TAB C JACOBSON

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

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

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

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

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

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

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

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

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

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

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

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

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

TAB D HAUCK

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

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

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

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

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

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

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

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

TAB E SADOLSKY

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

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

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

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

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

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

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

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

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

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

TAB F SANDERS

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

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

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

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

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

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

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

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

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

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

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

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

RESPONSE OF

THE NEW YORK COUNCIL OF DEFENSE LAWYERS

TO THE JULY 1, 2003 REQUESTS FOR COMMENTS

REGARDING DOWNWARD DEPARTURES

Respectfully submitted,

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Dated: July 31, 2003

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

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

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

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

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

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

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

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

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

Chambers of Judge Nancy Gertner

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

FROM: Judge Nancy Gertner

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

DATE: August 5, 2003

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

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

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

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

[2] U.S.S.G. § 5K2.0.

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

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

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

1. Departure Study

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

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

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

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

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

2. Crime Control

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

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

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

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

3. District Reports

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

4. Guideline Commentary

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

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

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

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

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

c) District sentencing reports or a Sentencing Information System (described below) -- describing the sentencing practices in the area-- should be widely circulated, for the same reasons as outlined in (b) above.

d) The Commission should provide commentary to each Guideline and in particular, the policy statements in Chapter 5, more akin to legislative history. Legislative history could include summaries of hearings, Commission reports, etc. Alternatively, it could include commentary like the commentary to § 1B1.3, "Illustrations of Conduct for which the Defendant is Accountable." In that section, the Commission has provided courts with examples of relevant conduct to illustrate the Guidelines. It is essentially a series of narratives -- not unlike a body of case law -- which I, for one, find enormously helpful in elucidating the boundaries of the Guidelines.

5. Sentencing Information System

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

6. Conclusion

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

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

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

CHAMBERS OF
HELEN G. BERRIGAN
CHIEF JUDGE

(504) 589-7515

Memorandum

To: United States Sentencing Commission

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

Date: July 30, 2003

Subject: Comment regarding PROTECT Act

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

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

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

These are my comments regarding the specific questions:

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

overruled.

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

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

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

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

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

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

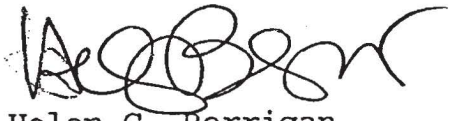
6. Should any of the above downward departures be eliminated. My short answer is "no." My longer answer is that I think 5K1.1 departures need to be reviewed, particularly with respect to those offenders who are minor players, tell all they know, and are denied a 5K1.1 because what they know isn't of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

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

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

Thank you very much for asking our input.

Sincerely,



Helen G. Berrigan

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
CATHERINE C. BLAKE
UNITED STATES DISTRICT JUDGE

July 31, 2003

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

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

Dear Judge Moore:

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

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

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

Sincerely yours,

Catherine C. Blake
United States District Judge

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

[75]

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

Chambers of
Marilyn L. Huff
Chief Judge

Phone:
(619) 557-6046
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August 1, 2003

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

Re: Public Affairs - Public Comment

Dear Judge Murphy:

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

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

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

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

Sincerely,

Marilyn L. Huff

Marilyn L. Huff
Chief Judge

MLH:am

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

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VIA FACSIMILE & U.S. MAIL

July 30, 2003

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

Dear Judge Huff:

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

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

MARK F. ADAMS
ATTORNEY AT LAW

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

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

Yours very truly,

MARK F. ADAMS
Attorney at Law

MFAlerd

FEDERAL DEFENDERS OF SAN DIEGO, INC.

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

August 1, 2003

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

Dear Judge Huff:

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

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

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

Very truly yours,

Mario G. Conte
Executive Director

MGC/mlk
Enclosure

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Comments for the Sentencing Commission

Prepared by Shereen J. Charlick & Steven F. Hubachek, FDSDI.

How should §5K2.0 and/or the commentary to §5K2.0 be revised?

Should the Commission provide additional and/or more restrictive guidance on mitigating factors, particularly those described in other provisions of Chapter 5, Part K, that may warrant a downward departure?

U.S.S.G. § 5K2.0 Issues:

These issues must be considered in light of what the the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub.L. No. 108-21, 117 Stat. 650 (Apr. 30, 2003) ("The PROTECT Act") sought to accomplish and by what means. The sections potentially applicable to 5K2.0:

a) instruct the Sentencing Commission to promulgate appropriate amendments to the Guidelines to "ensure that the incidence of downward departures are substantially reduced;"

b) limit availability of "fast-track" or early disposition departures to instances where (1) the government files a motion for such departure (2) pursuant to an early disposition program authorized by the Attorney General and (3) limiting the extent of such downward departure to not more than 4 levels.

c) direct the Commission to promulgate any other amendments necessitated by the Act, recognizing that could mean some revision of section 5K2.0

Section 5K2.0 should be revised only to reflect the PROTECT Act's express limitations upon downward departures for child and sexual offenses and in "early disposition" or "fast-track" type cases. Revisions should occur here and this will accomplish the congressional directive to substantially reduce downward departures or specifically, the type of downward departures which the PROTECT Act seeks to reduce – "fast-track" downward departures which are not driven by government motion. By placing the power to control "fast-track" or early disposition departures in the hands of prosecutors and in only designated districts and to limited degrees, the number of downward departures will be "substantially reduced."

Section 5K2.0 could be revised to reflect Congress' desire to limit "fast-track" type departures to instances where such government motion is made which would further eliminate use of another category of departure, *i.e.*, general mitigating circumstances or totality of the circumstances, as a grounds for a "fast-track" departure[1].

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[1] The Federal Defender Training Group material gathered from the Sentencing Commission Website provides that out of 59, 897 cases, courts departed downwards in 5.97% or

Similarly, the Act's entire elimination of certain departures for child and sexual offenses will also contribute to "substantially reduc[ing]" downward departures.

Any other revisions which would limit or restrict other permissible grounds for departures would conflict with another statute, 18 U.S.C. § 3553(a), which sets forth a list of considerations for judges at sentencing, many of which are mirrored in both upward and downward departures grounds specified presently in section 5K2.0. Section 3553, first and foremost, still directs courts to "impose a sentence sufficient but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. 18 U.S.C. § 3553(a). These particular "purposes" which courts are directed to consider constitute factors which could result in downward departures, for example: "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), the need for the sentence "to provide just punishment for the offense," 18 U.S.C. § 3553(a)(2)(A), the need "to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner," 18 U.S.C. § 3553(a)(D), "the kinds of sentences available," 18 U.S.C. § 3553(a)(3), "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. § 3553(a)(6), and "the need to provide restitution." 18 U.S.C. § 3553(a)(7).

Section 3553 and the considerations it sets forth were left untouched by Congress in enacting the PROTECT Act. Section 3553(a) is in fact cited in other portions of the PROTECT Act dealing with appeals from sentences. Thus, the PROTECT Act must be read *in pari materia* with18 U.S.C. § 3553 which still definitively sets forth the mandatory considerations for the judiciary in sentencing. *See Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 262 (6th Cir.1984)("[W]e are mindful that where two or more statutes deal with the same subject, they are to be read in pari materia and harmonized, if possible.").

The considerations in section 3553(a), for example, the nature and circumstances of the offense (was it committed in order to avoid "lesser harms;" was there coercion or duress involved?), the history and characteristics of the defendant (is this criminal act "aberrant" in light of the defendant's history; does the defendant have serious mental health issues?) all remain viable grounds for departure so that the sentence "provides just punishment for the offense," 18 U.S.C. § 3553(a)(2)(A). So that section 3553 remains meaningful, a tandem reading of these statutes means that no amendments which restrict any departures other than those expressly limited or eliminated by the PROTECT should be promulgated. To revise the Sentencing Guidelines in a manner which otherwise restricts departures would conflict with section 3553(a) and violate the principles of statutory construction.

Are there factors in Chapter Two (Offense Conduct), Chapter Three (Adjustments), or Chapter Four (Criminal History) to which the Commission has attached excessive weight, and if so, should the

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10,026 cases. Out of this not even 6%, the top reasons for departures were "general mitigating circumstances," (19.9%), "pursuant to plea agreement,"(17.6), overrepresentative criminal history, aberrant behavior, (7.9%), and fast track (7.7%). With the exception of the "pursuant to plea agreement" category, these statistics do not reflect instances of departures where the government has also moved for a downward departure.

Commission change the weight attached to those factors, thereby reducing the likelihood that a departure is warranted in a particular case"?

Chapter Two & Three Issues

In the Southern District of California, the Guidelines that prompt downward departure most frequently are sections 2D1.1, applicable to drug offenses, and 2L1.2, applicable to deported aliens who reenter or attempt to reenter the United States.

Section 2D1.1, which is applicable to the drug possession/importation offenses which are frequently prosecuted in the Southern District, sets the base offense level for drug offenses by reference to drug type and quantity. The use of drug type and quantity as proxies for culpability can produce inequities, particularly when the convicted defendant is a lower level actor, such as the drug "mules" that are frequently prosecuted in the Southern District. While not every drug mule is ignorant or lacking control of the type and/or quantity of drugs involved in his or her offense, many are. Yet the base offense level does not account for these differences.

It is true that the Commission has already made some effort to reduce such inequities by way of the safety valve adjustment, USSG § 5C1.2, and the reduction of base offense level contained in USSG § 2D1.1(a)(3). But those adjustments do not go far enough to remedy the disparities caused by a quantity driven base offense level. In particular, the latter only applies to very high offense levels, leaving inequities in high to mid level base offense levels unaffected.

The problem is exacerbated by the extremely limited nature of the role reductions set forth in USSG § 3B1.2. Although 2 level "minor" role reductions are routinely given in drug importation cases, the Commission has never made it explicit that such reductions are proper. Moreover, the commentary to the "minimal" role reduction makes it extremely unlikely that such a reduction will be granted, even for the least culpable defendants in typical Southern District court cases. Indeed, the judges of the Southern District almost never grant minimal role reductions in the typical drug importation cases; downward departures are far more common. The meager reductions available, and the narrow application of the minimal role reduction, ensure that section 3B1.2 does little to relieve the considerations that would prompt a district court to depart.

There are a number of potential cures that the Commission could adopt to reduce the incidence of downward departures in drug cases.

1. The Commission could de-emphasize quantity in the calculation of base offense level. This could be accomplished in a number of ways.

    a. The Commission could require some sort of scienter as to drug type and quantity as a precondition for use of the base offense level associated with the drug actually seized in the offense. Such a scienter requirement would not complicate prosecutions: convictions could still be secured without proof of a higher level of mens rea. Absent proof of scienter, the base offense level could be set by reference to the drug type and quantity that the defendant believed the offense involved or the Commission could set a minimum offense level applicable in the event that the defendant's state of mind cannot be proved.

b. As an alternative, the Commission could allow a reduction in offense level, or a cross-reference to a different drug type/quantity, if the defendant demonstrates that he or she lacked knowledge of or control over drug type or quantity.

2. The Commission could expand the availability and value of role adjustments.

a. The Commission could promulgate new commentary that broadens the applicability of minimal role adjustments, thus giving courts an opportunity to craft more appropriate sentences without the necessity to resort to departure. In addition, the Commission should clarify the commentary to make clear that drug "mules" are eligible for minimal and minor role adjustments.

b. The Commission could increase the value of the reductions available to minor and minimal participants.

With respect to defendants convicted of reentry offense under 8 U.S.C. § 1326, district courts are frequently confronted with requests for departure based upon the assessment of 12 and 16 level upward adjustments based upon prior convictions that are purportedly relatively minor offenses. While it is true that the Commission has addressed this issue, providing a more incremental approach, significant inequities persist. For example, all drug offenses for which the sentence is more than 13 months are assessed a 16 level enhancement. *See* USSG § 2L1.2(b)(1)(A). This across the board approach requires district courts to treat a low level courier in a typical Southern District case the same as a kingpin: both will receive 16 level increases.

The crime of violence provisions also cause significant inequities. The Commission has adopted a broad definition of the term "crime of violence," which includes any offense that "has an element the use, attempted use, or threatened use of physical force against the person of another." USSG § 2L1.2, comment. n.1(B)(ii)(I). Although the definition includes a second part that may have been intended to limit the definition's broad sweep, *see id.* at n.1(B)(ii)(II), the Ninth Circuit held that it was promulgated merely to ensure "that the enumerated crimes always be classified as 'crimes of violence.'" *United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1051 (9th Cir. 2003) (citation, internal quotations omitted). Thus, there are arguably no limitations on the application of the definition of "crime of violence." Because there are no limitations on the definition, offenses like simple assault or threatening communications can be treated in a manner similar to murder or rape.

The Commission can reduce the number of downward departures based upon these inequities, and others, by further refining section 2L1.2. One suggestion could be that the Commission increase the sentence required before a drug offense result in a 16 level enhancement. A five year requirement could be imposed before the 16 level enhancement is assessed. Similarly, the current 13 month limit could be required for the 12 level enhancement. All other drug offenses could result in an 8 level enhancement.

Similarly, the Commission should impose limitations on the crime of violence prong. Truly violent crimes provoke lengthy sentences, By imposing a sentence requirement, again, perhaps five years, the Commission could separate serious violent prior convictions from those that qualify only through a formalistic analysis. Graduated enhancements could be provided for

offenses with lower sentences.

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

Should the Commission provide additional and/or more restrictive guidance on the offender characteristics described in provisions of Chapter Five, Part H, that may warrant a downward departure?

Should, for example, the Commission provide additional guidance on .the circumstances under which an offender characteristic may become relevant that is ordinarily not relevant in sentencing?

U.S.S.G. § 5H Issues:

A. For offenses involving child crimes and sexual offenses:

In light of the addition of U.S.S.G. § 5K2.22, it does not appear necessary to revise section 5H unless the Commission wishes to reiterate in the particular provisions of section 5H the directives already set forth in 5K2.22. For example, sections 5H1.1, could be amended to include an additional paragraph stating: Age is a permissible basis for a downward departure in offenses involving child crimes and sexual offenses, and section 5H1.4 could include commentary excluding gambling dependence for defendants sentenced for offenses involving child crimes and sexual offenses. Section 5H1.6 is already revised.

B. For all offenses NOT involving child crimes and sexual offenses:

Here, unlike the above category, Congress did not limit any of the previously available range of departures with the exception of departures for early disposition of cases. The answer here is similar to that set forth above relative to section 5K2.0.

Instances of downward departures will be substantially reduced by virtue of the new section 5K2.22 and 5H1.6 and by the suggested amendments to section 5H1.1, 5H1.4.

As is true with section 5K2.0, the considerations referenced in section 5H are many of the same statutorily-mandated considerations set forth in 18 U.S.C. § 3553(a). For example sections 5H1.1 (age), 5H1.4 (physical condition) and 5H1.6 (family ties and responsibilities) directly fulfill the congressional demand that courts consider the "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1) in "provid[ing] just punishment for the offense," 18 U.S.C. § 3553(a)(2)(A).

Should, for example, the Commission provide additional guidance regarding the circumstances under which an offender characteristic that is ordinarily not relevant in sentencing may become relevant?

The characteristics set forth in section 5H, as is the case with section 5K encompass a large number of circumstances, many of which could not be foreseen or encompassed by way of example. They also involve balancing and weighing of all of the factors set forth in section 3553(a). For these reasons, a finite number of examples would not serve a useful purpose the way that they do in other guidelines section where they illustrate calculations. *See, e.g.*, U.S.S.G. § 1B1.3(a)-(c) (examples regarding mathematical aggregation and calculation of relevant conduct

in drug, theft and robbery offenses); U.S.S.G. § 3D1.4, app.nts (3), (4), (6) (examples of applying formula for grouping different offenses). In the context of § 5H, where determinations are not formulaic but rather are based upon judicial balancing, the judiciary, which makes this type of determination in a number of other contexts, *see, e.g.*,, Fed. R. Evid. 403, 404(b), 609, 18 U.S.C. § 3142(g), is particularly well-suited to accomplish this task without a need for examples. Indeed, unless the examples could subsume all the factors set forth in section 3553(a), they may have a limiting effect regarding other factors set forth in section 3553(a). Such limitation would be contrary to congressional intent as noted in 18 U.S.C. § 3553(a).

How, if at all, should guideline provisions governing downward departures for criminal history be revised?

Should the Commission provide additional and/or more restrictive guidance in §4A1.3 regarding the circumstances under which the court may depart for the over-representation of the defendant's criminal history?

Should the Commission provide for a dow.nward departure adjustment (or, in the case of criminal history, a reduction in criminal history points) in lieu of a downward departure for any factor or downward departure basis, or for a combination of factors and/or downward departure bases described above, or for any other mitigating factors the Commission should more fully take into account in the guidelines?

If so, how should such a downward adjustment or reduction be structured. and what should be the extent of the downward departure or reduction?

Should any of the downward departure bases described above be prohibited as a basis for downward departure"?

Criminal History

Numerous factors prompt district courts to depart downward based on criminal history. It is hard to imagine how a guideline system could adequately account for the enormous variation in charging and sentencing practices throughout the country. Because of this diversity, the Guidelines' calculation of criminal history points can and does create serious inequities that courts frequently attempt to redress through downward departures. No guideline system could eliminate these inequities to such an extent that departures would no longer be necessary. Changes in the calculation of criminal history points could, however, reduce the need to depart.

One significant source of inequity is the failure to distinguish between misdemeanors and felonies. As an example, a defendant who receives probation and sixty days in custody for driving on a suspended license could receive up to 5 criminal history points for that offense (if his release date is recent and he is still on probation). Yet a defendant who serves out a five year sentence for rape may be given only 3 points if he is no longer on supervision and his release was more than 2 years ago.

The over-representation of misdemeanor convictions can be devastating in drug cases. A defendant given straight probation for a minor misdemeanor who commits an offense while on

unsupervised probation, gets 3 criminal history points. He therefore loses eligibility for the safety valve, USSG § 5C1.2, and the reduction of base offense level contained in USSG § 2D1.1(a)(3). While such a result may be more reasonable for a person on felony probation, it can be grossly disproportionate for a mere misdemeanor conviction.

The Commission could limit the disproportionate effect of misdemeanor convictions by limiting the criminal history points that can be attributed to such convictions. One method for accomplishing this goal would be to limit the supervision/recent release enhancements to prior felony convictions. *See* USSG §§ 4A1.1(d), (e). Of course, in cases where a district court feels that additional points are merited for misdemeanor convictions, an upward departure could be considered.

Similarly, the Commission could consider increasing the sentencing thresholds for the 1, 2, and 3 point convictions. *See* USSG §§ 4A1.1(a)-(c). For instance, the 3 point level requires only 13 months. That low threshold essentially lumps together vast numbers of felony convictions, from less serious drug offenses up to murders and rapes. Indeed, the lowest state prison sentence typically imposed under California law is 16 months. Thus, essentially every defendant sentenced to state prison in California gets a 3 point conviction, no matter what the offense.

An increased threshold, such as 5 years, would not eliminate the problem. It would, however, address some of the more substantial inequities, and prompt fewer departures.

How should the Commission structure the downward departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney?

Structuring Early Disposition Departures

While Congress indicated a desire to require a government motion in order to obtain a "fast-track" departure, the same constitutional limitations and "bad faith" contract principles which currently govern disputes regarding the government's unwillingness to make a downward departure motion under USSG § 5K1.1,[2] should govern any dispute regarding the government's unwillingness to make the motion when the "early disposition" criteria (waiver of indictment, filing no motions, waiving appeal) are satisfied. The Guidelines should recognize this as a possibility and indicate that both the due process clause and contract principles may govern any disputes.

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[2] *See Wade v. United States*, 504 U.S. 181, 185-86(1992); *Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. Sandoval*, 204 F.3d 283, 285-286 (1st Cir.2000),

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CLARENCE C. NEWCOMER
JUDGE

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

July 23, 2003

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

Re: United States Sentencing Commission Request for Public Comment

Dear Judge Lake:

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

Personal Comment

1. There should be no revision of §5K2.0. Furthermore, the Commission should not provide additional or more restrictive guidance for mitigating factors that may warrant a downward departure, but instead, this guidance should arise from judicial opinions decided over the course of time.

2. The Commission has not attached excessive right to the departure factors. That should be an Article III judicial function not an Article I or Article II function.

3. Chapter 5, Part H, should be rescinded and the matter left to judicial discretion. Additional or more restrictive guidance on offender characteristics is not warranted.

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

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

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

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

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

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

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

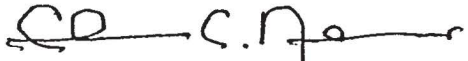
My response reflects that conviction.

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

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

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

Sincerely,



Clarence C. Newcomer

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

S. Arthur Spiegel
Senior Judge

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

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

July 31, 2003

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

Attention: Public Affairs-Public Comment

Re: Response to Request for Comment

To Whom It May Concern:

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

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

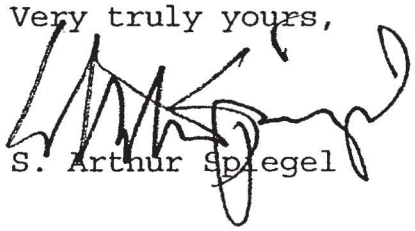
First, without the opportunity for judicial accounting for the various mitigating or aggravating circumstances that accompany each unique case, judges will not have the required discretion to issue an appropriate sentence. The Supreme Court of the United States has acknowledged the "wisdom, even the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

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

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

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

Very truly yours,



S. Arthur Spiegel

8/4/03
COPY TO JUDGE MURPHY, JUDGE LAKE AND KIM WHATLEY. WTM.

United States District Court
District of South Carolina
G. Ross Anderson, Jr. Federal Building and U.S. Courthouse
Post Office Box 2147
Anderson, South Carolina 29622

G. Ross Anderson, Jr.
United States District Judge

Telephone: (864) 226-9799
Facsimile: (864) 226-0112

July 29, 2003

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

Re: United States Sentencing Commission Request for Public Comment

Dear Judge Moore:

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

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

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

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

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

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

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

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

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

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

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

to Juveniles by Adult Criminal Court as Predicate Offenses for the Career Offender Provision, 8 ROGER WILLIAMS U. L. REV. 163, 166 (2002).)

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

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

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

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

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

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

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

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

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

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

Very truly yours,

G. Ross Anderson, Jr.

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August 1, 2003

Paula J. Desio, Deputy General Counsel
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Michael Courlander, Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Request for Public Comment

Dear Commission:

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

Commentary to §5K2.0 Revision

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

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

Sincerely,

/s/

Lynzy Wright
Legal Criminalist/Consulting Expert

/law

richard crane
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rney at law • corrections & sentencing law
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June 3, 2003

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

Dear Lou:

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

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

Sincerely,

Richard Crane

RC/mpf

cc: Barry Boss
Jim Feldman

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

July 11, 2003

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

Dear Chairman Murphy:

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

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

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

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

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

Respectfully,

James L. Murphy