as clean sand.

2. Dilution of the Intent Standard Fosters Overcriminalization of Enforcement.

The dilution of the "knowing" standard of the kind evident in the present case undoubtedly affects environmental enforcement. Notably, EPA has tried for many years, sometimes together with the Department of Justice, to draw a clear distinction between cases that warrant criminal prosecution and cases that should be handled civilly under EPA's ample civil enforcement authorities. The Agency has been unable to set out a simple, bright-line rule. Instead, it has variously issued guidance to EPA regional offices for screening of cases to identify potential criminal cases, as well as guidance for special treatment of potential criminal cases that present issues of first

response to a regulated company's inquiry of whether rags contaminated with solvents used in cleanup work are hazardous waste after their use. EPA's answer was that if the solvents are poured onto the surface to be cleaned up, then the contaminated rags used in cleanup become hazardous waste. But if the solvent is first poured onto the rags to be used in cleanup, the rags do *not* become hazardous waste! See Letter dated May 20, 1987 from Jacqueline Sales, Chief, EPA Reg. Develop. Branch, to Frank Czigler of S&W Waste, Inc.

impression.³ EPA's difficulty in clearly and simply distinguishing criminal cases from civil ones has resulted in a lack of predictability about what conduct is criminal. Minor infractions could be, and have been, criminally prosecuted while major knowing violations may be, and have been, handled administratively before the agency, or in civil proceedings.⁴

Moreover, given the lack of a meaningful intent standard in environmental cases, the prosecutor has very substantial leverage to force unwarranted guilty pleas because of the likely imposition of substantial prison sentences under the Sentencing Guidelines for even minor offenses. The published opinions in environmental criminal cases do not reflect the many cases resolved by plea agreements that could have equally well

³ For examples of agency attempts to set standards for environmental criminal prosecutions, see D. Carr, ed., *Environmental Criminal Liability: Avoiding and Defending Enforcement Actions* 21-27 (Bureau of National Affairs, 1995).

⁴ As a byproduct of the overcriminalization in the environmental area and prosecutors' ready ability to force plea agreements, businesses are reluctant to engage in socially useful environmental audits and self-reporting, fearing arbitrary criminal prosecutions. See Keith A. Onsdorff and James M. Mesnard, *Criminalizing Environmental Law: Can America Afford Jailing Honest Businessmen?* (Washington Legal Foundation, Legal Backgrounder, July 10, 1992).

been pursued under civil and administrative enforcement authorities.

But whatever can be said as to the level of mens rea and intent necessary for proving the common or usual violations of CWA and RCRA, Congress made it unmistakably clear that with respect to "knowing endangerment" charges, carrying a maximum penalty of 15 years, the prosecutor must prove beyond a reasonable doubt the defendants' intent or mens rea as to each of the elements listed, particularly that each was aware that their conduct placed another person in imminent danger of death or serious bodily injury due to a RCRA violation, as opposed to some other workplace safety problem that is covered by OSHA regulations. R. Hansen Br. 17-23.

II. THE SENTENCE MUST BE VACATED BECAUSE THE ENVIRONMENTAL SENTENCING GUIDELINES WERE UNLAWFULLY PROMULGATED AND RESULT IN THE IMPOSITION OF PATENTLY UNREASONABLE SENTENCES

While this Court has more than enough reasons to remand this case for a new trial, amicus agrees with the defendants that the district court also erred by not departing downward by failing to find that this case was not a "heartland" violation, and by mistakenly believing that he did not have the discretion to do so. See R. Hansen Br. at 43-45; C. Hansen Br. at 38-41; Taylor Br. at 28-30. Amicus submits in the alternative that this Court can, and should, reverse the sentences imposed because, as will be demonstrated, the Environmental Sentencing Guidelines, U.S.S.G. §§ 2Q1.2 and 2Q1.3 were unlawfully promulgated and produce irrational sentences. This Court is mandated by 18 U.S.C. § 3742(f)(1) to set aside a sentence and remand the case for further sentencing proceedings if it "determines that the sentence * * * was imposed in

violation of law or imposed as a result of an incorrect application of the sentencing guidelines* * * ." The unlawful promulgation of the Environmental Guidelines produces sentences that are "imposed in violation of law." Accordingly, the district court should be free to re-sentence the defendants even if a new trial is not ordered by exercising its sentencing discretion as if the convictions were for pre-Guideline environmental offenses or for an offense for which the Commission has yet to promulgate a guideline. See R. Hansen Br. at 45, n.31.

As a preliminary matter, there can be no question that this Court has the jurisdiction to determine *de novo* whether a particular sentencing guideline is reasonable in the same way that courts routinely exercise their power to review the reasonableness of any other regulation promulgated by government agencies. In *United States v. Lee*, 887 F.2d 888 (8th Cir. 1989), for example, the court of appeals unanimously struck down the applicable guideline in that case, U.S.S.G. § 2J1.6, and remanded the case to the district court for resentencing because the guideline was "not sufficiently reasonable and violates the statutory mandate given to the Sentencing Commission" by producing unreasonably lengthy sentences. *Id.* at 892. Comparing the U.S. Sentencing Commission to any other regulatory agency, the standard of review of its regulations (guidelines) is whether they are "sufficiently reasonable" in light of the congressional directive given to the Sentencing Commission. *Id.* at 890, citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981).

To understand why the Environmental Sentencing Guidelines are patently

unreasonable and arbitrary, this Court need look no further than the sentences that were essentially mandated in this case for the defendants with respect to their convictions under the Clean Water Act. The Probation Office dutifully and mechanically calculated the offense levels as prescribed by U.S.S.G. §2Q1.3 and came up with a total adjusted offense level of 29. Because the defendants had no prior criminal history, the offender category was a level I. Cross-referencing these numbers to the grid on the Sentencing Commission's Sentencing Table yields a shockingly high 87-108 month sentence (approximately 7-9 years) for a first offender! Yet the maximum statutory sentence under the Clean Water Act for the worst water polluter with the worst criminal history not convicted of a "knowing endangerment" charge is only 36-months.⁵ How can the statutory maximum effectively constitute a mandatory minimum sentence? How can any rational guideline call for a sentence that is two to three *times* greater than the statutory maximum set by Congress? Even with the minor downward adjustments of 6 levels by the trial court, the resultant score of 23 still translates into a prison sentence of 46-57 months, which is still in excess of the statutory maximum of 36

⁵ The defendants were not charged with "knowing endangerment" under the Clean Water Act; rather, the charges in Counts 2-21 were for simple and relatively minor exceedances of the company's NPDES permit for mercury; such exceedances are not an uncommon occurrence in many companies which are not criminally prosecuted, let alone the officers of the company. Such regulatory violations are usually handled by administrative or civil proceedings.

months. The Court was left with no choice but to impose the statutory maximum of 36 months for each of the Clean Water Act counts. Surely, Congress did not intend that the maximum punishment be imposed in these kind of cases for these kind of first offenders.

These draconian sentences dictated by the guidelines are all the more unreasonable when one considers that it was only in 1987 that Congress reclassified the criminal penalty provisions for CWA violations from a Class A misdemeanor (up to one year imprisonment) to the current maximum term of three years, a Class E felony, the lowest classification for a felony. 18 U.S.C. § 3559. To be sure, the offense scores in this case were substantially raised by an additional 11 points for "substantial likelihood of death or serious bodily injury," but as noted, none of the defendants were charged with such "knowing endangerment" counts under the Clean Water Act, even though the Clean Water Act has an almost identical "knowing endangerment" provision to the RCRA provision. *Compare* 33 U.S.C. § 1319(c)(3) *with* 42 U.S.C. § 6928(e).⁶

⁶ Amicus submits that the addition of the 9 for "substantial likelihood of death or serious bodily injury" under § 2Q1.2(b)(2) (the guideline for hazardous pollutants) and 11 points under § 2Q1.3(b)(2) (the guideline for non-hazardous pollutants) for the Clean Water Act violations was in any event erroneous, since the Application Notes to both of those sections clearly indicate that the increase applies where the general "public health" is seriously endangered which was not demonstrated in this case. Rather, the prosecution focused only the alleged endangerment to the

Even subtracting all of the 11 points added under §2Q1.3(b)(2) for an offense that has a "substantial likelihood of death or serious injury," the normal offense score would be a level 18. This score translates into a sentence of 27-33 months for a first offender, a sentence that is unreasonably close to the statutory maximum for a first offender. While the RCRA violations were computed under U.S.S.G. § 2Q1.2 (the guideline for hazardous pollutants), the resulting offense score under that section was also 29, the identical score as that for the release of *non*hazardous pollutants under §2Q1.3. This equivalence in score for separate categories of pollutants simply does not make any sense.⁷

employees at the plant. If the government believes that the Clean Water Act seriously endangered the public health, why didn't the government charge the defendants with "knowing endangerment" under CWA? Amicus submits that there simply was no evidence to support such a charge.

⁷ The scores are the same for both categories of pollutants because the Commission arbitrarily provided for an increase of 11 levels for a non-hazardous pollutant where there is a "substantial likelihood of death or serious injury," whereas the Commission provided for an increase of only 9 levels for a hazardous pollutant under §2Q1.2(b)(2). The reason the numbers add up to the same total, whether the pollutant is hazardous or not is because the base offense level of the hazardous pollutant under §2Q1.2 is set at 8 which is two points higher than the base offense level for §2Q1.3 which is set at 6. This differential between the offense characteristics

To fully appreciate amicus' argument as to the unreasonableness of these guidelines, it is important to keep in mind the fact that prior to the promulgation of the Sentencing Guidelines in 1987, the normal practice was that those defendants sentenced to prison for more than one year were generally eligible for parole after serving only one-third of the sentence imposed. 18 U.S.C. § 4205(a). Thus, if a defendant were sentenced to prison for the statutory maximum of three years, that defendant would be eligible for parole after serving one year in prison. Likely candidates for parole included first-time offenders for regulatory offenses such as the defendants and offenses in this case.⁸ Therefore, the 46-month prison sentence imposed on Randall Hansen is comparable to a pre-guideline sentence of a staggering 132 months, or a 11-year sentence; the 78-month sentence for Mr. Taylor translates to mind-boggling 234-month sentence, or approximately 20 years; and the 108-month sentence imposed on 73-year old Christian Hansen translates into a truly draconian

for the two different kinds of discharges is backwards: one would think that hazardous pollutant offense levels would be greater than the non-hazardous pollutant, rather than the other way around as it is here. This is yet further evidence of the arbitrariness of the Environmental Guidelines.

⁸ Indeed, for those convicted of environmental violations and sentenced to prison, they were eligible for parole after serving 0 to 10 months. 28 C.F.R. Chapter Eleven, Subch. H; 28 C.F.R. § 2.20.

sentence of 324 months or 27 years! Even taking into account only the 36-month sentences imposed under the Clean Water Act for each defendant, that sentence still translates into a 9-year pre-guideline sentence.

All the defendants would have received drastically reduced sentences if instead of the committing these environmental regulatory offenses, they engaged in certain drug activity that Congress deemed deserving of *greater* punishment such as managing a crack house instead of a chemical plant that makes products that are socially useful in our society and improves our standard of living; or illegally using a registration number to manufacture or distribute controlled substances.⁹ Indeed, if the defendants had "wilfully" violated safety laws and regulations required under the Occupational Safety and Health Act (OSHA) -- the law which more properly governs the workplace

⁹ See U.S.S.G. § 2D1.8(a)(2) (managing or allowing use of premises for drug activity is **capped** by the Sentencing Commission at a level 16 (21-27 months) despite Congress providing in 21 U.S.C. § 857 for up to 20 years imprisonment, a statutory sentence almost seven *times* greater than the maximum three-year sentence provided under the Clean Water Act, and five years *more* than the 15-year sentence for knowing endangerment); *see also* U.S.S.G. § 2D3.1 (punishment for illegal use of registration number to distribute controlled substances is **capped** at a level 6, which allows for *probation*, despite the statutory maximum sentence of *four* years provided for in 21 U.S.C. § 843857(d), which is one-year greater than the maximum sentence under the Clean Water Act.

safety issue in this case -- and as a result, a worker was actually killed (and not merely threatened with serious injury as was alleged, but not proven, here), the statute, 29 U.S.C. § 666(e), provides a *maximum* of six-months in prison, a misdemeanor. And even when death results, courts have not always imposed prison terms. *See, e.g., United States v. Shear*, 962 F.2d 488 (5th Cir. 1992) (trial court sentenced a supervisor to three years probation, fine, and community service where employee killed in trench not properly shored up per OSHA regulations; conviction overturned because supervisor is not "employer" under the statute).

The arbitrariness of the Environmental Sentencing Guidelines is further evident from an examination of the various offense levels that can be, and often automatically are, added to the base level. The defendants were sentenced under U.S.S.G. § 2Q1.2, the guideline applicable for environmental offenses involving hazardous or toxic substances, as well as §2Q1.3 which is the guideline for non-hazardous substances. For illustration purposes, amicus will focus on § 2Q1.2, although the analysis is the same for §2Q1.3.

The base offense level under § 2Q1.2(a) is an 8. The base offense charged in this case is the discharge (or storing) of a hazardous pollutant without a permit or in violation of a permit. An additional 4 levels are added under § 2Q1.2(b)(1)(B) if the offense "involved a [single] discharge. . . of a hazardous . . . substance" regardless of the amount. If the discharge was continuous, perhaps over a period of a few days, an additional two points for a total of 6 are added to the base level of 8, thus bringing the

offense level to a 14. Yet that conduct -- discharging a pollutant -- was already accounted for in the base offense for which the defendants were charged and convicted. This double-counting would be comparable to a Sentencing Guideline providing for a certain base level for bank robbery, and then adding as an aggravating factor that the object of the robbery was a bank! In addition to the 14 points already accumulated, § 2Q1.2(b)(4) requires adding yet another four levels for not having a permit or discharging in violation of the permit. Again, this is double counting as aggravating conduct what should already be included in the base offense level since the base charge of almost any environmental violation is a discharge of some pollutant in violation of a permit or without a permit. Thus, the score has quickly escalated to a level 18 which translates into a sentence of 27-33 months for a first time offender for a garden variety permit exceedance.

Why do these guidelines produce such truly bizarre sentences? The answer is that the Sentencing Commission simply did not do its homework before drafting the guidelines. The Commission ignored Congress' mandate that before the Commission was to set guidelines for any category of crime, it was to review past sentencing practices in order to determine "*average sentences* imposed in [each] category of cases" as the "starting point" before the Commissioners were allowed to exercise their independent (and informed) judgment as to whether or not it made any penological sense to depart from such past practice in devising the new guidelines for that category of crimes. 28 U.S.C. § 994(m) (emphasis added). The source material primarily used

by the Commission in determining past sentencing practices was a 1,279 page report indexing and categorizing some 40,000 sentences imposed by federal courts from January 1, 1984 to February 28, 1985. Federal Judicial Center, Punishments Imposed on Federal Offenders (1986). Conspicuously absent from this otherwise comprehensive study covering numerous categories of federal offenses is any data describing the sentences and fines imposed for violations of the Clean Water Act, the Clean Air Act, and the host of most other environmental laws on the books. Perhaps this was due to the paucity of such prosecutions, with administrative and civil remedies found to be more than adequate to punish, deter, and remedy the violations. After all, with respect to malum in se crimes like bank robbery, society cannot bring the robber before an administrative law judge to assess a fine, or file a civil suit for injunction and civil penalties. Criminal prosecution for such crimes is the only method that society has to deal with malum in se crimes. On the other hand, for malum prohibitum offenses, that is, conduct that is prohibited by statute or regulation, society has successfully used a number of remedies available to it short of criminal prosecution. Consequently, because almost any violation that is brought civilly could also be brought criminally, the more appropriate universe of determining what punishments society metes out for environmental offenses should take into account *all* the remedies used, i.e., administrative, civil, and criminal, to get an accurate picture of what the proper punishment should be.

If the Commission had properly done its homework, and even if it simply limited

itself to looking at criminal prosecutions of environmental offenses, it would have quickly discovered that pre-guideline sentences for environmental offenses were fairly uniform (already one of the goals of the Sentencing Reform Act, i.e., the elimination of disparate sentences). The sentences meted out by federal judges using their sound discretion, and taking into account the goals of punishment to impose no more punishment than is necessary, rarely involved incarceration; rather, suspended sentences, probation, fines, community service, and restitution were the norm. Where incarceration was imposed, the length of the sentences were usually for several few weeks or months which more than adequately served the principles of punishment and deterrence. See generally U.S. EPA, Office of Enforcement, National Enforcement Investigations Center, Denver Summary of Criminal Prosecutions Resulting From Environmental Investigations (May 31, 1991) (summarizing the disposition of all environmental criminal cases from fiscal years 1983 to 1991) (hereinafter "Summary").¹⁰

¹⁰ A few representative cases makes this clear. For example, in *United States v. ABC Compounding Company, Inc.*, William S. Armistead and Vincent Armistead, No. 85-484 (N.D. Ga.), a company engaged in the business of mixing and selling chemicals was charged with RCRA conspiracy, disposal, and reporting violations. The company was fined \$40,000 and the father who was vice-president and part owner, and the son, who was plant supervisor, each received suspended term of imprisonment, placed on probation for one year, assessed a \$20,000 fine, and ordered to perform community service. Summary at 39. In *United States v. Richard*

Significantly, the Commission has never identified in any of its literature what other source documents and data it relied upon in developing the environmental guidelines, or more importantly, if it did use other information, whether it first determined the average pre-guideline sentence. The government no doubt will attempt

Brown, No. 86-005 (D. Col.), the defendant ordered five drums of toxic waste to be buried, and he was indicted for disposing of hazardous waste without a permit and for making a false statement to the EPA. The court fined the company \$3,500 and placed Mr. Brown in a pretrial diversion program. Summary at 38. In *United States v. Arthur J. Greer*, No. 85-00105 (M.D. Fla.), the proprietor and operator of four hazardous waste handling companies endangered the lives of employees by ordering them to test for the presence of chemicals such as cyanide, methyl ethyl ketone, xylene, and other chemicals by "sniffing samples or lighting them in soft drink cans, rather than by performing required chemical analysis." In addition, he dumped 1,000 gallons of waste and mislabeled the drums as harmless dirt. Greer was indicted on 33 counts, including six counts of "knowing endangerment" under RCRA. He was acquitted of the knowing endangerment counts, but sentenced for RCRA and CERCLA violations to one year and one month imprisonment (and eligible for parole after serving one-third of that time, or approximately four months). Summary at 35. In *United States v. Taylor Laboratories, Inc. and John H. Taylor, Jr.*, No. CR89-006-R (N.D. Ga.), the company and Mr. Taylor were charged with storing reagent chemicals in violation of RCRA, some of which were found near a lake. Mr. Taylor was sentenced to five years and five days imprisonment, all of which was suspended and placed on three-years probation. Summary at 84.

to counter amicus' arguments on this score by claiming that the Commission did have the authority to increase sentences from past practice if those sentences "d[id] not accurately reflect the seriousness of the offense." 28 U.S.C. § 994(m). But any such departures "will require that, as a starting point. . . the Commission ascertain the average sentences." Afterwards, departures upward may still be made, but only if the resulting sentencing range "is consistent with the purposes of sentencing" in 18 U.S.C. § 3553(a)(2). 28 U.S.C. § 994(m).¹¹ It is Commission Policy that "when departures [from past sentencing practice] are substantial, the reasons for departure will be specified." Paragraph 6, Principles Governing the Redrafting of the Preliminary Guidelines, adopted December 16, 1986, *reprinted in* Stephen Breyer (former member of the Sentencing Commission), The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 50 (1988); *see also id.* at 17 (Guidelines primarily to be based on "typical, or average, actual past practice").

Where are the Commission's reasons to justify the substantial upward departures from pre-guideline sentencing practices? There simply are none. The fact of the matter is that (a) the current sentences mandated for environmental offenses

¹¹ Congress also directed that the Commission "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j).

clearly do not represent the "typical" or "average" pre-guideline sentence, and (b) the Commission has never provided any reasons for the sharp departure which would assist a reviewing court in determining whether those departures are "consistent with the purposes of sentencing" or whether they are, as *amicus* submit, arbitrary, unreasonable, and inconsistent with the sentencing factors mandated by Congress in 18 U.S.C. § 3553(a) (sentences shall be "sufficient, but not greater than necessary" to satisfy punishment, deterrence, avoid sentencing disparities, etc.). The Commissioners figuratively threw darts on the wall to come up with the offense levels for environmental guidelines. If the courts do not scrutinize the promulgation and reasonableness of the guidelines, they become, and have become, blank checks to be arbitrarily filled out or modified by the Commission.¹²

Because of these drafting flaws, it should come as no surprise that the environmental guidelines are inherently unreasonable and result in wildly disparate and excessive sentences in this and other environmental cases. For an excellent critique of the environmental sentencing guidelines and the Commission's misguided "one-size-fits-

¹² An agency's failure to follow Congressional directives for the promulgation of rules is itself sufficient grounds for invalidating a rule or guideline as a violation of law. *Environmental Defense Fund, Inc. v. EPA*, 898 F.2d 183, 189 (D.C. Cir. 1990) (court "cannot sustain [agency] action merely on the basis of interpretive theories that the agency might have adopted and findings that (perhaps) it might have made.") (emphasis added).

all" approach for applying the guidelines to different environmental statutes which provide for punishments ranging from 6 months to 15 years, see B. Sharp & L. Shen, The (Mis)Application of Sentencing Guidelines To Environmental Crimes, BNA Toxics L. Rpt'r 189 (July 11, 1990).

Not only do the flawed environmental guidelines produce sentences such as the instant one that are grossly disparate from pre-guideline cases, they also produce disparate post-guideline sentences, contrary to the purpose of the guidelines to reduce sentencing disparity. Consider, for example, *U.S. v. Wells Metal Finishing, Inc.*, 922 F.2d 54 (1st Cir. 1991) where the defendant was convicted after trial of 19 counts of "knowingly discharging excessive amounts of zinc and cyanide into the City of Lowell's sewer system" over a two-year period between February 1987 and 1989 resulting in the sewer system "containing levels of zinc and cyanide vastly in excess of federal pretreatment limits" and having costly impacts on the sewer system operation. The 15-month prison sentence imposed in *Wells Metal* for 19 counts of continuously discharging zinc and cyanide over two years stands in sharp contrast to the 46-108 month sentences imposed in this case. The 46-month sentence imposed on Randall Hansen in this case is a more than a 300 percent *longer* sentence than that imposed in *Wells Metal* for conduct that was less serious; Taylor's sentence of 78 months is over 500 percent greater than that in *Wells*; and Christian Hansen's sentence of 108 months is over 700 percent greater than in *Wells*. and certainly no worse than that in *Wells*.¹³

That is not to say that all sentences require mathematical exactitude; however,

sentencing disparities ranging from 300 to over 700 percent for roughly comparable acts for post-guideline offenses (and disparities easily over 1,000 percent between pre- and post-guideline sentences) is troubling to say the least, especially where the rationale for having the Guidelines in the first place was to *reduce* sentencing disparities, not to create them. Accordingly, this Court should seriously examine the fundamental flaws in the environmental guidelines and strike them down on their face or as applied in this case.

CONCLUSION

For all the foregoing reasons and those presented in the briefs of appellants, the judgment and convictions should be reversed. In the alternative, the sentences should be vacated, and the case remanded for re-sentencing.

Respectfully submitted,

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October 8, 1999

¹³ Cf. *United States v. Bogas*, 920 F.2d 363 (6th Cir. 1990) convicted for discharging hazardous and ignitable materials and lying about it to officials, was resentenced to a level 12 on remand, and received home detention. The defendants' sentences ranging from 46 to 108 months of hard prison time is infinitely greater than Mr. Bogas' home detention.

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
Brunswick Division**

UNITED STATES OF AMERICA,

Plaintiff,

v.

RANDALL W. HANSEN,

Defendant.

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Docket No. CR298-23
Argument Requested

**MEMORANDUM OF LAW IN SUPPORT OF MOTION OF
RANDALL W. HANSEN UNDER 28 U.S.C. § 2255 TO
VACATE, SET ASIDE, OR CORRECT HIS SENTENCE**

Defendant Randall W. Hansen, through his undersigned counsel, respectfully submits this memorandum of law in support of his motion, under 28 U.S.C. § 2255, to vacate, set aside, or correct his sentence. Mr. Hansen, the former Vice President and, after April 1993, acting Chief Executive Officer ("CEO") of LCP Chemicals ("LCP"), is currently serving out the 46-month sentence imposed by this Court following his conviction, on January 15, 1999, for conspiracy and violations of the Clean Water Act ("CWA") and Resource Conservation and Recovery Act ("RCRA"). The prosecution arose from LCP's operation, primarily in 1993 and early 1994, of a chlor-alkali plant in Brunswick, Georgia, although Randall Hansen at all relevant times resided and had his office in New Jersey. In the words of the Eleventh Circuit, Mr. Hansen's "primary focus was financial, and, with the support of the bankruptcy creditor's committee and court, he

sought to sell the company to a responsible party who could operate the business and have the financial resources to deal with the various environmental conditions.” *United States v. Hansen*, 262 F.3d 1217, 1229 (11th Cir. 2001), *cert. denied*, 535 U.S. 1111 (2002).

Given the absolute lack of any evidence whatsoever of Randall Hansen’s involvement in any actions that caused violations of the environmental laws, Mr. Hansen was prosecuted and convicted under a theory of vicarious “responsible corporate officer” (“RCO”) liability, as embodied in one of the Court’s jury instructions. Indeed, the Government’s theory to justify the conviction on appeal was that Mr. Hansen was responsible as acting CEO for failure to close the plant down when periodic violations of the environmental laws were inevitable. The RCO instruction permitted the jury to find Mr. Hansen guilty if (1) the CWA or RCRA violation “occurred under his area of authority and supervisory responsibility”; (2) he “had the power or capacity to prevent the violation”; and (3) he “acted knowingly in failing to prevent, detect or correct the violation.” *Id.* at 1252.

At trial, the Court overruled Mr. Hansen’s objection to this instruction, and the Eleventh Circuit affirmed the application of RCO liability. *Hansen*, 262 F.3d at 1235. Since that time, however, the Supreme Court has materially changed the law with respect to the imposition of vicarious liability on corporate officers such as that imposed on Randall Hansen. In *Meyer v. Holley*, 123 S. Ct. 824, (2003), the Supreme Court recently rejected the imposition of vicarious liability on corporate officers for an employee’s unlawful acts simply because they controlled, or had the right to control, the employee’s actions. As discussed below, Mr. Hansen’s conviction was clearly contrary to the principles set forth in *Meyer*. This change in law applies retroactively

to Mr. Hansen's sentence and requires that his sentence be vacated, set aside, or corrected under 28 U.S.C. § 2255.

BACKGROUND STATEMENT

The Court is familiar with this case from Mr. Hansen's trial and sentencing hearings, as well as the Eleventh Circuit's *per curiam* opinion. Our recitation of the background facts is abridged accordingly.

In 1998, a federal grand jury in the Southern District of Georgia, Brunswick Division, returned a 42-count indictment against Mr. Hansen and his codefendants. The indictment charged Mr. Hansen with violations of the federal conspiracy statute, 18 U.S.C. § 371 (count 1); the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A) ("CWA") (counts 2-21); and RCRA, 42 U.S.C. §§ 6928(d)(2)(A) and (e) (counts 22-34). The last RCRA count (34) charged Mr. Hansen with knowing endangerment.

While the CWA has a provision allowing for RCO liability under the appropriate circumstances, *see* 33 U.S.C. § 1319(c)(6), RCRA does not. Moreover, the legislative history to RCRA's knowing endangerment provisions reflects the clear intention that corporate managers and officers *not* be subject to vicarious liability for the unlawful conduct of employees. *See* H.R. Conf. Rep. No. 96-1444, at 39-40 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 5039 ("[R]esponsibility for the felony of criminal endangerment should properly be confined only to those persons who themselves have actual knowledge of the danger resulting from their conduct. A supervisor, for example, who personally lacks the necessary knowledge, should not be criminally prosecuted for knowledge that only his subordinates possessed.") By contrast, the

RCO instruction in this case permitted a conviction if Mr. Hansen "failed to detect" the unlawful actions. The "failure to detect" standard was well below the standard Congress expressly established, and undermined Congress's intent to reserve RCRA's knowing endangerment statute for "the occasional case where the defendant's knowing conduct shows that his respect for human life is utterly lacking and it is merely fortuitous that his conduct may not have caused a disaster." H.R. Conf. Rep. No. 96-1444, at 38 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5038.

As this Court concluded at Mr. Hansen's sentencing, the evidence established that Mr. Hansen "was never directly involved in the discharging or dumping of hazardous waste, nor did he order such conduct to take place," and, further, was not located in Georgia but New Jersey. The government argued that as CEO he should have allocated additional funds for repairs and maintenance at the Brunswick plant, but offered no proof that those funds existed. Indeed, in 1991, before Mr. Hansen joined LCP, Hanlin, the parent corporation, filed a voluntary bankruptcy petition, becoming a Chapter 11 debtor-in-possession, with pre-petition obligations exceeding \$100 million. *Hansen*, 262 F.3d at 1227. The company remained in bankruptcy throughout the relevant period, during which time the bankruptcy code severely restricted management's ability to allocate the bankruptcy estate's assets, or to assume new debts, for maintenance, repairs, and environmental compliance. *Id.*

Mr. Hansen nonetheless found additional funds for repairs. Maintenance spending increased under Mr. Hansen's management, contrary to the government's allegations. First, he "attempted to find additional funds by selling excess equipment and reducing the payroll but the

funds remained limited.” *Id.* Second, under an asset purchase agreement negotiated primarily by Mr. Hansen in the late summer of 1993, the plant’s former owner, Allied Signal, and another investor, Holtrachem, made a multimillion dollar advance against the purchase price for improvements primarily at the Brunswick plant. *Id.* 1230-31. Finally, contrary to the government’s argument that Mr. Hansen “denied” requests for funds to make repairs at the Brunswick plant, evidence introduced at the sentencing hearing showed that he directed that such requests be fulfilled. For example, in response to a memorandum received from Al Taylor regarding “small parts needed for cell repair,” Mr. Hansen instructed: “Mike, High priority to get funded. Help Al T[aylor] out as soon as practical. Thanks, R[andall].” (Document attached at Tab A(1).)

At trial and on appeal, the government argued that, because of the lack of funds available for repairs, Mr. Hansen should have caused LCP to cease operating the Brunswick plant before February 1994, when it was shut down. As acting CEO, however, Mr. Hansen did not have authority unilaterally to close the plant. The government’s own witnesses testified that only the Board of Directors could close the Brunswick plant, and even that was subject to the approval of the creditors’ committee and bankruptcy court. *Id.* at 1238. As the Eleventh Circuit stated, the “ultimate decision-making for all major projects, capital and extraordinary expenditures,” including whether to shut down or cease operations at any particular plant, “were subject to the approval of the Board and the bankruptcy creditor’s committee and court.” *Id.* at 1227-28. Furthermore, a government witness, Hugh Croom, testified that Mr. Hansen at least once sought to close the plant in 1993 but was denied authority to do so by the Board. R19-23.

Faced with the undisputed fact that Mr. Hansen could not have closed the plant by himself, the government has argued that he nonetheless caused the CWA and RCRA violations, or conspired to commit them, by concealing information from the Board about the number of excursions at the Brunswick plant, thereby duping the Board into continuing operations at Brunswick. The government's only evidence at trial to support this theory was the immunized testimony of James Mathis, who was a Board member, Chairman of LCP's Environmental Committee, and Chairman pro tem of the Board during most of 1993. Mr. Mathis testified that the information Mr. Hansen provided to the Board, "indicated that, really, compliance was not a problem" and that "there were really no excursions of any significance going on." *Id.* at 1238 & n.27. The Eleventh Circuit stated this "evidence indicates that [Mr. Hansen] apparently misled [the Board] into believing that environmental compliance was not a problem." *Id.* Indeed, this seemed to be essentially the closest the appellate court could come to identifying *anything* that in its view could have supported the notion that Randall Hansen was responsible for the environmental excursions in light of the uncontested evidence that closing the plant was a Board and Bankruptcy Court decision.

In fact, however, documents prove that the Board decided to continue operating the Brunswick plant *after* receiving information from *Mr. Mathis* about the number of excursions during the period January 1 to November 11, 1993. Specifically, on November 30, 1993, Mr. Mathis circulated a memorandum to the Board concerning the "Brunswick situation" in which he stated that the "thing that is causing much anguish by GAD-NR is the sporadically high rate of mercury releases since mid-August." (Document attached at Tab A(2).) Mr. Mathis appended a

chart to his memorandum "depicting the releases" from January 1 through November 11, 1993, which reflected a "dramatic worsening of results" beginning in mid-August. The November 30, 1993 memorandum from Mr. Mathis further advised his fellow members of the Board that "[f]ortunately the releases have been low the past several days."¹

After receiving Mr. Mathis's memorandum with data on the year to date mercury excursions at Brunswick, the next day, December 1, 1993, the Board convened during a conference call, and voted not to shut down the plant. In a memorandum to the files dated December 7, 1993 on the subject of the "December 1, 1993 Conference Call with RHansen, RHill, JMcKinney and Board of Directors," A. Patrick Nucciarone, Esq., wrote that, "*[a]fter expressing concern about past permit exceedences, the Board concluded that it should not shut down the plant until further information developed because of the fact that a plant shut down may exacerbate other environmental problems and may prevent the acquisition by Allied and HoltraChem which are currently funding the plant upgrade and site remediation.*" (Document attached at Tab A(3).) These documents refute the argument – central to the government's case against Mr. Hansen and the Eleventh Circuit's affirmation– that he caused the violations at Brunswick by concealing information about compliance from the Board, which, in fact, voted to keep the plant operational after receiving such data from Mr. Mathis. Even Judge Amanda Williams visited the site in late 1993, at which time the Georgia DEP withdrew its motion to close the plant, commending LCP on its "extraordinary" efforts to improve compliance.

As the Court is aware from the many letters received prior to Mr. Hansen's sentencing

¹ Documents confirming these facts are attached at Tab A hereto.

hearing, one of Mr. Hansen's numerous character witnesses (who did not testify at trial as such but submitted letters on behalf of Mr. Hansen prior to his sentencing), was Hugh Croom. Mr. Croom, the former Brunswick manager, did testify at trial for the government, as its first witness, but later wrote to the Court asking for leniency for Mr. Hansen. At trial he also testified that Mr. Hansen was "just as concerned as we were about the problems" and "did the best he could to help us." R19-50. After making reductions to the offense levels but reluctantly denying Mr. Hansen's request for a downward departure ("if I knew of an appropriate way to really depart, I would do so."),² the court sentenced him to serve 46 months of incarceration and to pay a \$20,000 fine. Mr. Hansen has paid the fine and served almost a year of incarceration. His sentence was dramatically extended under the Guidelines by the knowing endangerment conviction, for which the evidence at trial was particularly weak, if not directly contradictory:

To minimize the workers' risk of skin irritations and burns, LCP held routine safety meetings, encouraged and received safety inspections, and provided the employees with training, protective equipment to preclude skin contact, and first aid stations and showers to relieve inadvertent contact. All employees, including those assigned to the cellrooms, were authorized to work elsewhere in the plant if they were concerned about their safety.

Hansen, 262 F.3d at 1227. The Eleventh Circuit upheld the conviction on the basis of water having accumulated on the cell room floors (while Mr. Hansen was in New Jersey), and the testimony of the government's expert that the caustic water on the floors could in theory have been fatal if one were to fall in and be unable to get out, and not be taken out by another person (which of course never happened). *Id.* at 1240. Indeed, the one person to testify that he did on

² June 2, 1999 Sentencing Tr. at 78 (excerpts attached as Tab B).

one occasion fall into the sump and come into contact with the caustic water admitted that he simply showered off and returned to work, never reported the incident to the plant nurse, and could not remember the decade in which the incident took place. *Id.* at 1227 n.6.

The judgment became final on June 3, 2002, when the Supreme Court denied Mr. Hansen's petition for a writ of certiorari.

ARGUMENT

I. the supreme court has changed the standard for vicarious corporate officer liability

When an intervening change in law is such that the defendant was punished "for an act that the law does not make criminal," the new rule is entitled to retroactive application. *Davis v. United States*, 417 U.S. 333, 346 (1974). Thus, a conviction that has become final may nonetheless be collaterally attacked on the basis of such a subsequent change in substantive law under 28 U.S.C. § 2255. *E.g.*, *United States v. McKie*, 73 F.3d 1149, 1152-53 (D.C. Cir. 1996).

In *Meyer*,³ the Supreme Court reversed a decision by the Ninth Circuit imposing vicarious liability on a corporate shareholder and officer for an employee's unlawful acts. 123 S. Ct. at 828. The case, which arose under the Fair Housing Act ("FHA"), involved claims against David Meyer, an officer and sole shareholder of Triad, Inc., a real estate corporation. *Id.* A Triad salesman, Grove Crank, was alleged to have prevented the Holleys from obtaining a house for discriminatory reasons. The Holleys sued Meyer, claiming that he was vicariously *civilly* liable for Crank's unlawful actions. The Ninth Circuit recognized that "under general principles of tort

³ The Supreme Court decided *Meyer* on January 22, 2003.

law corporate shareholders and officers usually are not held vicariously liable for an employee's action," but nonetheless interpreted the FHA to impose such liability. *Id.* The Ninth Circuit stated (in language similar to that used to affirm the RCO instruction in this case) that, in his capacity as Triad's sole shareholder and officer, Meyer had (1) "the authority to control the acts" of a Triad salesperson, and (2) "did direct or control, or had the right to direct or control, the conduct" of a Triad salesperson. *Id.* The Ninth Circuit further held that, even if Meyer neither participated in nor authorized the discrimination in question, "that control" or "authority to control" is "enough ... to hold Meyer personally liable." *Id.*⁴

The Supreme Court, in reversing the Ninth Circuit's decision, stated that "traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Id.* at 829. Moreover, absent "special circumstances it is the corporation, not its owner or officer, who is the principal or employer, and thus subject to vicarious liability for torts committed by its employees or agents." *Id.* The Supreme Court further rejected the Ninth Circuit's extension of vicarious liability to corporate officers, stating that it "has applied unusually strict rules only where Congress has specified that such was its intent." *Id.* In the case of the FHA, "Congress said nothing in the statute or in the legislative history about extending vicarious liability" to corporate officers. "And Congress' silence, while permitting an inference that Congress intended to apply

⁴ Similarly, the RCO instruction in this case, directed the jury to find Randall Hansen guilty of knowing endangerment if (1) the violation "occurred under his area of authority and supervisory responsibility"; (2) he "had the power or capacity to prevent the violation"; and (3) he "acted knowingly in failing to prevent, detect or correct the violation." *Hansen*, 262 F.3d at 1252.

ordinary background tort principals, cannot show that it intended to apply an unusual modification of those rules." *Id.* (emphasis added).

The Supreme Court's decision in *Meyer* makes clear that an extension of vicarious liability can occur only where Congress "has specified that such was its intent." This case is even more clear than *Meyer*. Not only did Congress *not* express an intent to impose vicarious liability, it expressed its intent to the contrary. The legislative history for RCRA's knowing endangerment provisions made clear that Congress intended *not* to impose RCRA's strict felony sanctions vicariously and, indeed, that its intent was only to impose liability under the most egregious of circumstances.⁵ Congress expressly stated that it did *not* intend § 6928(e) (the RCRA knowing endangerment provision) to criminalize managerial negligence, that is, omissions based on knowledge that a defendant "should have had, could have had, or would have had under various circumstances." S. Rep. No. 96-172 at 39, *reprinted in* 1980 U.S.C.C.A.N. 5019, 5038. And Congress further stated that it *did not* intend the imposition of criminal liability under § 6928(e) to attach to corporate officers who were "making difficult business judgments" or "for errors in judgment made without the necessary scienter, however dire may be the danger in fact created." *Id.* at 37-39, *reprinted in* 1980 U.S.C.C.A.N. at 5036-5038. One is hard pressed

⁵ Congress understood the difference between permitting a responsible corporate officer to be held liable and how to express its desire that such be permitted. In the Clean Water Act, there are provisions that expressly permit "responsible corporate officers" to be convicted. *See, e.g.*, 33 U.S.C. § 1319(c)(6). By contrast, no RCRA provision contains such language, and, as discussed herein, the legislative history behind RCRA's knowing endangerment provisions demonstrate that it intended such vicarious liability not to attach. Although Mr. Hansen was convicted for Clean Water Act violations also, had he only been convicted on those counts, under the Sentencing Guidelines, he would no doubt have already served out his sentence as of the filing of this petition.

to describe Mr. Hansen's business quandary in 1993 otherwise; while the Board and Creditors decided to keep the plant open, he was hamstrung by bankruptcy proceedings in his ability to fund repairs. Instead, Congress intended the provision for "the occasional case where the defendant's knowing conduct shows that his respect for human life is utterly lacking and it is merely fortuitous that his conduct may not have caused a disaster." *Id.* at 40, *reprinted in* 1980 U.S.C.C.A.N. at 5037-5038. These standards are not only facially in contrast to the evidence at trial but certainly cannot form the basis for the Court to conclude, as it would have to under *Meyer v. Holley*, that Congress clearly expressed its intent that vicarious criminal liability be imposed under this statute on corporate officers rather than on the corporation itself.⁶

This Court itself at sentencing characterized the basis for Randall Hansen's conviction in terms describing negligence rather than the willful conduct that Congress explained was necessary to support a knowing endangerment conviction. For example, the Court stated that "The willful violation of the EPD permits were done without the prior consent or knowledge of [Randall Hansen]." It explained that Randall Hansen "failed to act in an appropriate and reasonable manner when various violations were reported to him... [but] he was notified of these violations after the fact. And his failure to act in a reasonable manner caused further harm to the environment." July 1, 1999 Sentencing Tr. at 6.

These circumstances could not be farther from those described by Congress in creating

⁶ The dearth of cases brought against individuals under this statute reflects the extreme nature of the conduct it was intended to punish. The government was never able to cite to a single case where an individual's conviction under § 6928(e) was upheld under even remotely analogous facts.

the statute under which Randall Hansen was convicted, as described above, and for which conviction he is serving out a lengthy sentence that is inconsistent with the Supreme Court's most recent pronouncement regarding vicarious corporate officer liability in *Meyer v. Holley*. The Court's reasoning in *Meyer* applies with even greater force in the criminal context than the civil context, where the repercussions of extending liability have infinitely greater implications on personal liberties.

**II. THE COURT DID HAVE THE DISCRETION TO GRANT A
DOWNWARD DEPARTURE BECAUSE THE CONDUCT AT ISSUE WAS
"ABERRANT BEHAVIOR"**

At the initial Sentencing Hearing in this matter, the Court indicated that it was particularly troubled by Randall Hansen's case. After hearing testimony regarding Mr. Hansen's exemplary character, family life and past conduct, the Court stated that the letters from friends and evidence before him "describe a life such as your wife did here, something that somehow is foreign to what finally happened here." The Court went on to add that, under those circumstances, "I do not mind saying, if I knew of an appropriate way to really depart, I would do so." June 2, 1999 Sentencing Tr. at 77-78. The Court's observations were, of course, correct. Randall Hansen had an impeccable record of achievement and community service, was a devoted family man with two young children in whose lives he remained intensely involved. Since his conviction, while his appeals were pending, Mr. Hansen devoted much of his time to helping his wife care for her ailing father (who has since passed away during Mr. Hansen's incarceration).

The Court apparently believed that it did not have the discretion to depart under the

Guidelines for conduct that was acknowledged to be "foreign" to Mr. Hansen's prior conduct and character. The Guidelines have since been revised to make clear that a departure based on "aberrant behavior" is appropriate. See Guideline §5K2.20, made effective November 1, 2000. This departure applies when "the defendant's criminal conduct constituted aberrant behavior." This provision applies unless the case involved: "serious bodily injury or death" (this case did not); discharge of a firearm or dangerous weapon by defendant (not applicable); serious drug or drug trafficking offense (not applicable); a defendant with more than one criminal history point (not applicable); or a defendant with a prior felony conviction (none here).

Application Note 2 for §5K2.20 states that "In determining whether the court should depart on the basis of aberrant behavior, the court may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the offense. These factors warranted application of a downward departure in Randall Hansen's case. He had an exemplary record of employment and prior good works. Indeed, the record established that, with his M.B.A. from Harvard University, he had left a more lucrative career path at his father's urging to come to the assistance of LCP while it was in financial straits. Indeed, his cost-cutting actions included cutting his own salary to help raise money to improve plant conditions. It was clear that, as the evidence established at trial and the Court recognized (July 1, 1999 Sentencing Tr. at 5), his motivation was to find a buyer with the resources to handle the environmental and other problems plaguing the plant. Moreover, after the plant was closed, Randall sought funds from the Bankruptcy Court to remediate the conditions and effect a safe shutdown, but those funds

were denied. *Hansen*, 262 F.3d at 1231. He nevertheless was able to secure some funds from the prior owners to do everything possible to mitigate any harm from the plant's operation, though decisions as to expenditures for capital improvements were Board decisions that had to be approved by the Bankruptcy Court. *Id.* at 1227, 1231.

The Court was mistaken that it did not have the authority and discretion to depart from the guidelines. Randall Hansen should be resentenced accordingly.

III. conclusion

For the foregoing reasons,⁷ the Court should vacate the conviction of Randall Hansen under all counts alleging violations of RCRA. Alternatively, the Court should apply the Sentencing Guidelines to reduce his sentence because the conduct alleged was aberrant behavior.

Dated: June 2, 2003

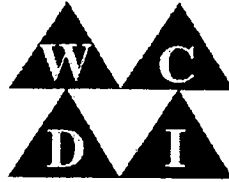
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⁷ In addition to the argument contained in this Memorandum, Mr. Hansen adopts in support of his Motion, and incorporates by reference as if fully set forth herein, the arguments made in the "Memorandum of Law in Support of Motion Filed Pursuant to 28 U.S.C. § 2255" by Mr. Hansen's codefendant, Christian A. Hansen to the extent that they are applicable to him.

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August 1, 2003

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Re: Request for Public Comment

Dear Commission:

The following sets forth our public comment for the amendment cycle ending May 1, 2004, and possibly continuing into the amendment cycle ending May 1, 2005:

Additional Priority Insert

"In the event such recommendations made by the Commission's Organizational Guidelines Advisory Group require substantial revisions to Chapter Eight of the Guidelines, the Commission shall consider the need for presenting a national symposium covering such Chapter Eight Guidelines revisions and the compliance management required by the Sarbanes-Oxley Act of 2002."

UNITED STATES SENTENCING COMMISSION

Page Two

August 1, 2003

Thank you very much for the opportunity to provide the above public comment.

Sincerely,

/s/

L.A. Wright

Legal Criminalist/Consulting Expert

/law

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August 12, 2003

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PUBLIC COMMENT SUMMARIES (LATE SUBMISSIONS)

Federal Public and Community Defenders (FPCD)

Jon M. Sands

Chair, Federal Sentencing Guidelines Committee of the FPCD

SECTION I

A. Increasing Rate of Downward Departures

When making decisions to change the guidelines, the FPCD recommends that the Commission only increase sentences "where necessary, preserve judicial discretion whenever warranted, and act solely based on the facts, fully explaining the reasons for the Commission's actions in the official commentary to the guidelines." The FPCD recognizes that the rate of downward departures has been steadily increasing, but does not believe that this is due to an "epidemic of leniency among federal judges." The FPCD believes that 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." The FPCD goes on to say that most downward departures are controlled by the government in one form or another, and cites as an example the Southern District of New York where the standard plea agreement in white collar cases requires the defendant to waive the right to seek a downward departure.

1. Fast Track Practices

The FPCD argues that fast-track departures are not limited to immigration cases and are not standard from district to district or even within a single district. In the Tucson division in the district of Arizona, for example, fast track departures are stated to be based on a "plea agreement."

a. Departures Pursuant to Plea Agreement

The FPCD cites the Commission's statistics that departures "pursuant to plea agreements" account for nearly 20% of all departures nationally, and states that the majority of these departures will presumably be eliminated once the Commission promulgates an "Early Disposition" departure as required by the PROTECT Act. The FPCD goes on to argue that 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. The FPCD believes that 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.

The FPCD contends that 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"

The FPCD notes that in the Phoenix division of the district of Arizona, the fast-track practice is slightly different, departures pursuant to fast-track agreements are granted for the stated reason that the guidelines have not accounted for the "totality of the circumstances." The FPCD believes the Commission's 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%. The FPCD believes that other districts may use formulations similar to those 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

The FPCD also notes that the very low rate of upward departures does not reflect a judiciary intent on soft-on-crime sentences.

SECTION II

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

The FPCD believes that the Commission should preserve judicial discretion whenever possible. It asserts Congress did not explicitly direct the Commission to abolish or restrict judicial discretion, but directed it to "reduce the incidence of downward departures" and left intact the statutory authority allowing district judges to depart when warranted. The FPCD thinks that changes that broadly limit the authority of district court judges to depart might be struck down as

inconsistent with the statutory mandates in §§ 3553(a) & (b). The FPCD also believes that drastic restrictions on the district court's discretion to depart would transfer even more power to federal prosecutors, whose charging decisions would control the outcome even more than at present. The FPCD further states 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." citing *United States v. Mistretta*, 488 U.S. 361, 371 (1989). The FPCD concludes that 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 FPCD recognizes as one of the central functions of the Commission 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. The FPCD argues that "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 nor replaced by the PROTECT Act - without risking a constitutional challenge."

The FPCD thinks that 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. The FPCD argues that alternatively the Commission might 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 FPCD goes on to say that the Commission should limit departure authority only if it determines that there is a systemic failure on the part of district judges to comply with statutory or guideline commands. Failure of individual judges to abide by the guidelines should be corrected through the appeal process, which the Department of Justice will monitor with more rigor under the new directive implemented by Attorney General Ashcroft.

The FPCD thinks that the enhanced specificity requirement in § 3553(c) 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). The FPCD believes that this will lead district judges either to realize that a departure is not warranted or to articulate more clearly why the departure is warranted, which will allow the Commission to more readily review and revise the guidelines.

The FPCD also believes that the newly expanded de novo standard of review will serve the same self-policing purpose by appellate courts. 18 U.S.C. § 3742(e). The FPCD concludes that 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.

1. Acceptable Rates of Departures

While the Sentencing Reform Act of 1984 contemplates a departure rate of 20%, Congress has left for the Commission to decide what rate of departure is appropriate. The FPCD suggests that an inference can be drawn from § 3553(b) that the number of departures that may be granted is limitless.

The FPCD says that the Commission should be cautious in determining how much of a reduction in the rate of departures would amount to “substantial” reduction. The FPCD suggest that the Commission should await making further changes until after it 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 FPCD recommends that the Commission implement the directive to “substantially reduce” departures by means other than reducing judicial flexibility.

C. *The Incidence of Downward Departures*

Contrary to the Commission’s statistics, the FPCD believes that the rate of departures granted by federal judges have remained relatively constant from 1995 to 2001. The FPCD contends that the increased departure rates evidenced in the Commission’s statistics are directly related to a spike in immigration cases in border districts. In the following sections of its comments, the FPCD addresses reasons for the various departures based on its own experience.

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*. The FPCD believes that the departures in the border states include marijuana “backpack” cases in addition to immigration cases.

b. Standard of Review & Specificity of Ground for Departure

The amendments to the standard of review and the specificity requirements will also reduce the number of downward departures. The FPCD asserts that the cases that have been decided since the effective date of the PROTECT Act support its 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.

2. Criminal History Departures

The incidence of criminal history downward departures has decreased in recent years from 15.1% in 1995 to 11.9% in 2001. Criminal history departures are necessary for reasons identified by the Commission in the commentary to § 4A1.1. Criminal history departures are especially necessary in light of the state jurisdictions that have recently admitted to engaging in racial profiling. The FPCD argues that because departures in this area have been used sparingly by district courts, there is no need to reduce discretion. If anything, the FPCD believes that the Commission should add language encouraging consideration of disparate state practices.

The FPCD believes that the Commission should, however, address the provision for counting minor offenses under §4A1.2(c), which it argues would reduce a number of criminal history departures.

The FPCD suggests that the Commission should await the results of its two-year recidivism study before making changes to limit discretion to depart under the criminal history provision.

3. Family Ties

The rate of departures based on family ties has diminished throughout the years from 6.2% of all departures in 1996 to 3.8% in 2001. The FPCD does not believe that discretion to grant this departure should be narrowed. To the contrary, it suggests that this departure is not being used often enough in light of the *Family Unit Demonstration Project* passed by Congress in 1994.

The FPCD notes that 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. The FPCD believes that the departure is applied too strictly to deny downward departures to persons who are

suffering from diminished capacity, which in many ways does contribute to the commission of the offense.

This departure is particularly appropriate because person who suffer from mental disabilities are less deserving of punishment and less likely to be deterred by a lengthier sentence.

The FPCD argues that this departure is not overused and district courts are not abusing or improperly granting departures on this ground.

5. Substantial Assistance Departures

The FPCD points out that the rate of substantial assistance departures has decreased, while the number of safety valve cases has increased. The FPCD believes that the Commission needs to require the government disclose its reasons for granting and denying departures before any rational inferences can be drawn.

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. The FPCD believes the increased rate of departures are primarily in the Southwester border districts. Similarly, the FPCD believes that the increase in downward departures in marijuana cases is due in large part to the marijuana importation cases prosecuted in the Southwestern border districts.

The FPCD provided a table of departure statistics in drug cases taken from statistics in the Commission's annual report.

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

The FPCD argues that the drug guideline, which is driven by quantity, does not sufficiently differentiate among the great range of culpability of persons engaged in drug trafficking. The FPCD notes that the only provision for differentiating for the broad range of activity and culpability is the role in the offense adjustment, which it argues is not often used. The FPCD suggests that the Commission's recent drug cap may reduce the incidence of downward departures in these cases.

7. Unmentioned Factors

The FPCD states that these departures are at the heart of judicial flexibility and allow judges to consider each person as an individual. The FPCD claims that 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. The FPCD does not believe that this is a ground that is overly used or abused by district courts.

8. Departures in White Collar Cases

The FPCD argues that 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 FPCD believes that the current rate of departure in this area is modest 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.

D. Need to Explain Commission Action in Official Commentary

The FPCD suggests that the Commission should explicitly explain its actions in response to the congressional directive and in general. Additionally, the FPCD recommends that the Commission include more explicit explanations for its policy choices in the official commentary of the guidelines.

CONCLUSION

The FPCD recommends that, in responding to the PROTECT Act, the Commission act by scrupulously adhering to the central or “intelligible principles” of the Sentencing Reform Act.

Probation Officers Advisory Group (POAG)
Concord, NH

THE PROTECT ACT

The Probation Officers Advisory Group (POAG) met in July to discuss the directives of the PROTECT Act and other issues of concern to probation officers around the country. In that meeting, the POAG noted that downward departures are appropriate when valid reasons exist, and probation officers do not want to lose the ability to recommend departures to the courts.

Further, the POAG believes that while Commission staff presented information regarding the rates of downward departures, significant data found only in sentencing transcripts is missing, and it believes this information would allow Commission staff to conduct a more detailed analysis regarding that rate. It noted that while courts were perhaps stating more specific departure findings on the record, since the transcripts are not provided to the Commission, those specified reasons cannot be determined. The POAG thinks the new proposed Statement of Reasons might help Commission staff gather more accurate departure information, noting that the new form includes blocks to be checked for specific departures and adds a section entitled "Additional Supporting Explanation." The POAG believes the form will make Commission coding more accurate.

The POAG does not believe the category marked as "plea agreements" is a valid reason for departure. The POAG suspects that binding stipulations for drug weight or other factors might be cited in the plea agreement which, if accepted by the court, would cause the judgment in a criminal case to reflect a downward departure pursuant to the plea agreement. Further, the POAG notes that this downward departure involved either the explicit or implicit approval of the Department of Justice. Therefore, according to the POAG, while it appears this is a "judicial departure," perhaps it should be categorized as a downward departure which involves the government's participation, similar to §5K1.1.

Additionally, the POAG discussed the appropriateness of a standard downward departure in immigration cases, and considered a specific offense characteristic for defendants subject to deportation, but concerns were raised that not all deportation cases are for simple re-entry offenses. Thus, the POAG agreed a specific offense characteristic would be difficult to draft. However, the POAG recognizes that if this departure was added to Chapter 5 and addressed separately from "judicial departures," similar to §5K1.1, the rate of other "judicial departures" would be significantly reduced as the authority for this departure would rest with the government.

Issue for Comment 1

The POAG wishes to emphasize that downward departures under §5K2.0 are appropriate and should not be more restrictive, but it recognizes the PROTECT Act mandates a reduction in downward departures. The POAG believes additional wording could be added to strengthen the

application instructions of this guideline, or perhaps some clarifying examples of appropriate and inappropriate departures could be included.

Issue Comment 2

The POAG recommends clarifying the purpose of §5H as to whether it addresses departures or guideline sentences within the applicable range. The POAG requests guidance and examples as to what is outside the heartland as it relates to departures for a combination of factors involving §5H. The POAG notes the specificity of the guideline instructions for Aberrant Behavior and Diminished Capacity and suggest similar language in §5H would be beneficial in reducing the number of inappropriate departures.

Issue for Comment 3

The POAG argues that while Commission data preliminarily indicates that the over-representation of the defendant's criminal history is a frequent basis for departure, there is currently insufficient data to determine what specific factors the courts are relying on in making these departures. In its view, simply adding up criminal history points does not necessarily provide the court with an idea of whether an individual is a violent recidivist who needs to be treated more severely than another defendant with the same number of points. The POAG believes the Commission should continue to pursue a detailed analysis of the reasons behind the downward departures before making any decisions in restricting these departures. In addition, the POAG strongly believes the Commission needs to review Chapter 4 in its entirety, noting that the concepts of "related cases," §4A1.2 issues, recency points, revocations, and the staleness factor should be addressed.

Issue for Comment 4

The POAG does not think the guidelines require any more restrictive guidance, however, it believes specific examples in those sections suggesting a downward departure could be helpful.

Issue for Comment 5

The POAG does not believe any of the aforementioned departure issues should be prohibited.

NOTICE OF PROPOSED PRIORITIES

1. Involuntary Manslaughter

The POAG believes this guideline warrants change as the conduct for this type of crime can vary substantially. In its view, the guideline does not provide for any specific offense characteristics, and it believes consideration should be given as to whether the defendant has a prior history of assaultive behavior, whether a weapon was used, or the number of victims injured in the offense.

2. Immigration

The POAG believes the ambiguous language in the guideline needs to be corrected because of the large number of immigration cases and because this is frequently a question on the Helpline.

Additionally, the POAG suggests that if a defendant agreed to waive deportation, there could be a two to four level reduction as a specific offense characteristic, which could impact the downward departure rate. If a defendant was eligible for the Early Departure Program, then this specific offense characteristic should not be applied.

3. Review of the Limitation on the Base Offense Level

The POAG believes that no application difficulties with the specific offense characteristic regarding the mitigating role cap in the drug guideline exists. However, the POAG has ongoing concerns, and believes more examples or guidance are needed in Chapter 3 regarding this issue. It further notes that this is a circuit conflict which it wishes the Commission would address.

TENTATIVE ISSUES

The POAG suggests that a two level reduction should be added in §2D1.11 if an offender meets the criteria for the safety valve because defendants who are similarly situated as those sentenced pursuant to §2D1.1 are not receiving this benefit.

Finally, the POAG believes an index to Appendix C should be created to ease research regarding all amendments.

The Honorable John W. Bissel, Chief Judge
United States District Court
District of New Jersey
Newark, New Jersey

THE PROTECT ACT

Judge Bissel notes that the commentary to §5K2.0 needs to be revised in light of the PROTECT Act and its impact on the holding of *Koon v. United States*, 581 U.S. 82 (1996).

Judge Bissel suggests the following changes to Chapters Two, Three and Four:

- the number of criminal history points needed to fall into a particular category and adjustments in drug quantities needed to trigger certain base offense levels;
- mitigating role adjustments ranging from 3 to 5 under §3B1.2, rather than 2 to 4;
- an examination of §4A1.1(d) and (e) - if the numerical impact of these subparts could be lowered, or if they could be applied only to higher criminal history categories, this might reduce the need for downward departures due to criminal history overstatements;
- expand provision in §4A1.3 dealing with the situation where “a defendant’s criminal history category significantly over-represents the seriousness of a defendant’s criminal history or the likelihood that the defendant will commit further crimes.” A focus on the likelihood of recidivism (or lack thereof) in a given case or class of cases could be productive.

Regarding Chapter Five Part H, Judge Bissel believes that some added exceptions, if well-defined and clearly justified, would aid sentencing judges.

Judge Bissel concludes by suggesting that Chapter I, Part A, Subsection 4(b) be reexamined in light of the PROTECT Act and its impact upon the continuing viability of *Koon v. United States*. Judge Bissel notes that the revisiting of this Subsection could result in an elaboration and clarification of the heartland/non-heartland population of cases.

The Honorable James C. Fox, Senior Judge
United States District Court
Eastern District of North Carolina
Wilmington, North Carolina

THE PROTECT ACT

Judge Fox states that it would be helpful if §5K2.0 and the commentary thereto were amended to provide hypothetical situations that might warrant a departure thereunder. Judge Fox believes

that the Commission should provide additional and/or more restrictive guidelines on mitigating factors, particularly those described in other provisions of Chapter 5, Part K, that may warrant a departure. Judge Fox believes that the guideline provisions governing downward departures for criminal history should offer more detailed suggestions as to how the court should structure the departure. Judge Fox notes that the Commission should provide additional and/or more restrictive guidance in §4A1.3 regarding the circumstances under which the court may depart for the over-representation of the defendant's criminal history. Judge Fox notes that a defendant should receive a two-offense level downward adjustment if he has no prior scorable convictions. Judge Fox also notes that the penalties for crack cocaine are disproportionate.

The Honorable Max Rosenn, Senior Circuit Judge
United States Court of Appeals
Third Circuit
Wilkesbarre, Pennsylvania

THE PROTECT ACT

Judge Rosenn believes that §401(m) of the PROTECT Act runs the serious risk of undermining judicial autonomy and encouraging one-size-fits-all sentencing. Judge Rosenn believes that a case-by-case approach to sentencing would be more effective in protecting children and in upholding the rights of criminal defendants and society as a whole.

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Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
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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-

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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)

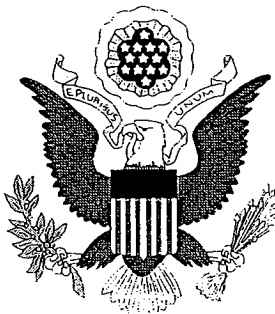
PROBATION OFFICERS ADVISORY GROUP

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August 1, 2003

The Honorable Diana E. Murphy, Chair
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Dear Judge Murphy:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on July 23 and 24, 2003 to discuss the directives in the PROTECT Act, issues pertaining to the Commission's "Notice of Proposed Priorities," and other areas of concern from probation officers around the country.

The primary focus of our meeting addressed the PROTECT Act directives and the Commission's request for public comment. In a general discussion, POAG noted that downward departures are appropriate when valid reasons exist and officers do not want to lose the ability to recommend departures to the courts. While Commission staff presented information regarding rates of downward departure, POAG believes that significant data found only in sentencing transcripts is missing. The group believes this information would allow staff to conduct a more detailed analysis regarding the departure rate.

One downward departure area that surprised members involved the category marked as "plea agreement." The group does not believe this is a valid reason for departure. POAG discussed whether Chapter 6 should be a guideline and not a policy statement to ensure that the departures agreed upon are factually and legally based. It was noted that the Courts were perhaps stating more specific departure findings on the record, however, since sentencing transcripts are not provided to the Commission, the reasons specified can not be determined. The group suspects that binding stipulations for drug weight or other factors were cited in the plea agreement which if accepted by the Court, would cause the Judgement in a Criminal Case to reflect a downward departure pursuant to the plea agreement. It is thought that the new proposed Statement of Reasons might help Commission staff gather more accurate departure information. The new form includes blocks to be checked for specific departures and adds a

section titled "Additional Supporting Explanation." The form should make Sentencing Commission coding more accurate. It was also noted that this downward departure category involved either the explicit or implicit approval of the Department of Justice. Therefore, while it appears this is a "judicial departure" perhaps it should be categorized as a downward departure which involves the government's participation, similar to §5K1.1.

POAG discussed the appropriateness of a standard downward departure in immigration cases. The group recognizes in districts with a high volume of immigration cases that departures are prevalent, while defendants in districts with few immigration cases will likely not be privy to these benefits, thus creating sentencing disparity. The possibility of a specific offense characteristic for defendants subject to deportation was considered but concerns were raised that not all deportation cases are for simple re-entry offenses. As many are serious drug offenses, POAG realized a specific offense characteristic would be difficult to draft. That being said, POAG recognizes that if this departure was added to Chapter 5 and addressed separately from "judicial departures," similar to §5K1.1, then the rate of other "judicial departures" would be significantly reduced as the authority for this departure would rest with the government.

Issue for Comment #1 How should subsection (a) of §5K2.0 be revised?

Once again POAG wishes to emphasize that downward departures under this guideline are appropriate and should not be more restrictive. However, we recognize the PROTECT Act mandates a reduction in downward departures. POAG believes as to §5K2.0, additional wording could be added to strengthen the application instructions of this guideline or perhaps some clarifying examples of appropriate and inappropriate departures could be included.

Issue for Comment #2 – How, if at all, should Chapter Five, Part H be revised?

POAG recommends clarifying the purpose of §5H as to whether it addresses departures or guideline sentences within the applicable range. The group requests guidance and examples as to what is outside the heartland as it relates to departures for a combination of factors involving §5H. POAG notes the specificity of the guideline instructions for Aberrant Behavior and Diminished Capacity and suggests similar language in §5H would be beneficial in reducing the number of inappropriate departures.

Issue for Comment #3 – How, if at all, should guideline provisions governing downward departures for criminal history be revised?

While commission data preliminarily indicates that the over-representation of the defendant's criminal history is a frequent basis for downward departure, there is insufficient data at the present time to determine what specific factors the courts are relying on in making these departures. POAG hypothesized several possible reasons for this event, including §4A1.2 offenses, the recency factors, as well as related cases. Simply adding up criminal history points does not necessarily provide the court with an idea of whether an individual is a violent recidivist who needs to be treated more severely than another defendant with the same number of points. For example, ten years prior to the instant offense, a

defendant is convicted of theft (for failure to return a videotape); six months later he is convicted of Operating After Suspension and receives a one year probation sentence, and within that one year period, the defendant is convicted of DWI and fined \$500. The defendant's probation for the Operating After Suspension charge is violated and he receives a sixty-day sentence. As a result, this defendant is a criminal history category of III. Since that time period, the defendant has no other countable convictions. Compare that individual with another defendant who is convicted of three separate assaults for assaulting different women over a two-year period within five years of the commission of the instant offense and receives sentences ranging from a fine to twelve months imprisonment. These individuals are both a criminal history category III but represent a different picture to the court. The court needs the flexibility to make departure considerations regarding an individual's criminal history. POAG believes the Commission should continue to pursue a detailed analysis of the reasons behind the downward departures before making any decisions in restricting these departures. In addition, POAG strongly believes the Commission needs to review Chapter 4 in its entirety. Specifically reviewing the concept of "related cases," §4A1.2 issues, recency points, revocations, and the staleness factor should be addressed.

Issue for Comment #4 --Should the Commission provide additional and/or more restrictive guidance for any downward departure authorized in Chapter Two (Offense Conduct) for specific offenses?

POAG does not think the guidelines require any more restrictive guidance, however, the group believes specific examples in those sections suggesting a downward departure could be helpful to the practitioner in applying these departures correctly.

POAG declines to comment on Question #5. The group does not believe that any of the aforementioned downward departure issues should be prohibited.

Notice of Proposed Priorities

Of the thirteen proposed priorities published by the Commission, POAG selected three issues on which the group wishes to provide comment.

Involuntary Manslaughter

POAG believes this guideline warrants change as the conduct for this type of crime can vary substantially. The guideline does not provide for any specific offense characteristics. Consideration should be given as to whether the defendant has a prior history of assaultive behavior, whether a weapon was used, or the number of victims injured in the offense.

Immigration

There was a suggestion by the group that the ambiguous language in the Immigration guidelines needs to be corrected. It appears this is a question frequently asked on the Help Line and Commission staff are aware of the problem. Due to the large number of immigration cases, POAG suggests this language be corrected.

In addition, a suggestion was also made that if a defendant agreed to waive deportation, there could be a two to four level reduction as a specific offense characteristic, which could impact the downward departure rate. However, if a defendant was eligible for the Early Disposition Program, then this specific offense characteristic should not be applied.

Review of the Limitation on the Base Offense Level

The mitigating role cap was discussed by the group and no application difficulties with applying this specific offense characteristic in the drug guideline were noted, however, POAG has an ongoing concern with the definition of mitigating role. The group believes more examples or guidance are needed in Chapter Three regarding this issue and notes that this is a circuit conflict which the group wishes the Commission to address.

Other Issues

POAG suggests that the Commission consider adding a two level reduction in the §2D1.11 guideline if an offender meets the criteria for the safety valve. Defendants who are similarly situated as defendants sentenced pursuant to §2D1.1, are not receiving the benefit of the safety valve. POAG believes this sentencing disparity should be corrected.

The group believes an index to Appendix C should be created to ease application of research regarding amendments

There was discussion by the group about 18 U.S.C. § 545 violations and whether a violation of this statutory provision should be listed in the commentary at §2D1.11.

Closing

We hope you will find our comments beneficial. Please do not hesitate to contact us if you have any questions or need clarification of any issue. We appreciate the opportunity to participate with the Commission in this process.

Respectfully,


Cathy A. Battistelli
Chair

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
JOHN W. BISSELL
CHIEF JUDGE

U.S.D. & COURTHOUSE
P.O. BOX 899
NEWARK, NJ 07101
(973) 645-2517

July 31, 2003

8/7/03
COPY TO JUDGE MURPHY
AND KIM WARELEY
[Signature]

Honorable William T. Moore, Jr.
United States District Court
Old Federal Building
125 Bull Street
Savannah, Georgia 31401

Re: U.S. Sentencing Commission
Request for Public Comment

Dear Judge Moore:

I am writing to you as the Chair of the Committee on Criminal Law's subcommittee on sentencing issues, as requested in Judge Sim Lake's letter of July 18, 2003. I enclose a copy of that letter, assigning numbers to his questions in order to facilitate my answers. I have chosen to make my observations "through the committee". You will note that some of my comments are rather candid (although hardly unique), to assist your subcommittee in evaluating this response. Should you choose to do so, please feel free to incorporate any of my remarks into any presentation from the Committee on Criminal Law responding to the Sentencing Commission's call for public comment.

(1.) The Commentary will have to be revised in light of the Protect Act's general thesis to neutralize Koon v. United States, 581 U.S. 82 (1996), and the enactment of a de novo standard of review for the Court of Appeals reviewing a departure decision.

(2.) None other than is necessary to make sure that the bases for downward departure do not conflict with the Protect Act.

(3.) I have a few suggestions regarding in Chapters Two, Three and Four, although there surely are many others to be considered. Conceptually, it makes inherent sense that if provisions in the Guidelines themselves permit the sentencing judge to reach a just sentencing range, he or she will not have to employ a downward departure in order to do so. Some general adjustments that might be explored are the number of criminal history points needed to fall into a particular category and adjustments in drug quantities needed to trigger certain base offense levels. Mitigating role adjustments ranging from 3-5 under § 3B1.2, rather than 2-4, could also be explored. Also consistent with the approach that modification of the Guidelines themselves to promote fair sentencing can diminish the need for Judges to resort to downward departure, I suggest an examination of Guidelines § 4A1.1(d) and (e). These provide for enhancements of 2-to-3 points based upon whether the defendant "committed the instant offense" while still under a prior sentence or within two years after release from imprisonment on a prior sentence. Of course, those prior convictions themselves are counted in calculating the defendant's criminal history under subpart (a), (b) or (c) of § 4A1.1. Accordingly, a sentencing Judge may, from time-to-time, reach a conclusion that points added under subparts (d) and/or (e) generate an overstated criminal history. If the numerical impact of those subparts could be lowered, or if they could be applied only to higher criminal history categories, that might reduce the need for downward departures due to criminal history overstatements. By way of example, perhaps those aggravating factors would be triggered only in situations where at least 4 criminal history points were accumulated under § 4A1.1(a), (b) or (c). One must remember, however, that these (and any) Guideline adjustments will have to be acceptable to Congress, and much of that depends upon the extent of congressional commitment (as a whole) to the Protect Act's assault on moderate sentencing.

(4.-6.) Because most of the factors listed in Chapter Five Part H describe circumstances "not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range," I would leave that format in place because it seems consistent with current congressional thinking. However, with that opening as a general premise, added exceptions to it (if well-defined and clearly justified) would aid sentencing judges and might get through Congress.

(7.-8.) The Commission should be encouraged to expand the provision in § 4A1.3 dealing with the situation where "a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes." A focus on the likelihood of recidivism (or lack thereof) in a given case or class of cases could be productive.

(9.-10.) As stated in response to question No. 3, to the extent that considerations heretofore used in supporting downward departures can be incorporated into the Guidelines themselves, with point values assigned to them, leading to a direct reduction of either the offense level or criminal history classification, the need to employ downward departures is reduced.

(11.) That question requires intensive study across the board before it can be answered with any authority.

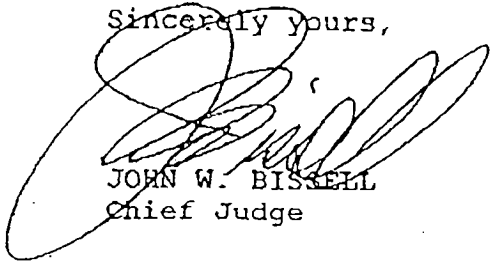
(12.) Chapter 1, Part A of the Guidelines is entitled "Introduction and General Application Principles." Subsection 4(b) of that Chapter addresses the subject of departures. The statements in that Subsection may have to be revisited in light of the focus of the Protect Act and its impact upon the continuing viability of Koon v. United States, 581 U.S. 82 (1996). The revisiting of this Subsection could result in an elaboration and clarification of the heartland/non-heartland population of cases.

(13.) If this is something other than a motion under § 5K1.1 of the Guidelines, I am not familiar with it. However, any such new downward departure should be structured in such a way that it is clearly non-exclusive of others in the instances when it is applied.

Finally, we should all maintain a sense of perspective here. We are dealing with statutory provisions, hastily enacted, that flew under the radar screen when attached to a bill with heavy support. They may not withstand the bright light of congressional debate, should it ensue, regarding the Commission's forthcoming Guideline amendments. Furthermore, most of us over time have granted very few downward departures other than those presented by a government motion under § 5K1.1. While the "Feeney amendments" are an affront to us as District Judges, trained and experienced in imposing just, appropriate sentences tailored as much as possible to a given case, their actual impact may be modest.

Thank you for your attention to my observations. I am at your disposal, should you have any further inquiries.

Sincerely yours,


JOHN W. BISSELL
Chief Judge

cc: Honorable Sim Lake, Chair
Committee on Criminal Law
Judicial Conference of the United States
9353 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, Texas 77002



COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
9535 Bob Casey United States Courthouse
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Honorable Donata W. Ambrose
Honorable William M. Catoe, Jr.
Honorable William F. Downes
Honorable Richard A. Engle
Honorable David F. Hamilton
Honorable Henry M. Herlong, Jr.
Honorable James B. Loken
Honorable John S. Martin
Honorable A. David Muzzone
Honorable William T. Moore, Jr.
Honorable Wm. Fremming Nielsen
Honorable Emmet G. Sullivan

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Honorable Sim Lake, Chair

July 18, 2003

MEMORANDUM TO ALL UNITED STATES JUDGES

SUBJECT: United States Sentencing Commission Request for Public Comment
(URGENT INFORMATION)

RESPONSE DUE DATE: August 1, 2003

The United States Sentencing Commission is seeking public comment in connection with the implementation of Section 401(m) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 or "PROTECT Act" (Pub. Law No. 108-21, 117 Stat. 650 (April 30, 2003)). The Act directs the Commission to review the grounds for downward departure that are authorized by the guidelines; amend the guidelines to ensure that the incidence of downward departures is "substantially reduced"; promulgate a policy statement authorizing a downward departure of not more than four levels if the government files a motion pursuant to an early disposition program; and make other conforming amendments, including a revision of Chapter 1, Part A, and Policy Statement 5K2.0 of the sentencing guidelines. The request for comments can be found on the United States Sentencing Commission website at <http://www.ussc.gov>. Comments are due to the Commission by August 1, 2003.

The Criminal Law Committee encourages all judges to carefully review several specific questions that have been posed by the Commission and to forward written comments directly to the United States Sentencing Commission, One Columbus Circle, NE, Suite 2-500, Washington, DC 20002-8002. In addition, the Committee expects to submit comments to the Commission on behalf of the judiciary. The Committee would appreciate receiving copies of any comments you make to the Sentencing Commission, or if you prefer you may make your comments through the Committee. Judge William T. Moore, Jr. serves as the Committee's chair of the subcommittee on sentencing issues. Please address any comments to his attention at United States District Court, Old Federal Building, 125 Bull Street, Savannah, Georgia 31401, telephone number 912/650-4172.

United States Sentencing Commission Request for Public Comment

2

The Sentencing Commission notice poses the following questions.

(1.) How should §5K2.0 and/or the commentary to §5K2.0 be revised?

(2.) Should the Commission provide additional and/or more restrictive guidance on mitigating factors, particularly those described in other provisions of Chapter 5, Part K, that may warrant a downward departure?

(3.) Are there factors in Chapter Two (Offense Conduct), Chapter Three (Adjustments), or Chapter Four (Criminal History) to which the Commission has attached excessive weight, and if so, should the Commission change the weight attached to those factors, thereby reducing the likelihood that a departure is warranted in a particular case?

(4.) How, if at all, should Chapter Five, Part H be revised?

(5.) Should the Commission provide additional and/or more restrictive guidance on the offender characteristics described in provisions of Chapter Five, Part H, that may warrant a downward departure?

(6.) Should, for example, the Commission provide additional guidance on the circumstances under which an offender characteristic may become relevant that is ordinarily not relevant in sentencing?

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

(8.) Should the Commission provide additional and/or more restrictive guidance in §4A1.3 regarding the circumstances under which the court may depart for the over-representation of the defendant's criminal history?

(9.) Should the Commission provide for a downward departure adjustment (or, in the case of criminal history, a reduction in criminal history points) in lieu of a downward departure for any factor or downward departure basis, or for a combination of factors and/or downward departure bases described above, or for any other mitigating factors the Commission should more fully take into account in the guidelines?

(10.) If so, how should such a downward adjustment or reduction be structured, and what should be the extent of the downward departure or reduction?

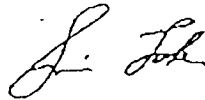
(11.) Should any of the downward departure bases described above be prohibited as a basis for downward departure?

United States Sentencing Commission Request for Public Comment

3

- (12.) Are there other specific suggestions that the Commission might consider in responding to the directive?
- (13.) How should the Commission structure the downward departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney?

On behalf of the Criminal Law Committee, thank you in advance for your input on these very important issues.



Sim Lake

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

POST OFFICE BOX 2143

WILMINGTON, NORTH CAROLINA 28402

JAMES C. FOX
SENIOR JUDGE

TELEPHONE: (910) 815-4738

FAX: (910) 815-4628

August 1, 2003

8/7/03
Copy to Judge Murphy
and Mr. Wootley
[Signature]

Honorable William T. Moore, Jr., Chair
Subcommittee on Sentencing Issues
United States Sentencing Commission
United States District Court
Old Federal Building 125 Bull Street
Savannah, GA 31401

Re: United States Sentencing Commission Request
for Public Comment -- PROTECT Act

Dear Judge Moore:

With the encouragement of the Judicial Conference's Criminal Law Committee, and the advice and assistance of Senior United States Probation Officer (E.D.N.C.), Steven E. Horne, I wish to take this opportunity to respond to the Sentencing Commission's request for public comment in connection with the implementation of the "PROTECT Act," Pub. Law No. 108-21, 117 Stat. 650 (April 30, 2003).

As you know, the Criminal Law Committee has forwarded to all the district judges a list of questions posed by the Sentencing Commission. Please find my responses below.

Thank you for the opportunity to participate in the public comment process.

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

A. It would be very helpful if § 5K2.0 and the Commentary thereto were amended to provide hypothetical situations that might warrant a departure thereunder.

Q. Should the Commission provide additional and/or more restrictive guidelines on mitigating factors, particularly those described in other provisions of Chapter 5, Part K, that may warrant a downward departure?

Hon. William T. Moore
August 1, 2003
page 2

A. Yes.

Q. Are there factors in Chapter Two (Offense Conduct), Chapter Three (Adjustments), or Chapter Four (Criminal History) to which the Commission has attached excessive weight, and if so, should the Commission change the weight attached to those factors, thereby reducing the likelihood that a departure is warranted in a particular case?

A. Yes. *The penalties for crack cocaine are disproportionate. All other base offense levels, specific offense characteristics, and Chapter Three adjustments appear to be fair.*

Q. How, if at all, should Chapter Five, Part H, be revised?

A. *Chapter Five, Part H seems adequate as written.*

Q. Should the Commission provide additional and/or more restrictive guidance on the offender characteristics described in provisions of Chapter Five, Part H, that may warrant a downward departure?

A. *Yes, it always is helpful when specific circumstances are included.*

Q. Should, for example, the Commission provide additional guidance on the circumstances under which an offender characteristic may become relevant that is ordinarily not relevant in sentencing?

A. *Yes, it always is helpful when specific circumstances are included.*

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

A. *The guidelines should offer more detailed suggestions as to how the court should structure the departure.*

Q. Should the Commission provide additional and/or more restrictive guidance in § 4A1.3 regarding the circumstances under which the court may depart for the overrepresentation of the defendant's criminal history?

A. Yes.

Hon. William T. Moore
August 1, 2003
page 3

Q. Should the Commission provide for a downward departure adjustment (or, in the case of criminal history, a reduction in criminal history points) in lieu of a downward departure for any factor or downward departure basis, or for a combination of factors and/or downward departure bases described above, or for any other mitigating factors the Commission should more fully take into account in the guidelines?

A. Yes.

Q. If so, how should such a downward adjustment or reduction be structured, and what should be the extent of the downward departure or reduction?

A. *A defendant should receive a two-offense level downward adjustment if he has no prior scorable convictions.*

Q. Should any of the downward departure bases described above be prohibited as a basis for downward departure?

A. No.

Q. Are there specific suggestions that the Commission might consider in responding to the directive?

A. *I am not familiar with the Commission's criteria for responding to Congress's directives.*

Q. How should the Commission structure the downward departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney?

A. *I am not familiar enough with the program to offer suggestions.*

Thank you again for the opportunity to comment.

Sincerely,

James C. Fox

James C. Fox

Senior United States District Judge

with permission by
4j

JCF/ejj

cc: Hon. Sim Lake, Chair
Committee on Criminal Law, Judicial Conf. of the U.S.

[37]

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

COPY

MAX ROSENN
SENIOR CIRCUIT JUDGE

MAX ROSENN UNITED STATES COURTHOUSE
167 SOUTH MAIN STREET, ROOM 235
WILKES BARRE, PENNSYLVANIA 18701

July 31, 2003

Honorable Sim Lake, Chair
Committee On Criminal Law
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

8/7/03
COPY TO JUDGE ROSENN
AND JUDGE WHARTNEY
WTF

Dear Judge Lake,

I am writing in response to your July 18, 2003 letter regarding implementation of § 401(m) of the PROTECT Act, Pub. L. 108-21. Thank you very much for soliciting judicial input.

The protection of children from exploitation and mistreatment is an important goal of law enforcement and the criminal justice system. I heartily agree that efforts must be undertaken to deter and punish offenders. However, I am concerned that § 401(m) may go about this the wrong way. For a long time, I have believed that we should increase rather than decrease the discretion of judges to sentence according to the individual facts before them. The PROTECT Act, that has the explicit purpose of "ensur[ing] that the incidence of downward departures are substantially reduced" implies that judges are incapable of competently evaluating mitigating factors as well as exacerbating factors in determining the appropriate sentence. Although I am an appellate judge, my experience in reviewing trial judge sentencing has been to the contrary. In my view, § 401(m), as drafted, runs the serious risk of undermining judicial autonomy and encouraging one-size-fits-all sentencing. A case-by-case approach to sentencing would be more effective in protecting children and in upholding the rights of criminal defendants and society as a whole.

Sincerely,

MAX ROSENN

MR:vkt

✓ cc: Hon. William T. Moore, Jr.

Protect Act
Implementation / Guidance
Brida

UNITED STATES DISTRICT COURT

DISTRICT OF NEBRASKA
ROOM 586

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

RICHARD G. KOPF
CHIEF UNITED STATES DISTRICT JUDGE

TELEPHONE
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402-437-5681
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Kristin_Leininger@ned.uscourts.gov

July 23, 2003

Via Federal Express

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

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

Re: United States Sentencing Commission Request for Public Comment

Dear Commissioners and Judge Moore:

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

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

July 23, 2003

Page 2

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

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

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

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

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

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

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

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

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

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

July 23, 2003

Page 3

Conclusion

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

Sincerely,

s/ Richard G. Kopf
Chief District Judge

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