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

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

G. Miscellaneous Drug Issues

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

1. GHB

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

2. Ketamine

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

3. Marihuana Equivalencies

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

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

4. White Phosphorous and Hypophosphorous Acid

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

5. Anhydrous Ammonia Theft

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

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

6. Chemical Offenses

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

7. Drug cap

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

H. Sentencing Policy for Illegal Transportation of Hazardous Materials

Illegal transportation of hazardous materials has emerged as a significant terrorist vulnerability in the aftermath of the attacks of September 11, 2001. More than a billion tons of hazardous materials[6] are shipped yearly across the United States by road, rail, pipeline, ship and air. Serious incidents involving these materials have the potential to cause widespread disruption, death, injury, and harm to property and the environment.[7]

The Department's Environment and Natural Resources Division ("ENRD") recently launched a hazardous materials ("hazmat") transportation initiative to enforce more strictly the federal Hazardous Materials Transportation Law, 49 U.S.C. §§ 5101-5127.[8] The purpose of this initiative is to make it more difficult for terrorists and other criminals to transport hazardous materials illegally, and to ensure that industries regulated under the hazardous materials transportation laws comply with those laws so as to reduce the inherent risks posed by the transportation of hazardous materials.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Finally, §2Q1.2 lacks specific offense characteristics for certain types of hazmat crimes. For example, §2Q1.2 does not address concealment of hazardous materials during transportation, one of the factors that make these crimes especially dangerous. It also does not take into account the mode of transportation aboard which the results of a hazmat offense may unfold. If an incident arising from a hazmat crime takes place on a passenger-carrying aircraft where there is little room for error or time to take corrective action, and the options for escape may be non-existent, no enhancement is available under the specific offense characteristics of §2Q1.2.[13]

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

I. Grouping Rules As Applied To Tax Cases

The current grouping rules as applied to certain tax offenses deserve consideration because they have produced widely varying judicial conclusions as to their appropriateness. *See e.g., Weinberger v. United States*, 268 F.3d 346, 352-55 (6th Cir. 2001) (holding that fraud and tax evasion counts are not grouped under either §3D1.2(c) or §3D1.2(d)); *United States v. Fitzgerald*, 232 F.3d 315, 319-21 (2d Cir. 2000) (holding that tax evasion, fraud and conversions counts could be grouped under USSG §3D1.2(d) and the loss attributable to all of defendant's offenses aggregated); *United States v. Vitale*, 159 F.3d 810, 813-15 (3d Cir. 1998) (rejecting claim that wire fraud and tax evasion counts should be grouped under §3D1.2(c), as such grouping would have no incremental effect on sentencing for tax evasion count); *United States v. Haltom*, 113 F.3d 43, 45-47 (5th Cir. 1997) (holding that tax evasion and mail fraud counts must be grouped under §3D1.2(c)); *United States v. Astorri*, 923 F.2d 1052, 1055057 (3d Cir. 1991) (concluding that wire fraud and tax evasion counts were properly grouped under §3D1.2(c), and adding that under §3D1.4, the court correctly added two units or levels to the fraud offense calculation).

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

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

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

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

J. Enhancement to the Guidelines For Certain Tax Offenses

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

* * * * *

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

A. Downward Departures Generally

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

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

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

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

1. Departures for Early Disposition Programs

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

2. Comprehensive Review of Other Mentioned Departure Factors

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

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

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

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

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

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

3. Criminal History Departures

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

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

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

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

4. Use of Unmentioned Factors

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

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

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

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

5. Combination of Factors

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

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

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

Sincerely,

Eric H. Jaso
Counselor to the Assistant Attorney General

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August 4, 2003

VIA HAND DELIVERY

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

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

Dear Judge Murphy:

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

1. Congressional Directives in the Protect Act

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

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

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

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

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

- Section 401(m) and other portions of the Protect Act resulted from the misperception created by the Department of Justice in Congress that there is an epidemic of leniency in the federal criminal justice system caused by judges who frequently and lawlessly depart from the Guidelines. To support this contention, the Department of Justice provided Congress with misleading statistics that were not properly understood or corrected before the bill was hastily passed. We believe that the incidence of non-substantial assistance, non-"fast track" downward departures (hereinafter "judicial departures") is actually quite low, i.e., somewhere between 7.5 and 12.2%. See Part 2, infra.

- The existing provisions of the Protect Act will further reduce the incidence of judicial departures. See Part 3, infra.

- The authority to depart for atypical reasons not adequately reflected in the Guidelines is an integral part of a healthy and constitutional guidelines sentencing system. If the departure power is reduced too drastically, the Sentencing Guidelines will lose credibility as a fair and rational sentencing policy, and may well be ruled unconstitutional. See Part 4, infra.

Our specific comments are set forth in Part 5.

2. Incidence of Judicial Departures

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

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

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

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

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

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

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

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

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

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

3. Existing Provisions of the Act

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

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

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

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

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

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

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

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

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

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

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

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

5. PAG's Recommendations

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

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

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

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

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

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

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

Conclusion

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

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

Sincerely,

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

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

FEDERAL JUDGES ASSOCIATION

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July 31, 2003

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

Dear Judge Murphy:

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

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

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

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

Sincerely yours,

Lawrence L. Piersol, President
Federal Judges Association

LLP:jh

[31]

Federal Bar Council

GERALD WALPIN
President

July 30, 2003

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

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

To Whom This May Concern:

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Respectfully submitted,

Gerald Walpin
President

ABA Defending Liberty Pursuing Justice

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July 31, 2003

VIA FACSIMILE
Honorable Diane E. Murphy
Chair
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Washington, DC 20002-8002

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

Dear Judge Murphy:

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

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

We appreciate the opportunity to provide these comments.

Very truly yours,

Irene M. Keeley

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

IMK/esj

Families Against Mandatory Minimums
FOUNDATION

August 1, 2003

The Honorable Diana E. Murphy
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 200002-8002

Re: Issue for Comment: Downward Departures

Dear Judge Murphy:

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

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

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

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

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

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

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

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

Methodology:

Our study involves the following steps:

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

Commission website.

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

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

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

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

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

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

The DOJ Cases and our findings:

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

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

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

The government did not appeal the departure.

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

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

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

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

The government did not appeal the departure.

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

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

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

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

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

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

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

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

The government did not appeal the departures.

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

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

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

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

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

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

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

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

Preliminary Conclusions

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

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

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

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

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

Thank you for considering our views.

Sincerely,

Julie Stewart
Julie Stewart
President

Mary Price
Mary Price
General Counsel

TAB A SARMIENTO

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

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

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

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

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

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

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

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

The government did not appeal the downward departure. Id.

TAB B CHECOURA

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

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

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

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

Ms. Checoura's plea agreement reserved her right to argue for a downward departure pursuant to section U.S.S.G. § 5K2.13. Checoura, 176 F.Supp at 311. Ms. Checoura requested a two-level downward departure based on her substantially reduced mental capacity. Id. Ms. Checoura's attorney submitted two comprehensive letter briefs supporting the departure. (See Letter of 7/30/2001; see also Letter of 9/24/2001.) In support of her request, Ms. Checoura presented a written evaluation from Dr. Valerie C. Lorenz, the Executive Director of the Compulsive Gambling Center and a Certified Clinical Mental Health Counselor. Id. Dr. Lorenz rarely makes recommendations regarding punishment, but she made an exception in Ms. Checoura's case. (Letter from Lorenz to Koch of 3/28/2001, at 4.) Dr. Lorenz examined Ms. Checoura on three separate occasions. (Letter of 9/24/2001 at 1-2.) She also conducted diagnostic testing. (See Psych. and Proj. Test Res.) Dr. Lorenz reported that Ms. Checoura's gambling disorder was severe (Letter of 9/24/201 at 3.) She also noted that Ms. Checoura met all of the criteria promulgated by the American Psychiatric Organization for diagnosis of pathological gambling. (See Intake Eval. Summ at 11-12.)

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

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

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

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

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

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

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

The government did not appeal. Interview, supra.