Public Comment

Proposed Amendments

2003

Protect Act
Implementation Guidance
Bride

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA
ROOM 586
ROBERT V. DENNEY FEDERAL BUILDING
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LINCOLN, NEBRASKA 68508

RICHARD G. KOPF
CHIEF UNITED STATES DISTRICT JUDGE

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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.

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.

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

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THE PROTECT ACT

U.S. Department of Justice
Criminal Division
Eric H. Jaso, Counselor to the Assistant Attorney General
Washington, D.C.

The Department of Justice (DOJ) states that over the past several months, it has begun a comprehensive review of its policies regarding charging and sentencing practices. Further, the DOJ states that consistent with section 401(*l*) of the PROTECT Act, the Attorney General issued a new policy directive to all federal prosecutors concerning sentencing recommendations and appeals. According to the DOJ, in this memorandum, the Attorney General prohibits prosecutors from engaging in any type of "fact bargaining;" agreements about the applicability of the guidelines must be fully consistent with the readily provable facts. If those facts are relevant to calculations under the guidelines, the prosecutor must disclose them to the court, including the Probation Office. This latter instruction specifically addresses a concern that has been raised by the Commission. The DOJ states that prosecutors now have an affirmative obligation to oppose any sentencing adjustment, including downward departures, that are not supported by the facts and the law. The new policy requires that prosecutors promptly report adverse, appealable decisions to the appellate section of the appropriate division of the DOJ in a variety of specifically articulated circumstances and that each of those cases be reviewed for appealability.

The DOJ announces it will complete a review of its charging and plea policies and practices, and anticipates a new policy statement from the Attorney General addressing these matters. In addition, the DOJ states the Attorney General will be issuing new guidance to ensure that expedited disposition (or "fast track") programs are only authorized where warranted. In response to the Commission's letter to the Deputy Attorney General requesting data on the current use of fast track programs, the DOJ is presently compiling such data and will supply that data to the Commission as soon as possible.

The DOJ commends the Commission staff which has already ably itemized the specific work required of it. The implementation work has already begun, and the DOJ has already met at the staff level with the Commission on many of the pending issues. However, there are two specific PROTECT Act issues not mentioned by the Commission in its request for comment which it thinks important to highlight.

First, according to the DOJ, 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 makes public

otherwise sensitive court documents. The DOJ believes 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, it is especially concerned that making cooperation agreements available to the public may, in certain cases, jeopardize the cooperating defendant as well as law enforcement officers and public safety generally. The DOJ thinks 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, and it pledges its support to assist the Commission in any way it can.

Further, Section 101 of the PROTECT Act also changes the maximum term of imprisonment allowed upon revocation of supervised release, and the DOJ thinks these and other related changes require careful and significant Commission consideration, and will require appropriate amendments to Chapter Seven of the guidelines. It also thinks this is 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.

Implementing Section 401(m) of the PROTECT Act

A. Downward Departures Generally

The DOJ recognizes that 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 (quoting 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."). It cites Ch. 1, Pt. A for the proposition that departures based upon factors not mentioned in the guidelines are to be "highly infrequent," and Ch. 5, Pt. H, intro. comment that discouraged factors (those defined in the guidelines as "not ordinarily relevant") may be the basis of a downward departure, but only in "exceptional cases" (citing the Commentary to §5K2.0 ("the commission believes that such cases will be extremely rare.")).

The DOJ believes that these 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, the DOJ believes, out of compliance with all of these standards. It argues that unless the Commission adopts more specific measures to regulate the ability to depart, unjustifiably wide variability in departure rates will likely continue, contrary to the mandate in the PROTECT Act.

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

To comply with the PROTECT Act, the DOJ argues that 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

The DOJ thinks 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. Further, it thinks 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

The DOJ believes the Commission should comprehensively review all other non-substantial-assistance departure factors now mentioned in the Manual. Additionally, it thinks the Commission should catalogue *all* such factors in Chapter Five within the next two amendment years. As a suggestion, the DOJ states that 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), and it states it would be pleased to work with Commission staff in developing specific proposals.

Further, the DOJ notes that the Commission should also carefully review and reform the existing grounds of departure authorized in Chapter Five. Consistent with concerns it previously voiced to the Commission and Congress during the debate over implementation of the Sarbanes-Oxley Act, it believes 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, including 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). Further, 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. Lastly, it believes a defendant's willingness to be deported should be a prohibited departure factor.

The DOJ is 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 many fraud and tax sentencings, feeding the public perception that businesspeople who steal get unduly lenient sentences.

3. Criminal History Departures

The DOJ reports that 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 DOJ, would have effectively banned such downward departures entirely, and the DOJ continues to adhere to that goal. To the extent that the Commission believes this would result in unduly severe sentences for certain offenders, the DOJ states 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, the DOJ believes the Commission should make significant reforms concerning the use of this departure. Instead of allowing an unlimited reduction in the offense level or the overall sentence, the DOJ argues the guidelines should explicitly cap such departures to a specified reduction in criminal history category, and that such a reduction should in no event exceed one criminal history category.

4. Use of Unmentioned Factors

The DOJ believes that in keeping with Congress' directive, the Commission should adopt additional measures to ensure that the use of unmentioned factors is very sharply reduced. Thus, in its view, the Commission should 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. In the DOJ's view, 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. It also believes that the Commission should annually review departures based on unmentioned factors and consider whether to address them in the Manual, and states it would be pleased to work with Commission staff in developing proposals in this area.

5. Combination of Factors

According to the DOJ, the Commission should seriously reconsider combination departures. At the very least, the Commission should provide further guidance to ensure that such combination departures are and will be extremely rare.

Practitioners' Advisory Group (PAG)
Co-Chairs Barry Boss and Jim Feldman
Washington, D.C.

The Practitioners' Advisory Group (PAG) believes the Commission should take a modest approach in responding to Congress' directive to reduce the incidence of downward departures because (1) the incidence of non-substantial assistance, non-"fast track" downward departures (thereafter termed "judicial departures" in the PAG's submission) is quite low, (2) the PROTECT Act will further reduce the incidence of downward departures, and (3) the authority to depart for atypical reasons not adequately reflected in the Guidelines is an integral part of a constitutional guidelines sentencing system.

Incidence of Judicial Departures

The PAG believes 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 five Mexican border districts. Furthermore, it believes that the Commission's data does not accurately reflect the number of departures that were "fast track" departures because frequently, these departures are categorized as something else, such as "pursuant to plea agreement" or "general mitigating circumstances." Its analysis of the incidence of "fast track" departures indicates that courts are granting downward departures not controlled by the government in only 7.5-12.2% of cases.

The PAG also notes that it appears that the government controlled 70-80% of all downward departures in 2001 through substantial assistance departures and "fast track" departures. The PAG argues that 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 is now the case.

Existing Provisions of the Act

The PAG suggests that the existing provisions of the PROTECT Act (e.g., the isolation of "fast track" departures, elimination of departures specifically identified in the Guidelines or policy statements in child crimes and sexual offenses, the specificity requirement in 18 U.S.C. § 3553(c), the *de novo* standard of review, and the record-keeping and reporting requirements) will further reduce the incidence of judicial departures.

Role of Departures in Preserving the Sentencing Guidelines

In the PAG's view, Courts rely on departure power to avoid finding various provisions of the guidelines unconstitutional. The PAG argues that "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."

PAG's Recommendations

First, the PAG recommends eliminating from the guidelines "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."

Second, 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, the PAG argues that any additional and/or more restrictive guidance is unnecessary.

Third, the PAG opposes any additional and/or more restrictive guidance in §4A1.3. It argues that unlike most other guideline factors, unwarranted disparity is inherent in calculating criminal history because definitions of prior misconduct depend on each states' divergent laws.

Finally, the PAG believes 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. However, it notes that it would be impracticable to revise the guidelines in any extensive way in the time alotted.

Federal Judges Association
Lawrence L. Piersol, President
Sioux Falls, South Dakota

Regarding the implementation of the Feeney Amendment, the Federal Judges Association believes that the proposed changes are not for the better and is an encroachment upon judicial independence. The Association recommends the repeal of Section 401(m) of the PROTECT Act and supports section 1086 and H.R. 2213. The Association urges that, as in the past, there should be time allowed for the Commission to gather and present information regarding the proposed sentencing changes.

Federal Bar Council
Gerald Walpin, President
New York, NY

The Federal Bar Council states that it is essential that any effort to reduce the incidence of downward departures not undermine the role that individualized circumstances play in sentencing criminal defendants.

Revisions to §5K2.0(a) and/or the Commentary to §5K2.0

The Council believes that it is not necessary to substantially reform §5K2.0 or its Commentary. One change the Council suggests is to import into the Commentary to §5K2.0 the language in Part A of Chapter One, which says that departures based on factors that are not addressed in the Guidelines are to be "highly infrequent." The Council urges that if other changes are to be made, they should occur only if analysis of empirical data about the factual bases of departures indicate that a change in a particular departure is warranted. In addition, the Council suggests that the Commission should examine the types of cases for which downward departures are most frequently granted to determine whether refinements to the base and adjusted offense levels would reduce the incidence of downward departure.

Revisions to Chapter Five, Part H

With respect to Chapter Five, Part H, the Council suggests adding Commentary to these provisions that would clarify and illustrate instances in which departures would and would not be warranted. The Council specifically addresses the lack of guidance provided in the provisions for §5H1.5 (employment record), §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). It suggests that §3C1.1 is a good example of a provision that provides a degree of specificity that may be useful in determining when a departure under this section is warranted.

American Bar Association (ABA)
Irene M. Keeley
Chair, ABA National Conference of Federal Trial Judges
Chicago, IL

Based on its belief that sentences should be imposed on a case-by-case basis, the National Conference of Federal Trial Judges of the American Bar Association supports S.1086 and H.R. 2213 of the PROTECT Act and urges the repeal of Section 401(m). The Conference suggests that before any further amendments are made to the guidelines in general, and specifically to Chapter 5, the Commission should request that Congress hold hearings on S.1086 and H.R. 2213, gather data on the incidence of departures, and obtain testimony from affected entities, such as the Judicial Conference and the Commission.

Families Against Mandatory Minimums (FAMM)
Julie Stewart, President
Mary Price, General Counsel

Families Against Mandatory Minimums (FAMM) advises the Commission of its Departure Study Project, which was prompted by U.S. Attorney William Mercer's testimony before the Commission on March 25, 2003. The FAMM points out that during his testimony, Mr. Mercer identified 78 "troubling" cases that he believed showed a pattern of federal judges using downward departures as a way of avoiding the imposition of the prescribed guideline sentence. The FAMM is currently researching these cases to develop a better understanding of the reasons for the departures and tell the stories of the defendants the departures benefitted. In order to create the case summaries, the FAMM interviewed the defense attorneys for each case and reviewed relevant documents related to the case. The FAMM has provided the Commission with its preliminary findings for the six cases it has reviewed and summarized to date, included as an attachment.

The New York Council of Defense Lawyers (NYCDL)
Brian E. Maas, Chairman, Sentencing Guidelines Committee
New York, New York

The New York Council of Defense Lawyers (NYCDL) does 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. The Council argues that downward departures result primarily from a perceived unfairness in the application of the guidelines to a particular case, and therefore, the proposed changes would only contribute to an increased unfairness in the sentencing process. The NYCDL also notes that in its experience in the Federal Courts in New York, downward departures in white collar cases are sparingly applied where the guidelines are so out of line with the facts of a particular case that their strict application would be inappropriate and are generally those where the prosecution perceives that a mitigating factor is present. The NYCDL also urges the Commission to consider modifications to "excessively harsh" guideline provisions, such as the fraud tables and those where criminal history is overstated. The NYCDL hopes that the Commission will not unnecessarily alter the language of the guidelines in ways that might cause unintended consequences.

The Honorable Nancy Gertner
United States District Court
District of Massachusetts

Departure Study

Judge Gertner believes the Commission should update its studies of departures to determine when they are given, the rationales for the departures, and the sizes of the departures. The Judge contends that 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.

Crime Control

Judge Gertner also believes that the Commission study should attempt to link departures, and the sentences that resulted from them, to crime control issues. She would like to see the Commission's 15 Year review broadened to consider the science of drug rehabilitation and propensity to commit crimes, and whether there are categories of offenders and offenses that the Commission can target for drug treatment. The Judge believes that the departure categories of Chapter 5 would be easier for the public and legislators to understand if they were linked to crime control issues, rather than to unspoken premises about social policy and judicial behavior.

District Reports

Judge Gertner considers it important to conduct a study of departures within each District because it would allow district judges to consider and correct their own practices, and because it would provide for a more substantive debate that would focus on why judges depart as opposed to how frequently they depart.

Guideline Commentary

Judge Gertner believes that courts need to spell out the grounds for their departures more explicitly than they have done before. She also argues for circulation of district court opinions, because appellate decisions, "while helpful, are not adequate to the task, because they review only a fraction of the cases the district court sees." The Judge also advocates circulation of district sentencing reports or a "Sentencing Information System" - her district has been working on a database that provides opinions, sentencing transcripts, statements of reasons, and presentence reports. Judge Gertner also thinks the Commission should provide commentary to each guideline, and in particular the policy statements in Chapter 5, more akin to legislative history, which "could include summaries of hearings, Commission reports, etc." or it could include commentary like that in §1B1.3. The Judge concludes that "providing judges with more of the data on which [ ] guidelines are based, or legislative history, or narratives, will rationalize departures, [and] create a more coherent body of law."

The Honorable Helen G. Berrigan, Chief Judge
United States District Court
Eastern District of Louisiana
New Orleans, LA

Judge Berrigan writes that in her experience, virtually all the downward departures are initiated by the prosecution for §5K1.1 cooperation and are case-specific. Judge Berrigan offers suggestions for internal changes for downward adjustments within the guideline range. Under

§5K2.0, the Judge recommends no change other than that the "*Koon* case has presumably been overruled."

Chapter 5, Part H.

Judge Berrigan believes that under §5H some of the offender characteristics, such as youth, mental retardation and learning disabilities, listed as ordinarily not relevant, should be legitimate grounds for a lower level adjustment or a downward departure. Judge Berrigan also believes that the addition of commentary would be very helpful when considering whether these characteristics are relevant or not.

Departures Based on Criminal History

Judge Berrigan objects to certain aspects of criminal history calculations, for example where relatively minor prior transgressions are counted, such as in §4A1.1 providing for 2 points for imprisonments exceeding sixty days even though many low level offenders may be unable to make bond for more than 60 days prior to trial but then plead out to time served. The Judge believes that misdemeanors and felonies for which imprisonment of 6 months or less is served should be counted as one point, at most, and she argues that two points for someone on probation or parole is unnecessary. Judge Berrigan believes that if the guidelines for criminal history calculations were made more reasonable, then the need for downward departures on this basis would be alleviated.

Offense Conduct Departures

Judge Berrigan also objects to statutory mandatory minimum sentencing and the extent to which the guidelines incorporate them as their threshold for sentencing.

Downward Adjustments in lieu of Downward Departures

Judge Berrigan supports downward adjustments in lieu of downward departures. She believes that if the guidelines would modify areas where departures are used because the guideline calculation result is too harsh to allow downward adjustments, then the pressure to downward depart would be alleviated.

Whether Downward Adjustments Should be Provided in lieu of Departures

Judge Berrigan believes providing for a downward adjustment in lieu of a downward departure is a "bulls-eye solution." She believes that most downward departures, not including §5K1.1 departures, are based on the perception that the guideline calculations are too harsh under the individual circumstances. She states "if the guidelines would modify those areas to authorize downward adjustments, then the pressure to downward depart would be alleviated."

The Honorable Catherine C. Blake
United States District Court
District of Maryland
Baltimore, MD

Judge Blake believes that the present structure permitting downward departures is appropriate and not in need of any significant change. She argues that district judges are exercising their discretion responsibly and should continue to be allowed to do so. The Judge and her colleagues believe that 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. Judge Beck notes that there is concern in the area of overrepresentation of the defendant's criminal history where the current point system does not distinguish sufficiently among types, seriousness, and timing of past crimes. She believes that it is essential to allow the sentencing judge to evaluate the defendant's record in context. Judge Blake states that her opinions are joined by all of her district judge colleagues.

The Honorable Marilyn L. Huff, Chief Judge
United States District Court
Southern District of California
San Diego, California

Included with Judge Huff's comment is additional comment she requested from her district. Judge Huff asks that the Commission consider the unique circumstances and challenges faced by border districts, such as the large volume of defendants and the need for interpreters for non-English speaking defendants, when it addresses changes to a fast track disposition program or other departures not prohibited by the PROTECT Act.

Comment from Mark Adams, Esq., San Diego, CA., writing as a representative on behalf of the Defender Services Division and as a Criminal Justice Act Attorney. Mr. Adams argues that Section 5K2.0 should not be revised. He argues that the Commission should allow district court judges to exercise their discretion in warranting downward departures. If Chapters 2, 3, or 4 should be changed, Mr. Adams requests that the changes reflect an increase in judicial discretion to downwardly depart. He argues that district courts should be permitted wide latitude in deciding appropriate sentences, and the Commission should recognize that downward departures pursuant to a fast track program are an appropriate exercise of the court's sentencing authority.

Comment from Federal Defenders of San Diego, Inc. The Federal Defenders of San Diego (FDSD) suggests that §5K2.0 should only be revised to the extent that the PROTECT Act expressly limits downward departures for child and sexual offenses and in early disposition or fast track-type cases. The FDSD argues that the PROTECT Act must be read *in pari materia* with 18 U.S.C. § 3553, which sets forth the mandatory considerations for the judiciary in sentencing. The FDSD maintains that no amendments which restrict any departures other than those expressly limited or eliminated by the PROTECT Act should be promulgated, or they would otherwise conflict with section 3553.

Regarding fast-track departures, the Federal Defenders of San Diego, Inc. (FDSD) believes the guidelines should recognize the same constitutional limitations and "bad faith" contract principles which currently govern disputes regarding the government's unwillingness to make a downward departure motion under §5K1.1. The FDSD further believes the guidelines should indicate that both the due process clause and contract principles may govern any disputes.

Additionally, the FDSD believes that for all offenses involving child crimes and sexual offenses, in light of the addition of §5K2.22, it does not appear necessary to revise Section 5H unless the Commission wishes to reiterate the directives already set forth in §5K2.22. The FDSD believes that for all offenses not involving child crimes and sexual offenses, instances of downward departures will be substantially reduced by virtue of the new §§5K2.22 and 5H1.6 and by the suggested amendments to §§ 5H1.1 and 5H1.4. The FDSD does not believe that providing examples for §5H would serve a useful purpose the way they do in other guideline sections. Instead, the FDSD believes such examples may have a limiting effect regarding other factors set forth in section 3553(a).

Further, regarding Criminal History departures, the FDSD believes that no guideline system could adequately account for the variations in charging and sentencing practices throughout the country. Because of this, the guidelines' calculation of criminal history points can and does create serious inequities that courts frequently attempt to redress through downward departures, according to the FDSD. The FDSD suggests that the Commission could limit the disproportionate effect of misdemeanor convictions by limiting the criminal history points that can be attributed to such convictions or by increasing the sentencing thresholds for the 1, 2, and 3 point convictions.

The Honorable Clarence C. Newcomer
United States District Court
Eastern District of Pennsylvania
Philadelphia, PA

Judge Newcomer argues that the guidelines should not be amended to take away any more judicial discretion. Specifically, he states that §5K2.0 should not be revised to provide more restrictive guidance for mitigating factors, nor should provisions related to criminal history be made more restrictive. Judge Newcomer believes Chapter 5, Part H should be rescinded. Finally, he recommends making judicial adherence to the Guidelines voluntary, not mandatory.

The Honorable Arthur Spiegel, Senior Judge
United States District Court
Southern District of Ohio
Cincinnati, OH

Judge Spiegel believes Section 401(m) of the PROTECT Act demonstrates Congress' "significant distrust of United States Judges in sentencing criminal defendants" and states that

standardizing sentencing procedures limits a court's ability to issue an appropriate and individualized sentence. Judge Spiegel states that without the opportunity for judicial accounting for the various mitigating or aggravating circumstances that accompany each case, judges will not have the required discretion to issue an appropriate sentence.

Further, Judge Spiegel believes that eliminating downward departures in sentencing hinders judicial efficiency by discouraging plea bargains. In his view, permitting judges downward departures in determining sentences serves judicial efficiency by encouraging plea bargaining, and whatever changes result from the PROTECT Act, judges must be permitted to depart from the guidelines in approving plea agreements.

The Honorable G. Ross Anderson, Jr.
United States District Court
District of South Carolina
Anderson, South Carolina

Judge Anderson believes that under §3E1.1, the court, not the government, should possess the authority to grant the additional one point reduction for acceptance of responsibility. Judge Anderson notes that currently, the government must move to allow a defendant to receive the additional one point decrease before a criminal defendant receives the deduction, placing the discretionary decision-making power in the government's hands, not in the hands of the judge. Judge Anderson believes this new process should be changed because it is difficult for the government to change roles from an adversary to an impartial decision maker within the same case. Judge Anderson further notes that this process is subject to governmental abuse because it gives the government the final decision on whether a defendant "substantially" assisted the investigation. Judge Anderson concludes by stating that if the authority was transferred to the court and the Commission created a uniform definition for substantial assistance, its application would be neutral and would eliminate disparities.

The Workplace Criminalistics And Defense International
L.A. Wright
Houston, Texas

The Workplace Criminalistics And Defense International suggests the following revision to the Commentary to §5K2.0:

"[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."

Richard Crane
Attorney at Law
Nashville, Tennessee

Mr. Crane suggests that to help the Commission better understand judges' reasons for departing, the Commission should have courts send in not only the judgment, but also any motions and memoranda filed by the parties regarding departure grounds. In addition, he suggests that instead of viewing a decrease in departures from 9% to 8% as a 1% reduction, the Commission should view the reduction as a percentage of the total number of cases in which a departure was granted. Taking this approach would mean that a reduction from 9% to 8% would be a 8.9% reduction in departures.

James L. Murphy
Federal Correctional Institution
Marianna, FL

Mr. Murphy believes that §4B1.1 is overly inclusive, specifically with respect to drug offenders. He is concerned that under the Feeney Amendment, which does not permit downward departures, the number of offenders that are unfairly being defined as "career offenders" will increase. He suggests amending the guideline so that drug trafficking offenses and not drug sale offenses are counted. Alternatively, he suggests that only prior convictions for crimes of violence should be considered when determining if a person is a "career offender."

H.I.M. C'zar
Imperial Pornography Commission

Mr. C'zar, a claimed legal defender of a former nudist colony, writes to express his opinions regarding various issues, including his belief that in *Miller v. California*, the Supreme Court has "favored religious strictures and rigors" over the First Amendment, and his further belief that the PROTECT Act's prohibition on downward departures is related to U.S. Representative Tom Delay's reintroduction of the death penalty bill.

Citizen Letters

The Commission received approximately 50 letters from members of Families Against Mandatory Minimums urging the Commission to, while complying with the PROTECT Act, amend the guidelines in a way which will preserve judicial discretion and departure authority.

TENTATIVE PRIORITIES

The Commission received no public comment regarding the first four tentative priorities as listed in the Federal Register Notice.

Tentative Priority Number 5, Public Officials

U.S. Department of Justice
Criminal Division
Eric H. Jaso, Counselor to the Assistant Attorney General
Washington, D.C.

The DOJ is pleased that the Commission will consider amendment proposals related to the guidelines for public corruption offenses, and states it has already begun working with the Commission staff on this issue.

Tentative Priority Number 6, Continuation of 15 Year Study

The Commission received no public comment regarding this tentative priority.

Tentative Priority Number 7, Involuntary Manslaughter

U.S. Department of Justice
Criminal Division
Eric H. Jaso, Counselor to the Assistant Attorney General
Washington, D.C.

The DOJ commends the Commission for the amendments passed earlier this year relating to involuntary manslaughter offenses and for agreeing to further consider this issue this amendment year. However, the DOJ believes the guideline penalties for all homicide, other than for first degree murder, are inadequate and in need of review. In the DOJ's view, the guidelines for second degree murder and attempted murder are particularly problematic. Because both first and second degree murder are extremely serious offenses, the DOJ argues 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. Additionally, because the inadequate guideline sentence for second degree murder also creates a significant gap with the mandatory life sentence applicable to first degree murder, the DOJ urges the Commission to evaluate the operation of the second degree murder guideline carefully.

First, the DOJ believes 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. Next, the DOJ urges the Commission to determine if the second degree murder guideline should be amended to include specific offense characteristics, which it currently lacks. It argues that 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, and the DOJ believes the guideline could account for such facts.

Further, the DOJ is concerned with 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. Therefore, the DOJ believes the defendant should be sentenced close to the level which would have been applicable had he been successful. The DOJ points out that 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, and the DOJ thinks this is something the Commission ought to reexamine.

Tentative Priority Number 8, Immigration Offenses

U.S. Department of Justice
Criminal Division
Eric H. Jaso, Counselor to the Assistant Attorney General
Washington, D.C.

The DOJ thinks the Commission has appropriately identified sentencing policy for alien smuggling and other immigration offenses as warranting review and it looks forward to working with the Commission to review these concerns and develop appropriate policy responses. It also believes the Commission should examine more broadly some related crimes, such as passport and visa fraud, and the guidelines applicable to these offenses.

Federal Defenders of San Diego, Inc. (FDSD)
San Diego, CA

The Federal Defenders of San Diego, Inc. (FDSD) believes that inequities exist regarding the application of 8 U.S.C. § 1326 and §2L1.2. The FDSD believes that the Commission can reduce the number of downward departures based on these inequities by refining section 2L1.2, such as by increasing the sentence required before a drug offense results in a 16-level enhancement or by imposing limitations on the crime of violence prong.

Tentative Priority Number 9, Compassionate Release

Practitioners' Advisory Group (PAG)
Co-Chairs Barry Boss & Jim Felman
Washington, D.C.

The Practitioners' Advisory Group (PAG) continues to believe that the issue of sentence reduction under 18 U.S.C. § 3582(c)(1)(A) warrants Commission action. The PAG urges the Commission to develop policy guidance on implementation of 18 U.S.C. § 3582(c)(1)(A) as specified in 28 U.S.C. § 994(t) during the current amendment cycle.

Families Against Mandatory Minimums (FAMM)
Julie Stewart, President
Mary Price, General Counsel

The Families Against Mandatory Minimums (FAMM) contends that 18 U.S.C. § 3582(c)(1)(A) should be read broadly to permit prisoners to seek compassionate release for non-medical extraordinary and compelling reasons. The FAMM supports the formulation of criteria, content, and examples to guide judges in interpreting § 3582(c)(1)(A).

American Bar Association (ABA)
Margaret Colgate Love, Chair
Corrections and Sentencing Committee
Washington, D.C.

The Corrections and Sentencing Committee of the American Bar Association (ABA) commends the Commission for proposing the issue of sentence modification under 18 U.S.C. § 3582(c)(1)(A) as a priority during this amendment cycle. The Committee has provided a copy of the ABA resolution adopting a new policy on sentence modification mechanisms and the accompanying report, which it believes evidences further support for the argument that the Commission should give a generous construction to the open-ended language of § 3582(c)(1)(A).

The Committee notes that the provided report argues that the government should not limit releases based on "extraordinary and compelling" situations to cases involving medical or health-related concerns. The Commission further notes that the report suggests that the criteria for "extraordinary and compelling" situations should be sufficiently broad 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.

The Committee suggests that Congress intended § 3582(c)(1)(A) to be used broadly so as to apply to a variety of non-medical circumstances. However, it argues that the Bureau of Prisons

(BOP) has interpreted § 3582(1)(c)(A) very narrowly, reserving it for cases of terminal illness and profound disability. The Committee believes the Commission is 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 the courts.

Tentative Priority Number 10, Miscellaneous Drug Issues

U.S. Department of Justice
Criminal Division
Eric H. Jaso, Counselor to the Assistant Attorney General
Washington, D.C.

The DOJ is pleased the Commission has agreed to examine miscellaneous drug issues, including sentencing policy for offenses involving the unlawful sale or transportation of drug paraphernalia.

However, the DOJ believes the Commission should also: 1) consider amending the guidelines for GHB precursors and analogues, such as GBL (gamma-butyrolactone); 2) consider increasing the sentences for ketamine – a Schedule III and "emerging," diverted "club drug," which it states is sometimes used to facilitate sexual assault; 3) address the penalties for White Phosphorous and Hypophosphorous Acid (also methamphetamine manufacturing chemicals); and 4) additionally states that the guideline for anhydrous ammonia theft at 21 U.S.C. § 864 usually yields a 15 month sentence on a ten-year statutory maximum penalty which it believes is insufficient and should be reconsidered.

Further, the DOJ thinks the Commission should consider establishing marihuana equivalencies for the following drugs:

(a) 2C-B
(b) N-benzylpiperazine (BZP)
©) 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 (AFoxy@))

Lastly, the DOJ appreciates the Commission's consideration of the guideline sentences for chemical offenses, and believes 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).

Federal Defenders of San Diego, Inc. (FDSD)
San Diego, CA

Regarding the revision of Chapters 2 and 3, the Federal Defenders of San Diego, Inc. (FDSD) argues that the use of drug type and quantity as proxies for culpability produce inequities, especially when the defendant is a lower level actor. The FDSD suggests several "cures" to reduce the incidence of downward departures in drug cases. For example, the FDSD suggests that the Commission could de-emphasize quantity in calculation of the base-offense level by (1) requiring a showing of scienter as to drug type/quantity, or (2) by cross-referencing a different

drug type/quantity where the defendant can demonstrate a lack of knowledge or control over the drug type/quantity. The FDSD also suggests that the Commission could increase the value of the reductions available to minor and minimal participants.

Tentative Priority Number 11, Implementation of Other Crime Legislation

The Commission received no public comment regarding this tentative priority.

Tentative Priority Number 12, Cap for Mitigating Role Adjustment

U.S. Department of Justice
Criminal Division
Eric H. Jaso, Counselor to the Assistant Attorney General
Washington, D.C.

The DOJ 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.

Practitioners' Advisory Group (PAG)
Co-Chairs Barry Boss & Jim Felman
Washington, D.C.

The Practitioners' Advisory Group (PAG) continues to believe that the drug guidelines are overly punitive and strongly opposes any reconsideration of the limitation on the base offense level that was enacted less than a year ago, in November 2002. 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.

Families Against Mandatory Minimums (FAMM)
Julie Stewart, President
Mary Price, General Counsel

The Families Against Mandatory Minimums (FAMM) fully supports the 2002 amendment to §2D1.1(a)(3) that caps the offense levels for defendants receiving mitigating role adjustments. Given that this amendment was unanimously approved and has been in place for less than a year, the FAMM opposes the Commission's suggested priority of revisiting this issue.

Ronald Richards
Beverly Hills, CA

Mr. Richards thinks that while addressing this issue, the Commission should also consider implementing a base offense cap level for defendants convicted of pseudoephedrine crimes under §2D1.11.

Tentative Priority Number 13, Criminal History

Practitioners' Advisory Group (PAG)
Co-Chairs Barry Boss & Jim Felman
Washington, D.C.

Criminal History

The Practitioners' Advisory Group (PAG) continues to believe that the availability of alternatives to incarceration for first-time non-violent offenders should be increased, and is 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 the PAG has 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 G. Ross Anderson, Jr.
United States District Court
District of South Carolina
Anderson, South Carolina

Judge Anderson believes that §4A1.2(d) should be amended to prevent a defendant's juvenile convictions from being used in adult criminal court to determine his criminal history. Judge Anderson states that the guidelines' use of a defendant's juvenile convictions in an adult criminal court when computing his criminal history category fosters inequality. Judge Anderson argues that to avoid this inequality when deciding whether to apply the defendant's juvenile conviction, the guidelines should base the 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. Judge Anderson concludes by stating that 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.

POSSIBLE PRIORITY POLICY ISSUES

U.S. Department of Justice
Criminal Division
Eric H. Jaso, Counselor to the Assistant Attorney General
Washington, D.C.

The DOJ believes the guidelines are operating reasonably well and cites the Commission's Survey of Article II Judges which revealed that when asked to provide a general overall rating of effectiveness of the sentencing guidelines, approximately 77% of district court judges and 79% of circuit court judges reported a moderate or high degree of effectiveness. However, the DOJ believes the guidelines require significant improvement and reform to address the growing incidence of non-substantial assistance downward departures over the past several years.

Circuit Conflicts

The DOJ reports that over the past few years, the Commission has addressed only a limited number of circuit conflicts, and thinks it is critically important to do this in each amendment year. It raises two specific issues that it believes are ripe for resolution.

First, the DOJ believes 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. According to the DOJ, while this tack has the legitimate goal of preventing recidivism and protecting society, some courts have concluded that precluding access to computers as a condition of supervised release is too onerous a deprivation of personal liberty. It believes 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. In the DOJ's view, 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. Further, it argues that such restrictions would not only hinder a defendant's access to the illegal materials themselves, but would also deprive him of access to like-minded individuals who supply such materials.

Second, the DOJ believes the circuit conflict regarding application of the safety valve should be addressed. The DOJ cites an Eighth Circuit opinion, *United States v. Madrigal*, 379 F.3d 738 (8th Cir. 2003), in which though the court recognized that other circuits have adopted the rule stating that in order to qualify for the safety valve, a defendant must provide complete and truthful information before the commencement of the sentencing hearing, it held otherwise. It thinks this issue is ripe for consideration, and urges the Commission to address it by adding a policy statement following the majority of the circuits' holdings.

MANPADS (man-portable air defense systems)

In the DOJ's view, 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 and similar weapons that have been used by terrorists. The DOJ argues that 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.

The DOJ states that MANPADS and similar weapons are currently highly regulated under the National Firearms Act, 26 U.S.C. Chapter 53, and the Gun Control Act of 1968, 18 U.S.C. Chapter 44. Under the NFA, such weapons are classified as "destructive devices." The DOJ reports that 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, it further states that the guidelines do not provide for an increase specifically addressing MANPADS and similar weapons. Thus, 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. The DOJ thinks the Commission should correct the current low sentences applicable to possession and related offenses involving MANPADS, and 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. In its view, those 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.

Sentencing Policy for Illegal Transportation of Hazardous Materials

The DOJ reports that illegal transportation of hazardous materials has emerged as a significant terrorist threat in the aftermath of the attacks of September 11, 2001. The DOJ states its Environment and Natural Resources Division recently launched a hazardous materials ("hazmat") transportation initiative to enforce more strictly the federal Hazardous Materials Transportation Law, 49 U.S.C. §§ 5101-5127. In preparing to launch this initiative, the DOJ reviewed the guideline applicable to hazmat crimes, §2Q1.2, and determined that it is not adequately suited to such crimes. 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, and the DOJ believes the Commission should consider possible ways to improve sentencing policy for these offenses.

To support its argument, the DOJ sates that hazmat offenses are different from the pollution offenses covered in §2Q1.2 and have characteristics that are not adequately addressed by that

guideline. In the DOJ's view, 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, it argues 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.

Further, the DOJ argues that incidents resulting from hazmat crimes are not well described by the specific offense characteristics of §2Q1.2. In its view, in some instances, the specific offense characteristics of §2Q1.2 are inapplicable. Additionally, it states, §2Q1.2 lacks specific offense characteristics for certain types of hazmat crimes.

Grouping Rules As Applied To Tax Cases

According to the DOJ, the current grouping rules as applied to certain tax offenses deserve consideration because they have produced widely varying judicial conclusions as to their appropriateness. The DOJ reminds the Commission that it considered amending the grouping rules as to tax crimes during the 2001 amendment year, but withdrew its proposal after the DOJ and the Tax Division pointed out that the Commission's proposal would not "provide incremental punishment for significant additional conduct" as stated in Ch. 3. Part D, intro. comment. When it removed the grouping issue from consideration, the DOJ notes the Commission indicated that it would be seeking input from the DOJ on the issue. Therefore, it believes 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.

Enhancement to the Guidelines For Certain Tax Offenses

The DOJ urges consideration of a new upward adjustment in §2T1.4, dealing with aiding, assisting, or advising tax fraud, where 50 or more tax returns are involved, such as in an abusive tax shelter program or a fraudulent refund scheme. Such an enhancement is warranted, it argues, 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 under reporting of income.

Practitioners' Advisory Group (PAG)
Co-Chairs Barry Boss & Jim Feldman
Washington, DC

Recommendation to the Federal Rules Advisory Committee

The Practitioners' Advisory Group (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. Specifically, the PAG notes that sentencing practice and procedure would benefit from greater disclosure of

facts affecting guideline calculation between and among the parties. The PAG believes that any party wishing to present evidence to the court's probation officer should disclose such evidence to the opposing party. The PAG states that the Commission should address these issues in its policy statements in Chapter 6.

Relevant Conduct

Regarding relevant conduct, the PAG endorses suggestions found in a paper published by the American College of Trial Lawyers, "Proposed Modifications to the Relevant Conduct for the Provisions of the United States Sentencing Guidelines." Namely, 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.

Families Against Mandatory Minimums (FAMM)
Julie Stewart, President
Mary Price, General Counsel

Cocaine Sentencing Policy
The Families Against Mandatory Minimums (FAMM) urges the Commission to reconsider cocaine sentencing policy in the upcoming amendment cycle, as it believes the penalties for crack cocain are unsupported and should therefore be lowered.

Department of Health & Human Services (DHHS)
Food and Drug Administration
Rockville, MD 20857

Amendments to the guidelines that govern violations of the Federal Food, Drug, and Cosmetic Act (FDCA).

The Department of Health and Human Services (DHHS) requests the Commission consider amending the guidelines that govern violations of the Federal Food, Drug, and Cosmetic Act (FDCA). The DHHS believes that the current guidelines do not treat criminal violations of the FDCA as significant threats to the public health and are ineffectual to deter such conduct. According to the DHHS, convictions under the FDCA typically result in little, if any, prison time.

The DHHS notes that FDCA crimes are governed by two sections of the guidelines, §§2B1.1 and 2N2.1. Section 2N2.1 applies to FDCA violations that do not involve fraud. The base offense

level in §2N2.1 is 6, and there are no enhancements for specific offense characteristics. Accordingly, most sentences calculated under §2N2.1 are very low. Section 2N2.1 provides that, if the offense involved fraud, §2B1.1 applies. Like §2N2.1, §2B1.1 provides for a base offense level of 6. Section 2B1.1 includes various enhancements for specific offense characteristics. However, the DHHS argues that 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 §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. The DHHS also states that the cross-reference in §2N2.1 to §2B1.1 is not satisfactory in all cases because the latter section is intended to address economic fraud crimes. The DHHS believes that application of §2B1.1 is sufficient for crimes where the major offense conduct involves only pecuniary harm. The DHHS notes that, although FDCA offenses often cause pecuniary harm, 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.

I. Counterfeiting

The DHHS notes that the Food and Drug Administration (FDA), a subsidiary of the DHHS, has seen a recent increase in counterfeit drug activity. According to the FDA, the distribution of counterfeit drugs creates a significant public health risk. Because of the difficulties in locating the actual counterfeiters, the FDA states that its 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 their success in combating the counterfeit drug problem. The FDA notes that 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 the 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. The 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.

II. Prescription Drug Diversion

The FDA also believes that strengthening the guidelines for offenses involving prescription drug diversions should be a priority. The FDA notes that illegal diversion of prescription drugs threatens the integrity of the nation's drug supply in several ways. In its view, 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. The FDA also notes that the very existence of an unregulated wholesale submarket provides a ready path by which counterfeit, adulterated and expired drugs can enter the distribution chain.

The FDA notes that 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. The FDA believes that the current guidelines do not carry out the intention of Congress to provide for significant penalties without requiring a showing of fraud. Despite Congress's express mandate that these PDMA violations be punished more severely than other FDCA violations, the FDA argues that the guidelines treat all FDCA violations the same and provide for a base offense level of 6. 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). The FDA notes that these guidelines would not be problematic if these PDMA offenses frequently involved both fraud and significant pecuniary loss. However, the FDA's experience has shown otherwise. Therefore, the FDA urges the Commission to amend the guidelines to treat these PDMA offenses as serious offenses warranting prison time.

III. Other FDCA Violations

The 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. The FDA notes that under 21 U.S.C. § 333(e), it is unlawful to knowingly distribute, or to possess with intent to distribute, human growth hormone for any use not approved by the FDA. The FDA further notes that the Commission has not yet promulgated a guideline to cover these human growth hormone offenses. The FDA believes that, as a result, the United States Attorney's Offices are reluctant to prosecute these offenses, because it is unclear how the offenses will be treated under the guidelines.

IV. Proposals for a New Sentencing Regime

The DHHS proposes the following suggestions to be considered in amending the guidelines:

- provide 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));
- provide 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));
- add specific offense characteristics to §2N2.1;
- revise the enhancement at §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);
- revise §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;

- revise the application notes to §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;

- promulgate a guideline to address human growth hormone offenses in violation of 21 U.S.C. § 333(e), with a base 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;

- provide 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.

Washington Legal Foundation (WLF)
Washington, D.C.

Amendment to Environmental Guidelines

The Washington Legal Foundation (WLF) requests that the Commission consider amending or conducting a study on Part Q - Offenses Involving the Environment, more specifically §§2Q1.1, 2Q1.2, 2Q1.3 and 2Q2.1, as one of its priorities.

The WLF believes that over the last 16 years, the environmental guidelines have produced unjust and excessive prison sentences. The WLF sees the main flaw of these guidelines as producing lengthy prison terms even when the environmental harm is minimal and/or the culpability of the defendant is low. In other words, the WLF argues the guidelines do not adequately reflect the actual level of harm to the environment from the offense. In support of its position, the WLF cites three cases: *United States v. Mills,* 817 F. Supp. 1546 (N.D. Fla. 1993); *United States v. Hansen,* 262 F.3d 1217 (11th Cir. 2001), *cert. denied,* 555 U.S. 1111(2002) (copy of this case is attached to the WLF's comments); and *United States v. McNab,* 2003 U.S. App. LEXIS 10708 (11th Cir. May 29, 2003).

The WLF argues that what it characterizes as "truly bizarre sentences" produced in the cases listed *supra* are a result of the Commission failing to do its homework before drafting the environmental guidelines. The WLF concludes that the more appropriate universe for determining what punishment 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.

The Honorable G. Ross Anderson, Jr.
United States District Court
District of South Carolina
Anderson, South Carolina

Judge Anderson believes that 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. Judge Anderson notes that, despite the Commission's previous attempts to justify the current 100 to 1 ratio, many of the justifications used to enforce the current ratio lack merit. Judge Anderson further notes that the 100 to 1 ratio also has a devastating effect on blacks when compared to whites. Quoting Justice Stevens' opinion in *United States v. Armstrong*, 517 U.S. 456 (1996), Judge Anderson notes that this is a major threat to the integrity of the federal sentencing reform, whose main purpose was to eliminate disparities, especially racial, in sentencing. Judge Anderson believes the Commission should balance the punishment for crack cocaine and powder cocaine by raising the minimum sentence requirements for powder cocaine. Judge Anderson concludes by saying that this would create equal punishment regardless of race and of the cocaine's form.

The Workplace Criminalistics And Defense International
L.A. Wright
Houston, Texas

Organizational Guidelines

The Workplace Criminalistics and Defense International suggests the addition of the following 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."

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
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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

[1]We 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(*l*) 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

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[2]In 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

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[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

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[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.