
UNITED STATES SENTENCING COMMISSION



WRITTEN TESTIMONY

PUBLIC HEARING
August 19, 2003

PUBLIC HEARING AGENDA
UNITED STATES SENTENCING COMMISSION
Thurgood Marshall Federal Judiciary Building
Federal Judicial Center Classrooms A-C, Washington, DC

AUGUST 19, 2003

INTRODUCTORY REMARKS — 3:00 p.m.

Judge Diana E. Murphy
Chair, United States Sentencing Commission

PANEL ONE

William Mercer
United States Attorney for the District of Montana
Chair, Subcommittee on Sentencing Guidelines, Attorney General's Advisory Committee

Michael Goldsmith
Professor, J. Reuben Clark Law School, Brigham Young University
Former Vice Chair, United States Sentencing Commission

PANEL TWO

James E. Felman
Partner, Kynes, Markman & Felman
Co-Chair, United States Sentencing Commission Practitioners Advisory Group

John P. Rhodes
Assistant Public Defender for the District of Montana

Jon M. Sands
Assistant Public Defender for the District of Arizona
Chair, Federal Sentencing Guidelines Committee of the Federal Public and Community Defenders

PANEL THREE

Judge David F. Hamilton
Judge, United States District Court for the Southern District of Indiana
Member, Committee on Criminal Law, Judicial Conference of the United States

ADJOURN



IMPLEMENTATION OF THE PROTECT ACT OF 2003

TESTIMONY OF
WILLIAM W. MERCER,
UNITED STATES ATTORNEY,
DISTRICT OF MONTANA

BEFORE THE UNITED STATES SENTENCING COMMISSION

August 19, 2003

INTRODUCTION

Judge Murphy and Commissioners: I thank the United States Sentencing Commission for the opportunity to appear before you once again on behalf of the Department of Justice. My testimony will respond to your request for the views of the Department regarding the important issues concerning federal sentencing policy and practice raised by the passage of the PROTECT Act of 2003.

Before I begin my comments on the PROTECT Act, I want first to commend the Commission for holding this hearing and for soliciting and considering our views. This is the third time over the past year that I have appeared before the Commission to discuss various aspects of federal sentencing policy, including the Department's continuing concerns about the rate of non-substantial-assistance downward departures. The Department also would like to thank the Commission and its staff for its hard work in addressing the important issues before it. The tasks now before this Commission include some of the most significant issues it has had to address since the guidelines system was first established. The continued success of the reforms sought to be achieved by the Sentencing Reform Act and the PROTECT Act will depend, in large measure, on the actions this Commission takes in the next 10 weeks.

In our August 1, 2003 letter to the Commission, we lay out a number of sentencing policy issues – beyond those already identified by the Commission – that we think need to be examined. These issues include those raised by the required implementation of the PROTECT Act as well as other issues that we believe should be addressed as part of the ordinary amendment cycles. We recognize, however, that not all of the latter issues will likely be addressed before May 1, 2004. We look forward to working with the Commission in this and future years in pursuit of our continuing and mutual goal to make federal sentencing policy as effective and just as possible.

DOWNWARD DEPARTURES

It goes without saying at this point that both the Department and key Members of Congress have been very concerned for some time about the increasing number of non-substantial assistance downward departures, and the impact an increasing rate of departures has on the basic principles underlying federal sentencing policy. In passing the Sentencing Reform Act of 1984, Congress rejected what it described in the accompanying Senate Report as the “almost absolute discretion” traditionally exercised by federal judges in handing down criminal sentences, and instead adopted a system of determinate sentences calculated pursuant to pre-established guidelines. Congress intended this system – considered a radical change at the time – to “eliminate unwarranted disparities in federal sentences.” 18 U.S.C. § 3553(a)(6). Then, as now, the discretion of sentencing judges was not to be eliminated, but rather to be limited, and in most circumstances the exercise of that discretion resulting in sentences outside the applicable

guideline range would be subject to appellate review. Indeed, both the Congress and the Commission, in promulgating the original sentencing guidelines, contemplated that the vast majority of defendants would be sentenced within the applicable range. As the original Senate Report stressed, “[i]t is expected that most sentences will fall within the ranges recommended in the sentencing guidelines.” And as the Guidelines Manual still provides, departures in general should be “rare occurrences,” and departures based upon factors not mentioned in the sentencing guidelines should be “highly infrequent.”

Unfortunately, these laudable goals of sentencing reform have not been fully achieved. While the Commission has not established quantitative benchmarks for the terms “not very often”, “highly infrequent,” “exceptional,” and “extremely rare” – all of which could be used to define the appropriate rate of non-substantial-assistance downward departures – the national percentage of such departures, as well as the rate of such departures in many individual districts, have been, we believe, plainly out of compliance with any reasonable definition of these terms.

During the Senate hearings in 2000, this Commission produced data that properly analyzed the trends in downward departures by seeking to tease out the effect of (1) uncontroversial but atypical “fast-track” programs on the southwest border that significantly boosted both case volumes and departure rates; and (2) equally uncontroversial, but more typical, substantial assistance downward departures. The data produced by the Commission showed an unmistakable and steady increase in downward departure rates. Setting aside the southwest border cases and substantial assistance cases, the Commission found that 5.5% of the remaining

cases in FY1991 received a downward departure. By FY1996, this figure had risen to 8.9%, and in FY1999 (the last year in the Commission's data presented at the hearing), it was 12.4%. We have extrapolated these statistics using the more recent data sets now available, and they show that the relevant departure rate in FY2001 has, for the time being, leveled off at 13.2%. 10.9

Moreover, the rates of non-substantial-assistance downward departures differ widely and unjustifiably from one district to another: in South Carolina, it is 2% of all cases; in Connecticut, it is nearly 34%.

Some of the public comments submitted to this Commission criticize these statistical measures, but we believe that this approach – which the Commission itself used in analyzing the data, and which the American Bar Association has more recently used in advocating against the PROTECT Act – properly controls for the relevant variables and is, statistically speaking, the most accurate and informative measure that has been suggested. It was, I would note, one of the measures used in the Department's April 4, 2003 letter to the House-Senate Conference Committee urging support for the Feeney Amendment. Likewise, the charts used by Senator Hatch during the floor debate on the PROTECT Act also excluded southwest border cases and substantial assistance cases.

Others have suggested that a general downward departure rate as high as 13% is within the range that Congress contemplated, which they claim was 20%. This is wrong for two reasons. First, as Commissioner Steer correctly noted in connection with the 2000 Senate hearings, the 20% figure – which is mentioned in a 1983 Senate report – was based on pre-

guidelines Parole Commission data that included a 12% upward departure rate from parole guidelines, and an 8% total downward departure rate that included what we would now call “substantial assistance” departures. See Letter from Commissioner Steer to Senator Thurmond (Nov. 14, 2000), *reprinted at* <http://www.ussc.gov/hearings/res1013ltr.htm>. As Commissioner Steer stated, this suggests that current downward departure rates are “substantially greater” than Congress expected.

Second, whatever Congress’s expectation in 1983, it is now clear beyond all doubt that Congress deems the current downward departure rates to be too high. Of course, the PROTECT Act passed the Senate unanimously and the House by an overwhelming bipartisan margin; further, the original Feeney Amendment – which was substantially more stringent regarding departures than the bicameral compromise ultimately passed into law – attracted a substantial bipartisan majority in the House of Representatives. These votes were not cast, as some would portray it, in the confusion of a midnight session, but after floor debate and amidst considerable public debate in the press and by advocacy groups and influential commentators. Congress spoke clearly and with near unanimity in exercising its prerogative as architect of sentencing policy. As Chief Justice Rehnquist recently remarked:

It is well settled that not only the definition of what acts shall be criminal, but the prescription of what sentence or range of sentences shall be imposed on those found guilty of such acts, is a legislative function – in the federal system, it is for Congress. Congress has recently indicated rather strongly, by the Feeney Amendment, that it believes there have been too many downward departures from the Sentencing Guidelines. It has taken steps to reduce that number. Such a decision is for Congress, just as the enactment of the Sentencing Guidelines nearly twenty years ago was.

Remarks of the Chief Justice, Federal Judges Association Board of Directors Meeting (May 5, 2003), available at <http://www.supremecourtus.gov/publicinfo/speeches/sp_05-05-03.html>.

The Chief Justice's remarks also emphasize an obvious point that seemingly has been lost on some of those who have submitted written comments. Congress has directed that this Commission take measures, within 180 days, to "substantially reduce[]" the rate of downward departures. Lest we forget, that directive was added to the legislation in conference as a substitute for much broader and more sweeping proposed reforms at the behest of this Commission, representatives of the federal judiciary, and other advocacy groups, which requested time to study data, obtain additional input from the public, and consider amendments in a more deliberative manner. Although several commentators now in essence encourage this Commission to defy that directive, we are confident that you will not accept that unhelpful invitation.

The Department supports Congress's judgment that a consistent and unchecked increase in the number of cases where the specified Guidelines penalties are not applied will inevitably undermine the most basic principles of consistency, transparency, and predictability that Congress sought to achieve in the Sentencing Reform Act. Unless the Commission adopts more specific measures to regulate the ability to depart, this steady increase – coupled with an unjustifiably wide geographic and subject-area variability in departure rates – will likely continue.

Before I discuss the changes we think the Commission should take to implement the relevant sections of the PROTECT Act, I want to touch on some changes that have already taken place that we think will have a positive impact on federal sentencing policy generally, and on departure policy in particular.

1. Policy Changes at the Department of Justice

Given its unique role as the Executive Branch's prosecutorial authority within a geographically diverse federal system, the Justice Department has a unique responsibility to ensure that its policies and practices fully support the principles of the Sentencing Reform Act as well as the important reforms that are part of the PROTECT Act. Although the Department takes pride in its long history of dedicated career prosecutors exercising their judgment and discretion in each case to best further the interests of justice, we recognize that, just as is the case with federal judges, prosecutors' discretion must be exercised in a manner that does not undercut the consistency and equality in the enforcement of the law that must be maintained in a national system of justice. This Attorney General takes those principles very seriously, and insists that the prosecutorial power entrusted to Department prosecutors must be exercised fairly, consistently, and in a manner that ensures accountability. In order to carry out this responsibility most effectively, the Department over the past several months has been undertaking a comprehensive review and re-evaluation of its policies regarding federal charging and sentencing practices, particularly those which have an impact on non-substantial assistance downward departures. Indeed, many aspects of this project have been ongoing since last year, and long pre-date the passage of the PROTECT Act.

As a result of these efforts, and consistent with section 401(l) of the PROTECT Act, the Attorney General last month issued a new internal policy directive to all federal prosecutors concerning sentencing recommendations, litigation, and appeals. In his memorandum to all federal prosecutors, the Attorney General prohibits prosecutors from engaging in any type of “fact bargaining”; agreements about the applicability of the sentencing guidelines must be fully consistent with the readily provable facts. Accordingly, if readily provable facts are relevant to calculations under the sentencing guidelines, the prosecutor must disclose them to the court, including the probation office. This directive specifically addresses a concern that has been raised in the past by this Commission as well as a number of federal judges. See *Berthoff v. United States*, 140 F.Supp.2d 50 (D. Mass. 2001); *United States v. Rodriguez*, 45 F.Supp.2d 1088 (D. Colo. 1999).

The memorandum also establishes that prosecutors have an affirmative obligation to oppose any sentencing adjustments, including downward departures, that are not supported by the facts and the law. The memorandum makes clear that prosecutors cannot evade this responsibility by agreeing to “stand silent” with respect to an improper departure.

vice versa

The policy also requires that, in specific circumstances, prosecutors promptly report adverse, appealable decisions to the Criminal Division’s appellate section and that each of those cases be reviewed for appealability. For example, all downward departures that reduce an offense level from Zone C or Zone D to a lower zone and that result in a non-imprisonment sentence must be reported and considered for an appeal. This policy, which was implemented in

response to specific criteria set out in the PROTECT Act, treats these adverse sentencing guidelines decisions just like any other adverse decision. For years, the Department has required reporting of adverse decisions on the civil side and, except in sentencing guidelines cases, on the criminal side as well. The PROTECT Act effectively required the Department to extend this well-established mandatory reporting process to a *subset* of guidelines cases, and we have done so. This extension of the ordinary appellate review process to guidelines cases is entirely appropriate in light of the additional and significant appellate remedies afforded by the PROTECT Act.

Contrary to much recent media coverage and editorial comment, this Department policy regarding the litigation and appeal of downward adjustments and departures is *not* intended to create a “blacklist” of judges who depart from the guidelines. The new charging, plea, appeal, and fast track policies are first, a required response to the PROTECT Act and second, an important reaffirmation of the Justice Department’s commitment to the principles of consistency and effective deterrence embodied in the Sentencing Reform Act and the Sentencing Guidelines. Just as there is an appropriate place within the Guidelines structure for judicial discretion – even for unfettered, unreviewable discretion, such as where within a specified range of penalties a defendant’s sentence should fall – there is a place for the law to limit that discretion. As I have noted, the Chief Justice, who initially raised concerns about the original version of the PROTECT Act, reminded us all that “it is for Congress” to determine “what sentence or range of sentences shall be imposed on those found guilty of [criminal] acts.”

Over the coming weeks, the Department will complete a review of its charging and plea policies and practices, and we anticipate a new policy statement from the Attorney General addressing these matters. In addition, the Attorney General will be issuing new guidance to ensure that expedited disposition (or “fast track”) programs are only authorized where warranted. We also look forward to working with the Commission in reviewing existing “fast track” programs, and making sure that needed Department and Commission reforms do not create unintended consequences for our border districts.

Thus, while prosecutorial discretion is a longstanding and traditional element of our system of justice, there is a place for internal policies and procedures limiting that discretion. The policies promulgated by the Attorney General are intended to regulate prosecutorial discretion and to bring about appropriate consistency in charging, plea, and appeal practices. The potential for unbridled prosecutorial discretion to undermine the guidelines has been a longstanding concern of this Commission and other commentators. We think these new policies address these concerns and are important, practical steps that will have a real and positive impact on the federal criminal justice system and advance the longstanding principles of the Sentencing Reform Act.

2. Changes in the Standard of Appellate Review

The Department has long contended that the deferential standard of review announced by the Supreme Court in *Koon v. United States*, 518 U.S. 81 (1996), significantly impaired the government’s ability successfully to challenge district court departures and therefore was an

impediment to sound departure policy.¹ By the same token, the Commission and others have criticized the Justice Department for not sufficiently challenging departures on appeal.² The provisions in the PROTECT Act that changed the standard of appellate review are an important step toward improving departure policy and reducing the overall incidence of downward departures.

Already, several appellate courts have applied the new standard of review to cases involving downward departures. We are encouraged by many of the decisions. For example, in *United States v. Thurston*, ___ F.3d ___, 2003 U.S. App. Lexis 15516, 2003 WL 21782339 (1st Cir. 2003), the First Circuit reversed a downward departure – from a guideline minimum term of 63 months imprisonment to an imposed term of only three months imprisonment – that was based on charitable and other good works and on a disparity in sentence between the defendant and a codefendant. This is one of the 80 or so cases that we highlighted to the Commission late last year in expressing our concerns about downward departures. You may recall that the defendant had engaged in a multi-million dollar health care fraud. The appellate court properly wrestled with the grounds of departure identified by the district court and ultimately reversed and remanded for resentencing at the statutory maximum. *See also United States v. Swick*, 334 F.3d 784 (8th Cir. 2003); *United States v. Smith*, 331 F.3d 292 (2nd Cir. 2003). These recent cases

¹ The Department opposed the change in the standard of review to the abuse of discretion standard before the Supreme Court in the *Koon* case.

² *See, Oversight of the U.S. Sentencing Commission: Are the Guidelines Being Followed?*, Subcommittee on Criminal Justice Oversight of the U.S. Senate Judiciary Committee, October 13, 2000, Testimony of John Steer, Vice Chair, United States Sentencing Commission.

illustrate that the PROTECT Act has already had the intended effect of restoring a more robust role to the appellate courts in developing a “common law” of departures to guide the lower courts in the exercise of their discretion.

Importantly, this same standard of review is being used in cases involving upward departures. For example, in *United States v. Jones*, 332 F.3d 1294, (10th Cir. 2003), the Tenth Circuit reviewed *de novo* the trial court’s grant of an upward departure based on its conclusion that the defendant’s conduct fell outside the heartland. In *Jones*, the defendant’s convictions stemmed from an alcohol-related car accident on the Ute Mountain Indian Reservation in which Rufus Cayaditto, his common-law wife, Latanyia Begay, and their infant child, Jasmyne Cayaditto, were all killed. The defendant’s vehicle crossed the center line of Colorado Highway 160 and collided head on with the victims’ sedan. At the time of the accident, the defendant’s blood-alcohol level was .266, over twice the legal limit. The Tenth Circuit affirmed the upward departure in the case, holding that the circumstances of the killing of an entire family took the case out of the heartland of the guideline and that a sentence of five years and 11 months was reasonable. *See also*, *United States v. Tarantola*, 332 F.3d 498 (8th Cir. 2003); *United States v. Flores*, ___ F.3d ___, 2003 U.S. App Lexis 14438, 2003 WL 21673619 (8th Cir. 2003); *United States v. Semsak*, ___ F.3d ___, 2003 U.S. App. Lexis 14923, 2003 WL 21730615 (9th Cir. 2003), a case from the District of Montana.

3. Commission Action to Comply With Section 401(m) of the PROTECT Act

Despite these positive changes that I have already touched on, the PROTECT Act requires that the Commission take additional steps to reduce the incidence of non-substantial assistance downward departures. We think there are several definitive measures that are clearly called for and that the Commission should adopt to implement the directives of the PROTECT Act. As a preliminary matter, however, I wish to emphasize the Department's agreement with the Practitioners' Advisory Group on a fundamental and important point: we agree that, in light of the PROTECT Act's distinct treatment of substantial assistance departures, *see, e.g.*, section 401(l)(2) (detailing the congressional reporting requirement that will not go into effect), and its explicit endorsement of "fast-track" departures, *see* subsection 401(m)(2)(B), the Commission's task under subsection 401(m)(2)(A) is to substantially reduce the incidence of departures other than "fast-track" and substantial assistance departures. *See* PAG letter at 1-2 (Aug. 4, 2003).

A. Comprehensive Review of Other Mentioned Departure Factors


First, the Commission should comprehensively review all non-substantial assistance departure factors now mentioned in the Guidelines Manual. *See* PROTECT Act, § 401(m)(1).

We think the Commission should make it a goal to catalog *all* such factors in Chapter Five of the guidelines within the next two amendment years, to the extent and in a manner consistent with the limitations of § 401(j)(2) of the PROTECT Act (which temporarily limits the ability to add grounds of departure to Part K – which is the only Part that can be invoked in child victim and sexual abuse cases, *see* § 401(b)). Wherever possible, the Commission should replace departures authorized in Chapter Two with appropriate amendments to the underlying guideline


(e.g., by addition of new specific offense characteristics). We would be pleased to work with Commission staff in developing specific proposals to accomplish this goal.

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

We are concerned that the availability of certain downward departures pursuant to §5K2.0 – civic or charitable work (§5H1.11), aberrant behavior (§5K2.20), employment record (§5H1.5), family ties (§5H1.6), diminished capacity (§5K2.13), physical condition (§5H1.4), mental condition (§5H1.3), and even so-called “extraordinary” acceptance of responsibility – are fodder in virtually every fraud and tax sentencing, given the community standing and background of



many white collar defendants, as well as the sophistication of their legal counsel, experts, and consultants. Despite the fact that existing policy statements generally discourage such grounds for departure, prosecutors report an ever-increasing number of cases where these departures are granted. This phenomenon further erodes the relatively less onerous guideline ranges in white-collar cases, and feeds the public perception that businesspeople and other fraudsters who steal get unduly lenient sentences.



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

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

B. Criminal History Departures

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

At a minimum, we believe the Commission should make significant reforms concerning the use of this departure (*see* §4A1.3). Instead of allowing an unlimited reduction in the offense level or the overall sentence, the guidelines should explicitly cap such departures to a specified reduction in criminal history category. We further think such a reduction should in no event exceed one criminal history category.

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

§ 994(h) and that the guidelines should explicitly prohibit these criminal history departures for career offenders.

C. Use of Unmentioned Factors

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

The Commission’s initial rationale for allowing unmentioned departure factors was “for two reasons.” USSG, Ch. 1, Pt. A. First, the Commission noted that it could not prescribe a single set of provisions governing all relevant human conduct and that it did not need to do so at the outset, because, “over time” it would “be able to refine the guidelines to specify more precisely when departures should and should not be permitted.” *Id.* Second, the Commission stated its belief that, “despite the courts’ legal freedom to depart from the guidelines, they will not do so very often.” *Id.* Both rationales have been vitiated by the passage of time. The

Commission now has 15 years of experience under the guidelines, and greater specificity is both possible and warranted.

We think the Commission should, given its exhaustive and comprehensive work now spanning 15 years, promulgate a policy statement that establishes a strong and effective presumption that, in establishing the applicable guideline and specific offense characteristics and in cataloguing permissible and impermissible grounds of departure, the Commission has indeed considered virtually all factors that might be relevant to setting the guidelines range at sentencing, leaving other factors to be considered, as appropriate, only in determining the sentence within the range. The exact formulation of such a policy statement must be carefully considered, especially in light of the fact that the existing policy statement stating that such departures should be "highly infrequent" has proved to be ineffective. In conjunction with issuing such a new policy statement, the Commission may wish to consider whether there are any unmentioned factors that should be specifically mentioned. We also believe that, thereafter, the Commission should, annually, review departures based on unmentioned factors and consider whether to address them in the Guidelines Manual.

D. Combination of Factors

The commentary to §5K2.0 currently provides that in an extraordinary case in which a combination of offender characteristics or not ordinarily relevant circumstances takes a case out of the "heartland," even though none of the characteristics or circumstances individually distinguishes the case, a departure may be warranted. Since this provision was enacted, despite

the commentary that such cases will be extremely rare, this amorphous, catch-all provision has been urged on sentencing courts all too frequently by defendants and has been relied upon by the courts to grant downward departures.

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

E. Departures for Early Disposition Programs

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

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In sum, we think the PROTECT Act has already led to significant improvement in federal sentencing policy through statutory changes that will reduce the incidence of downward departures. We think the additional changes recommended here will further improve departure policy and make federal sentencings more consistent while preserving the ability of sentencing courts to depart from the otherwise applicable guideline range in those rare cases where such departures are appropriate.

I thank you again for the invitation to appear before you and for taking up these important issues of federal sentencing policy. I would be happy to address any questions.

Outline of Testimony Before the United States Sentencing Commission¹
Professor Michael Goldsmith
BYU Law School
August 19, 2003

Implementing the Protect Act

1. The Problem of Timing
 - A. The Protect Act's 180 Day Directive
 - B. Prerequisite for Reform: Comprehensive Evaluation of Departure Trends
 - (1) Based on departure rates for each guideline and judicial explanations, determine which guidelines are most problematic.
 - (2) Staff Studies and Outside Professional Commentary
 - (3) Consult with Congress, the Department of Justice, the Criminal Law Committee, the Practitioners Advisory Group, FAMM and other members of the criminal justice community.
 - (4) Amend guidelines based upon findings and recommendations.
 - (5) *The Commission has obviously begun this process, but six months is simply not enough time to get the job done properly.* However, ways still exist for the Commission to respond to the Protect Act in a manner that addresses Congressional concerns.
 - C. Resolving the Time Crunch: A Five Step Approach for Responding to Congress
 - (1) A Targeted Reduction: Amend the kidnapping guideline to reduce the incidence of departures for that crime.
 - (2) Correct the policy statement in sec. 1A.4.b which implicitly modified the statutory standard for judicial departure determinations.
 - a. *The judicial departure standard is not the "heartland" concept but the statutory standard based upon what the*

¹For a more detailed analysis of the basis underlying this testimony, see Goldsmith & Porter, "Lake Wobegone and the U.S. Sentencing Guidelines: The Problem of Disparate Departures, 69 Geo. Wash. L. Rev. 57 (2000).

Commission considered in formulating the guidelines.

b. The heartland concept is not always a proxy for the statutory standard.

(3) Add the Commission's Statement of Reasons to the Guidelines' Official Commentary. This will reduce departures by expanding and clarifying the range of factors the Commission considered in formulating guidelines.

(4) Propose an amendment to the Sentencing Reform Act to broaden the range of materials courts may examine in determining what the Commission considered in formulating the guidelines.

(5) Conduct the required comprehensive evaluation of departure rates

2. Amending the Kidnapping Guideline (sec. 2A.4.1) to Eliminate or Reduce Departures

A. *Such an amendment would directly respond to the crime that initially led Congress to enact the Protect Act.*

B. Reduce kidnapping departures by removing selected sec. 5K2 factors as departure factors or designating them as "not ordinarily relevant" in these cases.

3. Understanding the Correct Standard for Judicial Departures.

A. Origin of the "Heartland" Standard.

B. Distinguishing the Statutory Standard from the Heartland Concept.

C. Problems with the Heartland Standard.

D. Revise the policy statement (sec. 1A4.b) to emphasize the correct statutory standard for departures. This can be done immediately to alleviate Congressional concerns.

4. Reducing Departures Under the Existing Statutory Standard..

A. Include the Commission's "Statement of Reasons" as Guideline Commentary. This will help courts understand what the Commission considered in formulating guidelines.

-----> More detailed statements of reasons will curtail judicial discretion to depart

- B. Amend the Sentencing Reform Act to broaden the range of materials courts may review in determining whether "there exists a mitigating factor not adequately *taken into consideration* by the Commission in formulating the guidelines." 18 U.S.C. sec. 3553(b) (Emphasis added)

Example: Section 3553(b) of Title 18 of the United States Code is amended to read as follows:

In determining whether a circumstance was adequately taken into consideration by the Sentencing Commission, the court shall consider the sentencing guidelines, policy statements, [and] official commentary of the Sentencing Commission, *official studies authorized by the Sentencing Commission, transcripts and exhibits of public meetings and hearings conducted by the Sentencing Commission, public comment received by the Sentencing Commission, and briefing books prepared by the Sentencing Commission staff.*

----> This proposal creates the opportunity for the Commission to work with Congress to Implement the Protect Act


5. Amend the Guidelines based upon results of comprehensive evaluation.

Sent. Hrgs could be expanded. Circus.

**WRITTEN TESTIMONY OF JAMES E. FELMAN
KYNES, MARKMAN & FELMAN, P.A., TAMPA, FLORIDA
CO-CHAIR, PRACTITIONERS' ADVISORY GROUP**

August 19, 2003 Public Hearing Regarding
Implementation of the Protect Act

On behalf of the Practitioners' Advisory Group, I appreciate the opportunity to address the Commission today regarding the directives to the Commission contained in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21 (the "Protect Act"). The Protect Act directs the Commission to amend the guidelines, policy statements, and commentary to "substantially reduce" the incidence of downward departures. The PAG submitted its response to the Commission's request for public comment on this by letter dated August 4, 2003. In my testimony today I wish to expand on a few of the points made in that correspondence.



Of course as a practitioner I view the Protect Act as deeply unfortunate. In the real world, human conduct takes forms as diverse as the imagination allows, and sometimes more so. How often have we in the criminal justice system had occasion to observe "truth is much stranger than fiction?" The result is that justice suffers when it is driven exclusively by rules written down in advance. The achievement of human justice in the sentencing of crimes calls into play a mix of information so rich that there are times it should more appropriately be described as art than science. There are and always will be cases in which justice can best be achieved through a departure. Indeed, I have on rare occasions seen cases in which the result required by the guidelines without a departure is simply bizarre. I say that the Protect Act is unfortunate not because I believe it is in some way optional. But I believe the Commission should approach its task of implementing the Act with a deep appreciation of the vital role played by departures in appropriate cases.

Turning to the task at hand, the Act does not specify which downward departures are to be reduced. In light of the process by which the Protect Act became law, I am unaware of any research study or data which would assist in understanding why Congress sought to reduce departures or the types of departures which are of concern. In my capacity as an "advisor" to the Commission, the task at hand has the feel of a solution in search of a problem.



The initial search for the problem has primarily been a review of the categories of departures utilized with the greatest frequency. According to data from 2001, the most recent data available, these categories include: (1) general mitigating circumstances, (2) pursuant to plea agreement, and (3) criminal history is overstated. Before addressing this

“categorical” approach, I would observe that an equally, if not more rewarding, search for the problem might lie with a “geographical” approach.

I practice law primarily in the Middle District of Florida. In 2001, the incidence of “other” downward departures in the Middle District of Florida was 6.6%. Putting to one side Circuits such as the Ninth and Fifth which are skewed by “fast track” immigration cases, the overall departure rate in the Second Circuit in 2001 was 20.4% -- roughly triple the rate in MD FL. In the Eastern District of New York the rate was 28.4%. Cross a river to the Southern District of New York and the rate was 12.2%. Travel a little ways to Connecticut at the rate was 33.8%. Head over to the Western District of New York and the rate is 9.3%. The downward departure rate in Southern Iowa (17.2%) is twice that of Northern Iowa (8.1%). A defendant in the Middle District of Alabama (14.3%) is four times more likely to receive a downward departure as a defendant in the Northern District of Alabama (3.4%).

I do not know what accounts for these regional disparities. I suspect that they arise from the cultures of the legal practice in those districts which have evolved between judges, prosecutors and defense attorneys. I suspect that in some districts in which probation officers have been advised not to “look behind” plea agreements, cases are routinely sentenced within the guidelines on facts which would require a departure in other districts. If the goal is to reduce the incidence of downward departures by eliminating the departures which are not warranted, I believe the Commission must address the geographic aspect of the issue rather than rely solely on a categorical approach. I expect this suggestion will be met with the observation that it cannot be accomplished in the next two months. In my line of work this would be grounds for a motion to continue. In any event, I would hope that if the Commission takes some steps along the “categorical” line sufficient to comply with the Protect Act, the Congress would settle for less in this area in return for more promising reforms next year based on a geographic approach.

Turning to the “categories,” I find it difficult at this time to address the first two – “general mitigating circumstances” and “pursuant to plea agreement.” Neither is a valid ground for departure without more specific findings. It is my understanding that the staff has undertaken a review of a sample of the cases in these categories. I would ask that this data be made public so that we may learn from it and comment on it. I cannot think of any reason this data should not be made public. Depending upon what this data shows, these departures may or may not have been appropriate, but they certainly were not documented in an appropriate fashion. Given the importance of the issue, a sound approach would be to require greater specificity in the documentation supporting departures, a matter I believe is already addressed by the Protect Act. Once this more specified data is recorded, the Commission could more intelligently act in this area. In the meantime, the Protect Act’s interests would be adequately furthered by appropriate amendments to the guidelines clarifying that neither “general mitigating circumstances” nor “pursuant to plea agreement” are appropriate grounds for departure in the absence of other specified findings which include an appropriate ground for departure.



As to criminal history, in a perfect world the Commission would wait until the completion of its criminal history study before taking action in this area. If it is felt that the Protect Act does not afford the luxury of data-analysis before policy-making, additional guidance could be provided by requiring more specified findings before a departure on this ground would be permitted.

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

August 14, 2003

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

Re: Comments re: Section 401(m), PROTECT ACT

Dear Judge Murphy:

Thank you for the opportunity to testify at the Commission's public hearing on August 19, 2003. For over five years, I have served as an Assistant Federal Defender with the Federal Defenders of Montana. From May 2002 through November 2002, I served as Special Counsel to the Commission, and through December 2003, I am on temporary duty with the Defender Services Division of the Administrative Office of the United States Courts. Having represented hundreds of defendants in federal criminal prosecutions, spending thousands of hours with them and their families, and previously specializing as a Guardian Ad Litem for teenage rape victims (while serving as a state public defender), I appreciate the impact of the Commission's decisions on the lives of individual human beings.

I would like to dispel the political myth that the PROTECT Act seemingly responds to - an onslaught of baseless departures, resulting from the sentencing courts' ad hoc determinations of the appropriate sentence in a particular case. From the defense perspective, a district court's granting of a downward departure culminates months of work. That effort begins with the initial client meeting and the many subsequent conferences, in which the defense attorney must become acquainted with the life and offense circumstances of the defendant. The purpose of that inquiry is two-fold: to learn of facts that may impact the case, be it the determination of innocence or guilt or sentencing information, and to identify issues in the client's life subject to treatment and improvement. With a fundamental understanding of these areas, the defense attorney can then interview the client's family, friends, co-workers, health care providers and other individuals with regular contact with the client and the resulting insights into the client's behavior and circumstances. Frequently, this investigation entails reviewing medical, employment, and other social history records. At the same time, the defense attorney can also work to gain the client needed treatment, or at least a professional evaluation analyzing the client and prescribing future rehabilitation. As noted, these efforts are undertaken both to defend the client and to help them. For the attorney, and particularly for the client seeking to first recognize and then address their problems, this is a daily struggle.

If the facts permit, the defense attorney can begin advocating for downward departure. Usually, the potential departure facts are shared with the Pretrial Services Officer in the United States

John Rhodes' Comments re: PROTECT Act
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Probation Office. Candidly speaking, the facts are shared to help gain a downward departure. More immediately, however, the purpose is more practical: to identify the problem areas in the client's life and to enlist the services and resources of Pretrial Services to address those problems. From the downward departure perspective, this is a gamble, because it exposes the client's problems to the Probation Office and also potentially sets up the client to fail by lobbying Pretrial Services to help someone who may not be willing or able to cooperate. It is also a gamble in terms of release and detention, because any accommodation by Pretrial Services will be reflected in the client's conditions of release, and thus a client who does not embrace and abide by those accommodations has in essence checked into jail.

If, at this point, a downward departure is still viable, it can be part of the plea negotiations. In Montana, however, the United States Attorney's Office will not consider (non-substantial assistance) departures in plea agreements. For this reason, I do not try to negotiate the departure, however, frequently, I do share the facts supporting the departure argument with the prosecutor, both as a courtesy and to try to "win over" their sentiments, which at best, means less (but nonetheless still) resistance at sentencing.

After the client's change of plea to guilty, the focus of the departure effort expands to include the Probation Officer preparing the presentence report. Once again, this assumes that the client is dedicated to maintaining behavior that supports the departure argument, and that witnesses and documents (at least arguably) support the position. The presentence interview is an especially important occasion to share facts supporting departure. That Probation Officer not only prepares the presentence report, including its identification of any potential departure grounds, but also, in Montana, meets with the judge confidentially before sentencing and opines on potential departures. Between the presentence interview and the service of the draft presentence report, the Probation Officer investigates the facts claimed to support departures, interviews witnesses, and obtains and reviews social history documents relevant to departures.

During the presentence investigation, defense counsel continues to monitor the client's progress and maintain communication with potential departure witnesses, including expert witnesses and other professionals. I also solicit letters from those individuals close enough to the client to inform the judge about the client's life before and after the offense conduct.

When the draft presentence report issues, despite the above efforts, it frequently omits information relevant to departure. Thus, departure issues regularly are part of the presentence report objection letter, and equally if not more importantly, phone conversations and meetings with the Probation Officer.

Prior to the Sentencing Hearing, departure (and other) issues are briefed in a Sentencing Memorandum filed with the Court and served on both the Assistant United States Attorney and the Probation Officer. Filed documents frequently support the briefing, including the social history

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records discussed above, medical and professional evaluations, and letters from the client's friends and family. In the division in which I most frequently appear, the judge requires notice of witnesses, so that information is also provided. Of course, during this time, defense counsel continues to meet with the client and witnesses to monitor the client's status and inform them of the Sentencing Hearing procedure and related developments.

If, at this point, departure is still viable, the facts and witnesses canvassed above are marshaled at the Sentencing Hearing. In Montana, a contested hearing regularly last several hours, sometimes consumes a good part of a day, and occasionally spans more than one day, with the court generously providing the opportunity for both parties to call witnesses, present other factual evidence, and argue the law regarding the departures at issue.

I summarize the above process to counter the illusion that departures somehow result from the casually-rendered decisions of sentencing courts flippantly intent on disregarding the Sentencing Guidelines. Moreover, I inject the above efforts in every case (to varying degrees), yet, departures are infrequent: per the 2001 Sourcebook of Federal Sentencing Statistics, the departure rate in Montana is 11.8%. Indeed, I have appealed the district court's refusal to recognize departures grounds as lawful more often than I have defended government appeals of downward departures.

From this perspective, departures are not readily nor improvidently granted. Nonetheless, the PROTECT Act purports to solidify the integrity of the Sentencing Guidelines with amendments designed to promote uniformity. The Section 401(m) directive reflects this intended structural reinforcement. Given this legislative reality, I offer the following suggestions.

A mechanical approach to eliminating departures will defeat one of the Guidelines' bedrock principles, uniformity in sentencing. Simply forbidding currently lawful departures grounds will undermine the Sentencing Reform Act. If judges' flexibility to permit individualized sentencing is not maintained, different offenders with different offense characteristics, even those with extraordinary circumstances, will be sentenced alike. If extraordinary circumstances are rendered meaningless, then uniformity cannot be achieved. Sentencing would be reduced to mathematical calculation and not adjudicating facts and judging human beings.

Instead, the Commission must maintain the Guidelines' first principles, including 18 U.S.C. § 3553(b)(1)'s mandate that, "the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Via the PROTECT Act, Congress reviewed this principle and importantly, reaffirmed it by not changing it.

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As it has done with the mitigating role cap and the graduated enhancements in the illegal reentry guideline, the Commission should distill the facts frequently resulting in departures in particular types of cases and transform those facts into either guideline-specific or Chapter 3 adjustments. Not only will such an endeavor reduce departures, it will further the Commission's scientific mission and increase uniformity in sentencing. I specifically suggest examining departures relating to cultural assimilation (e.g. family, employment, education, community immersion, etc.) in immigration cases, duress/coercion, including family circumstances, in drug trafficking and fraud cases, victim conduct in assault cases, and getting to the bottom of the government's role in departures by identifying the facts which convince the U. S. Attorneys Offices to acquiesce to departures, such as in "pursuant to plea agreement" cases.

Criminal history departures also may warrant increased guidance. Specifically, the Commission could expand upon the quantitative guidance it provides to district courts for calculating the extent and explaining the rationale for such departures.

More importantly, however, rather than targeting specific types of cases, the Commission should objectively study all departures and then begin formulating conclusions. I understand that the Commission has undertaken an expansive review and analysis of all non-substantial assistance departures. With such proper study, the Commission can further demonstrate, through Guidelines' adjustments and commentary, that it has considered factors in formulating guidelines and thereby reduce departures, while still preserving the judicial discretion required by section 3553(b)(1).

I am not personally familiar with the two most frequently invoked departures grounds in the 2001 Sourcebook - "general mitigating circumstances" and "pursuant to plea agreement" - having never requested such departures, let alone argued or experienced a client benefitting from them. These vague characterizations may not survive the PROTECT Act's specificity requirement, codified at 18 U.S.C. § 3553(c).

The Commission may want to consider incorporating section 3553(c)'s requirements into the Guidelines, perhaps either in Part H or Part K of Chapter 5, or by creating a new Part L, dedicated to specificity and discussing and limiting catch-all departure explanations such as "pursuant to plea agreement" or "general mitigating circumstances." The new Part L could expound upon specificity by emphasizing that section 3553(b)(1)'s mitigating circumstance standard can only be met where a court can articulate exactly why the offense or offender circumstances are unusual. The new Part L could also forbid general departures as violating both sections 3553(b)(1) and (c). It could itself be specific by identifying inappropriately vague departure explanations that the Commission's studies reveal.

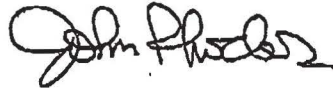
I conclude by emphasizing that the in every case United States prosecutes, attorneys represent, and the district court sentences individual human beings, not statistics. The Commission has done a masterful job of capturing the factors that typify the various federal offenses. At the same

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time, the Commission has recognized that not all offenses and offenders are alike and that sometimes factors in cases are so different that they deserve to be sentenced differently. By preserving section 3553(b)(1), Congress shares this recognition. If this first principle is abandoned or even diminished, the Guidelines' fundamental goal of uniformity in sentencing cannot be achieved. Rather than limit the discretion of sentencing courts, the PROTECT Act directive should be implemented by further guiding that discretion, perhaps in the ways suggested above.

Thank you for considering my comments. I look forward to testifying before the Commission on August 19, and am willing to provide the Commission with any additional information that it desires.

Sincerely,

A handwritten signature in black ink, appearing to read "John Rhodes". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

John Rhodes

September 12, 2003

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

Re: Comments re: Section 401(m), PROTECT ACT

Dear Judge Murphy:

Thank you again for the opportunity to testify at the Commission's public hearing on August 19, 2003. I truly appreciate working with the Commission to assist it in meeting its challenges and hope that its work is progressing smoothly.

I write regarding one aspect of my testimony. Following my oral testimony, the Commission's General Counsel, Charles Tetzlaff approached me with my written comments and inquired as to the accuracy of the following statement:

"In Montana, however, the United States Attorney's Office will not consider (non-substantial assistance) departures in plea agreements."

Based on my personal experiences and discussions with my fellow defenders and members of the Montana criminal defense bar, I told Charlie that I believed that my statement was true, but encouraged him to consult William W. Mercer, the United States Attorney for the District of Montana, who, as you know, had just testified, and was in the room.

Given Charlie's inquiry, the next day I e-mailed all of the attorneys in the Federal Defenders of Montana, as well as two lawyers who had previously worked in our office. No one reported a case in which the prosecutor had agreed to a downward departure in a plea agreement.

Moreover, I was reminded of the open court representation of an Assistant United States Attorney, to the Chief Judge of the United States District Court for the District of Montana, that "it's the policy of the United States Attorney's Office to object to downward departures." That statement was made by the senior prosecutor in the Missoula office in United States v. Vieke, CR 02-02-BU-DWM on September 10, 2002, and sometime shortly thereafter Tony Gallagher, the Federal Defender of Montana, informed me of this policy. Attached hereto is the transcript of that statement.

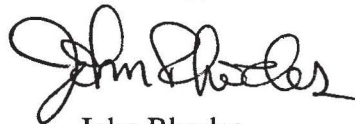
Despite this court room representation, the United States Attorney informed Charlie that there is no policy that an AUSA cannot agree to a downward departure by way of a plea agreement, but it does have to be justified by the facts and the law and approved by the United States Attorney. Charlie, in turn, relayed this policy to me.

John Rhodes' Comments re: PROTECT Act
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I provide this information to the Commission to explain the basis for my testimony. Moreover, Charlie's inquiry has proven beneficial. Per the attached letter, on August 29, 2003, the United States Attorney wrote Tony Gallagher to explain that, "It is not and never has been our policy to object to all motions for departure made by defendants. . . . For nearly two years it has been the policy that government lawyers would oppose departures unless I had authorized them to stipulate to a departure or to stand silent." The United States Attorney recognized that this explanation was necessary, "[g]iven the record in Vieke and Mr. Rhodes' testimony before the Sentencing Commission". Our office now knows not to rely on the AUSA's courtroom statement in September 2002 that, "it's the policy of the United States Attorney's Office to object to downward departures."

Thank you again for the opportunity to testify. I remain willing to provide the Commission with any additional information that it desires and to assist it in any way that I can.

Sincerely,

A handwritten signature in black ink, appearing to read "John Rhodes", written in a cursive style.

John Rhodes

enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION FEDERAL DEFENDERS OF MONTANA

SEP 26 2002

UNITED STATES OF AMERICA,

Plaintiff,

RECEIVED

vs.

CASE NO.
CR 02-01-BU-DWM

LAINA McCRACKEN VIEKE,

Defendant.

Missoula, Montana
Tues. 09-10-2002
11:19 a.m.

SENTENCING HEARING
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DONALD W. MOLLOY,
UNITED STATES DISTRICT JUDGE.

APPEARANCES

KRIS A. McLEAN, ESQ., Assistant United States Attorney
of the Office of the United States Attorney, District of
Montana, Missoula Office, 105 East Pine, Second Floor,
Missoula, Montana 59802,
Appearing on behalf of the Plaintiff.

MELISSA HARRISON, ESQ., Assistant Federal Defender
for The Federal Defenders of Montana, Missoula Office,
Executive Plaza, Suite 208, 218 East Front Street,
Missoula, Montana 59802,
Appearing on behalf of the Defendant.

Proceedings recorded by mechanical stenography,
transcript produced by computer by
Daina B. Hodges, RPR, CRR
Official Court Reporter, U.S. District Court
Missoula/Butte/Helena Divisions
Missoula, Montana

1 apparent that her stealing her parents' identity and Social
2 Security numbers and using those in a fraudulent manner was
3 something she could not control as part of her gambling
4 addiction.

5 It's for those reasons that we would object to any
6 departure downward based on a diminished capacity.

7 With respect to aberrant behavior, it's the policy
8 of the United States Attorney's Office to object to downward
9 departures. I no longer have any discretion in making
10 recommendations to the Court with respect to downward
11 departures. I am chaffing under this bit, but it is a bit
12 that I cannot remove. For these reasons we object to a
13 departure under aberrant behavior.

14 THE COURT: Well, with respect to the request for a
15 downward departure based upon diminished capacity under
16 5K2.13, I'm going to decline to exercise my discretion in that
17 regard. As the government points out, the behavior is
18 volitional.

19 And while there is a report by the person who
20 evaluated her and diagnosed her as having pathological
21 gambling, in this case, with the theft of the credit cards, I
22 am not going to make -- exercise my discretion and downward
23 depart on that ground.

24 However, with respect to the aberrant behavior, I'm
25 going to make a four-level downward departure. As pointed out

COPY

FOR DAVID



U.S. Department of Justice

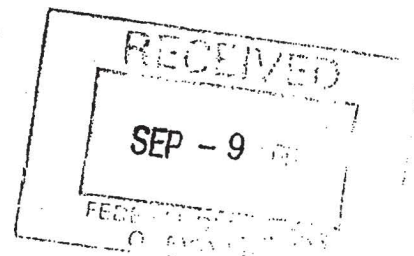
United States Attorney
District of Montana

William W. Mercer
United States Attorney

P.O. Box 1478
Billings, MT 59103

Phone: (406) 657-6101

August 29, 2003



Anthony R. Gallagher
Federal Public Defender
District of Montana
P.O. Box 3547
Great Falls, Montana 59403-3547

Re: Non-substantial Assistance Downward Departure Policy

Dear Tony:

Given the record in Vieke and Mr. Rhodes' recent testimony before the Sentencing Commission, I wanted to clarify the policy of this office regarding non-substantial assistance downward departures.

It is not and never has been our policy to object to all motions for departure made by defendants. Such a policy would be incompatible with the spirit of the Sentencing Reform Act and the guidelines which contemplate some small percentage of cases to result in sentences outside the otherwise applicable guideline range. For nearly two years it has been the policy that government lawyers would oppose departures unless I had authorized them to stipulate to a departure or to stand silent. The rationale for this policy is quite simple: (1) departures are to be rare; and (2) the approach of this office to such motions should be consistent. If you or your defense bar colleagues believe a departure is appropriate given the facts and law, you should ensure that it is brought to my attention.

Sincerely,

WILLIAM W. MERCER
United States Attorney

WWM:skf

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699

Diana E. Murphy, Chair



October 2, 2003

John P. Rhodes
Assistant Public Defender
Defender Services Division
Administrative Office of the U.S. Courts
One Columbus Circle, NW, Suite 4-240
Washington, DC 20544

Dear Mr. Rhodes:

Thank you for your letter of September 12 regarding your testimony at our public hearing in August. The clarification regarding departure practice in the District of Montana is of relevance to the issues before us. I have shared your letter with the other commissioners and our General Counsel.

Thank you for testifying at our public hearing. We appreciate your thoughtful assistance as we complete this difficult task.

Sincerely,

A handwritten signature in cursive script that reads "Diana E. Murphy".

Diana E. Murphy

PANEL THREE

Place holder
for HAMILTON
Testimony

**STATEMENT OF
UNITED STATES DISTRICT JUDGE DAVID F. HAMILTON
SOUTHERN DISTRICT OF INDIANA**

**ON BEHALF OF THE JUDICIAL CONFERENCE OF THE
UNITED STATES COMMITTEE ON CRIMINAL LAW**

BEFORE

THE UNITED STATES SENTENCING COMMISSION

August 19, 2003

Judge Murphy and members of the Sentencing Commission, on behalf of the Judicial Conference Committee on Criminal Law, I appreciate the opportunity to provide our views concerning the Sentencing Commission's implementation of Section 401(m) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, or "PROTECT Act" (Pub. Law No. 108-21, 117 Stat. 650 (April 23, 2003)). The Act directs the Commission, within 180 days of its enactment, to review the sentencing guidelines' grounds for downward departure; amend the guidelines to "substantially reduce" the incidence of downward departures; promulgate a policy statement authorizing a downward departure of not more than four levels if the government files a motion pursuant to an early disposition program; and make other conforming amendments, including a revision of Chapter 1, Part A and Policy Statement 5K2.0 of the guidelines.

While the Sentencing Reform Act revolutionized criminal sentencing in the federal system, it did not replace all individualized sentencing decisions by judges nor did it eliminate all judicial discretion. The Senate Report that constitutes the principal legislative history of the Sentencing Reform Act stated that "the purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences." The ability to depart was an important, if not the major, vehicle to preserve this traditional judicial function. As the guidelines themselves acknowledge repeatedly, in the offense conduct provisions and the criminal history provisions, there simply are too many relevant variables to capture them all in the guidelines themselves. Departures provide the flexibility needed to assure adequate consideration of circumstances that the guidelines cannot adequately capture.

Given the critical role that departures play in the guidelines regime, the Committee urges the Commission to preserve, to the fullest extent possible, the ability of judges to exercise individualized judgment and to do justice in each case before them. Historically, the Commission has amended the guidelines only after careful deliberation and study. The Commission—an independent body of experts appointed by the President and confirmed by the Senate—is best suited to develop and refine sentencing guidelines based upon its research and after examining a wide spectrum of views. Therefore, we defer to the Commission’s expertise on determining where it should focus its efforts on implementing the specifics of the PROTECT Act. As always, the Committee will review and comment, if appropriate, on any specific proposals the Commission publishes for comment.

Since Congress did not comprehensively review downward departures before issuing its directives to the Commission under the PROTECT Act, Congress surely anticipated that the Commission would develop a thorough understanding of the underlying reasons for current departure rates before changes are promulgated. We do not envy the task of the Commission to complete this review and promulgate guidelines within 180 days.

The Committee understands that the percentage of downward departures has reportedly increased in recent years. Various presentations of the data suggest that the downward departure rate has increased anywhere from 10 to 20 percent. By using highly-selective data on a low number of emotionally-charged cases accompanied by anecdotes containing selective recitations of the facts from carefully-selected cases, an argument has been made that downward departures

are over-used. Those advancing this argument suggest that judges are abusing their departure authority. This is not true.

As I believe the Commission understands, at the present time the percentage of downward departures that are attributable solely to the courts is unknown. We believe the percentage of downward departures made over the objection of the government is very low. The Commission's data show that about half of all downward departures are pursuant to substantial assistance motions filed by the government, pursuant to §5K1.1 of the Sentencing Guidelines. We also believe that many "non-substantial assistance" downward departures also occur pursuant to some type of agreement with the government. These agreements arise in a variety of ways. They can be part of a plea agreement, including a binding plea agreement, that cites specific grounds for a downward departure, or a plea agreement that indicates the government will not object to a downward departure motion made by the defense. Many non-substantial assistance downward departures are also based on motions made at sentencing. These include government motions pursuant to early disposition (or fast-track) programs, government motions that cite specific grounds for downward departures, and defense motions for downward departures. Separate and apart from formal motions, a number of non-substantial assistance downward departures arise at sentencing when the government attorney agrees with defense counsel, the probation officer, or the court that a departure is warranted or the government does not oppose a downward departure.

The Committee believes that most non-substantial assistance downward departures are concentrated in a handful of courts, particularly in the border districts. These departures often occur in immigration and drug (primarily marijuana) cases and are either initiated, supported, or unopposed by the government.

If one seeks a dramatic reduction in the rate of downward departures, the simplest solutions would be restrictions on the use of substantial assistance departures under §5K1.1 or on the use of so-called fast-track or early disposition programs. Obviously, however, there are substantial practical reasons for not interfering with current practices regarding these departures, which together make up a substantial majority of all departures, and which were probably not the target of Section 401(m) of the PROTECT Act. Assuming that the target of Section 401(m) is the minority of downward departures that are neither proposed nor agreed to by the Department of Justice, the complexity of this issue and the importance of departures under the Sentencing Guidelines make it imperative that any significant adjustment to that authority be based on a precise understanding of how the courts' departure authority has been used. By studying when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission should be able to more precisely refine the guidelines. We are confident that the Commission will take these issues into consideration as it confronts this difficult task.

The Committee is aware that the current data collection efforts have not always yielded the specific information that would be useful in analyzing departures. As you know, the Committee is working closely with the Sentencing Commission to help improve the quality of information that the Commission receives from courts. We appreciate your support in our efforts

to revise the Statement of Reasons to facilitate better documentation of sentencing departure actions taken by the courts. We also look forward to working with you at the upcoming National Sentencing Policy Institute and other judges' conferences to alert judges to the importance of the Statement of Reasons and the Commission's heavy reliance on its accuracy. We understand that the Federal Judicial Center will develop needed training to educate court staff, courtroom deputies, law clerks, and probation officers on the proper way to complete the Statement of Reasons.

The guideline manual reflects the Commission's belief that courts will not depart "very often." There may never be a consensus as to the proper quantification of this term. In a recent floor statement one of the original drafters of the Sentencing Reform Act stated that a 20 percent departure rate was anticipated. There is every indication that the current rate—whatever that may be—is well below that rate. Others argue that only a far-lower percentage rate would meet the requirement of "relatively few." In any event, only better record keeping and precise data collection will ensure that the extent of downward departures is clearly-defined and the reasons for them are accurately explained.

Thank you for the opportunity to present the views of the Criminal Law Committee on the implementation of the PROTECT Act. I would be pleased to answer any questions you may have.

OFFICE OF GENERAL COUNSEL
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington, DC 20002-8002
202/502-4520 OFFICE
202/502-4788 FAX

FAX

Number of Pages (Excluding Cover Sheet): 7

Date: February 5, 2009

Time: 9:43 am

TO: Judge David Hamilton

ORGANIZATION:

Phone No. _____ Fax No. (317) 229-3648

FROM: Ken Cohen, Esq.

TRANSACTION REPORT

P. 01

FEB-05-2009 THU 09:49 AM

FOR: USSC

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OFFICE OF GENERAL COUNSEL
United States Sentencing Commission
 One Columbus Circle, NE, Suite 2-500, South Lobby
 Washington, DC 20002-8002
 202/502-4520 OFFICE
 202/502-4788 FAX

FAX

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ORGANIZATION:

*OFFICE OF GENERAL COUNSEL
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington, DC 20002-8002
202/502-4520 OFFICE
202/502-4788 FAX*

FAX

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ORGANIZATION:

Phone No. _____ Fax No. 502-1677

FROM: Ken Cohen, Esq.

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OFFICE OF GENERAL COUNSEL
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington, DC 20002-8002
202/502-4520 OFFICE
202/502-4788 FAX

FAX

Number of Pages (Excluding Cover Sheet): 7

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Time: 9:44 am

TO: John Fitzgerald

ORGANIZATION:

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699



MEMORANDUM

To: Senior Staff
From: Karen Hickey *KH*
Re: Late-Arriving Public Comment
Date: April 8, 2003

Attached please find a revised public comment index, revised public comment summaries, and late-arriving public comment from the Probation Officers Advisory Group. For your convenience, these attachments have been hole-punched for placement in the March 2003 Public Comment notebook (simply replace the index and summaries, and insert the POAG submission at the back of the notebook).

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March 18, 2003

Amendment No. 1, Corporate Fraud

Practitioners' Advisory Group (PAG)

Co-Chairs Barry Boss and Jim Feldman

Washington, D.C.

The Practitioners' Advisory Group (PAG) requests that its public comment serve as its written testimony for the public hearing scheduled for March 25, 2003. The PAG strongly opposes adoption of a new loss table (options 1A-1C) and a new base offense level keyed to statutory maximum sentences.

Issue 1A Loss Table Revisions

The PAG states that existing white collar sentences are sufficiently severe. Because the Department of Justice statistics show that property crime rates have dropped steadily since 1974, the PAG argues that increasing white collar sentences would not further reduce the crime rate. The PAG notes that as the hypothetical examples in Professor Bowman's February 10, 2003, letter reveal (previously provided to the Commission as public comment in February 2003), sentences for moderately serious white-collar offenses are substantial, even in comparison to sentences imposed for violent crimes and drug-related offenses.

Further, the PAG points out that Commission statistics demonstrate the rate of imprisonment for fraud offenses has increased in the past decade. In addition, the PAG states that white collar offenders are also less likely to receive downward departures than other offenders, specifically drug trafficking offenders. Finally, the PAG argues that amending the loss table is an overbroad response to the Sarbanes-Oxley Act because many other guidelines, many having nothing to do with white-collar crime, incorporate the §2B1.1 loss table by reference.

Base Offense Level Increase

In the PAG's view, increasing the base offense level invites charging abuse by increasing prosecutors' ability to decide sentences at the time of indictment through charging either mail fraud or wire fraud to increase the sentence, or another offense carrying a lesser maximum, to lower it. For this reason, the PAG argues, it cannot reliably be predicted whom this proposal would affect or how it would affect them. The PAG further states that there has been no meaningful opportunity to evaluate the effect of the 2001 Economic Crime Package amendments, and it is troubled that the Commission (and sentencing policy) seems to be succumbing to political pressure in what it terms is a fashion which is reminiscent of the "War on Drugs."

National Association of Criminal Defense Lawyers (NACDL)
Washington, D.C.

A. Sarbanes-Oxley Act

The NACDL believes that comprehensive loss tables are not justified. The NACDL states that there is no suggestion in either the legislative history or the statutory directive that Sarbanes-Oxley was designed to increase sentences for garden-variety fraud or economic offenses, much less those offenses subject to the application of the loss table that do not involve corporate crime. The NACDL believes that there is no basis or proof to suggest that the current guidelines are not serving as a severe enough penalty, or deterrent to, criminal conduct. Therefore, the NACDL states that neither the Department of Justice's proposals nor the three proposed loss tables in paragraph (1)(A) of the issues for comment follow the intent of Congress.

B. 2001 Economic Crime Package

The NACDL states that because there has not been sufficient time to study the effects and impact of the 2001 economic crime amendments and new loss table, there is absolutely no basis to revise the economic crime guidelines at this time. The NACDL suggests that it will take three to four years before the impact of the 2001 amendments can be fully realized in the legal community. The NACDL notes that the incremental increases in offense levels at the higher end of the consolidated theft and fraud tables instituted via the economic crime package significantly exceed those of the previous separate tables. Therefore, an upward trend in sentences for economic crime has already been established by the Commission.

C. Loss Amounts and Culpability

The NACDL believes that loss amounts frequently overstate defendant culpability; therefore, increasing offense levels will continue to exacerbate the overrepresentation of culpability in many cases.

D. Proposed Permanent Amendments

The NACDL states that while the Commission has adequately addressed the Sarbanes-Oxley directives through the targeted specific offense characteristics and upward departures it has enacted in the emergency amendment. However, the NACDL believes the Commission has gone too far with regard to the two level increase for offenses under §2B1.1(b)(2) involving 250 or more victims. The NACDL states that it is particularly concerned that this amendment, when employed in a cumulative fashion together with the new proposed amendment providing for an additional four level increase if the offense substantially endangers the solvency or financial security of a publicly traded company, is unduly harsh.

District of Columbia Association of Criminal Defense Lawyers (DCACDL)

Paul F. Enzinna, Chair, White Collar Defense Committee

Washington, D.C.

Issue 1A Loss Table Revisions

The District of Columbia Association of Criminal Defense Lawyers (DCACDL) states that the directives in the Sarbanes-Oxley Act merely require the Commission to “ensure” that the guidelines are “sufficient” to punish and deter the perpetrators of corporate and financial fraud. While it recognizes the need for sentences adequate to punish perpetrators of corporate and financial fraud, it believes the previous guidelines were sufficient for that purpose and that the proposed amendments simply implement a reflexive and unnecessary increase in penalties. This, according to the DCACDL, is likely to lead to unfairness and confusion in guideline application, and even the deterrence of socially-beneficial conduct, i.e., corporate officials increase earnings, and benefit shareholders, by taking lawful risks. Therefore, the DCACDL strongly urges the Commission not to recommend even greater increases.

The DCACDL’s view is that these penalties will lead rational executives to be more risk-adverse, to the possible detriment of the shareholders the legislation is meant to protect. This is true given that the new amendments follow the November 2001 amendments which significantly increased the penalties faced by white collar defendants. According to the DCACDL, the system has had insufficient experience under the 2001 amendments to determine whether they are sufficient to deter and punish the conduct at which the new amendments are aimed.

The DCACDL suggests that a more efficient means of policing corporate conduct is to provide incentives for “good” behavior, such as the Department of Justice Antitrust Division which offers “amnesty” in order to encourage those who might otherwise be charged with criminal violations to make early disclosures of wrongful conduct and to cooperate with the government.

Issue 1B §2B1.1(b)(13)

Also, the DCACDL argues the rationale provided for the four-level enhancement where the offense involved a violation by an officer or director of a publically-traded company is identical to that for §3B1.1, however the Commission has failed to explain its rationale for providing a four-level enhancement for those participants, yet only providing a two-level enhancement for others who violate positions of trust that make their victims even more vulnerable.

Issue 2B §2B1.1(b)(12)

Further, the DCACDL states the offenses at issue in the proposal to increase from the four-level enhancement to a six-level enhancement where the crime involved more than 250 victims were considered by the Commission when it adopted the four-level increase for crimes involving more than 50 victims, and there appears to be no evidence to suggest the additional two-level enhancement is needed to punish those who would commit large-scale fraud. In fact, it argues

this provision will overlap to a great extent with the proposed §2B1.1.(b)(12)(B) which provides a four-level enhancement where an offense jeopardizes the solvency or financial security of publicly-traded companies, or those that employ more than 1,000.

Proposed Amendments to Application Notes in the Commentary to §2B1.1

Additionally, the DCACDL states the amendments are likely to bring new confusion in guideline application, particularly the loss table at §2B1.1, because the amendment's addition of the reduction in the value of equity securities to the list of factors that may be considered will only exacerbate the difficulties that already exist in calculating loss under the guidelines. It argues that the sheer stock market decline is not necessarily an accurate proxy for the reasonably foreseeable pecuniary harm specified in the guideline's definition for loss. Further, the amendments fail to account for the real impact of such "loss."

Finally, the DCACDL believes the Department of Justice's motive in seeking higher sentences, to compel the cooperation of less culpable offenders in prosecuting those who are higher up, is disturbing. In its view, the Department's proposals represent a major paradigm shift in sentencing philosophy which might well impair the basic truth-finding function of criminal trials.

New York Council of Defense Lawyers (NYCDL)

Brian E. Maas, Chairman,
Sentencing Guidelines Committee
New York, New York

Issue 1A Loss Table Revisions

The New York Council of Defense Lawyers (NYCDL) notes that when the Commission proposed the 2001 Economic Crime Package, it published data which it contended supported the change, that the public had ample opportunity to respond and comment, and that the changes were implemented as part of a comprehensive review of the guidelines governing economic crimes, creating public confidence in the process and result which it argues does not attend the current changes in the loss table. Because there was no Congressional direction given to amend the loss table for offenses other than for those with losses which exceed the current maximum loss amount of \$100,000,000, the NYCDL argues that any change to the overall table would constitute inappropriate reaction to the general anger at business misconduct without any evidence that any further change in the tables is warranted.

Additionally, the NYCDL states that each of the three loss tables included in the issue for comment would lower the loss triggers from those included in the new table enacted less than eighteen months ago, which itself implemented a substantial lowering of the loss triggers from the loss table previously in effect. The NYCDL strongly urges the Commission to limit any amendment to the loss table to only two additional levels for losses in excess of \$100,000,000.

Further, the NYCDL opposes any change in the base offense level for fraud offenses, stating that to the extent Congress increases the statutory maximum for certain fraud offenses, the current proposal to amend the loss table will insure that defendants convicted under these statutes will receive greater sentences than are now being imposed. It further argues that increasing the base offense level will impose an improper form of double counting.

Issue 1B §2B1.1(b)(13)

The NYCDL strongly urges the Commission not to make permanent the four-level enhancement for defendants who are officers or directors of publicly traded companies, and also urges the Commission not to extend this enhancement to other individuals with a fiduciary or statutory duty of trust to investors. Instead, the NYCDL proposes that to the extent the Commission believes the guidelines are unclear as to whether such persons in the securities or investment business are covered, an amendment to the Application Notes in §3B1.3 would clarify the applicability of this section.

The NYCDL further argues the four-level enhancement for any officer or director of a public company which was included in the emergency amendment as enacted is unnecessarily harsh. By failing to distinguish between the size of the company or the size of the fraud, the four-level enhancement can result in double counting for a participant of a \$120,000 fraud while resulting in a much smaller proportionate sentence for a participant in a fraud on the scale of Enron. According to the NYCDL, this is inconsistent with the Sarbanes-Oxley Act.

Finally, the NYCDL requests that in considering an enhancement based on the equivalent of an abuse of position of trust, the Commission should create an enhancement that treats officers or directors who abuse their positions similarly to other fiduciaries who have abused their positions of trust. Because the Commission has not developed evidence suggesting that the two-level enhancement at §3B1.3 is inadequate for officers and directors, the NYCDL argues that the new enhancement should only be a two-level enhancement.

Issue 2B §2B1.1(b)(12)

The NYCDL does not object to the elimination of Application Note 10(E), stating that the elimination will reduce litigation over the meaning and application of the standard of “substantial jeopardy” and will promote more accurate fact-finding. However, the NYCDL believes this commendable change is overshadowed by negative and possibly unintended consequences of the amendments. The NYCDL states that the enhancement and minimum offense levels apply to too many potential defendants because they apply to fraudulent conduct at any publically traded company, whether it trades on a major exchange or only on the so-called “bulletin board” or “pink sheets,” and reminds the Commission these are not the frauds that compelled the emergency amendments.

In the view of the NYCDL, these amendments lack any type of asset test or similar proxy for their application to publically traded companies, and it does not believe an offense that

contributed to layoffs at a small publically traded company warrants the punishment called for by the emergency amendments. Instead, it believes these amendments should require threshold levels of employment and/or assets for the enhanced penalties.

Also, the NYCDL objects to the factors listed in the Application Notes to support an enhancement for endangering the solvency and financial security of a public company or organization of over 1,000 employees on other grounds, as well. In its opinion, the imposition of enhancements for factors just as likely due to the current economic climate as due to the defendant's actions runs contrary to current case law where losses resulting from acts over which the defendant had no control are routinely excluded.

The NYCDL is additionally concerned that the amendments do not take into account the possibility there may be double counting when a victim of an offense involving multiple victims under §2B1.1(b)(2) counts as an employee for purposes of determining whether a company that had more than 1,000 employees was "substantially endangered" under §2B1.1(b)(12).

In addition, the NYCDL states there is a potential double counting issue because the amendments provide for enhanced punishment when an offense "substantially endangered the solvency or financial security of 100 or more victims." According to the NYCDL, there is a double counting issue when some of these victims are also victims for purposes of §2B1.1(b)(2).

Finally, the NYCDL objects to the lack of any guidance in the Application Notes, stating the lack of a definition of "financial security" would engender a major debate. Therefore, the NYCDL believes this provision should be stricken as confusing and redundant when viewed in light of other amendments.

Proposed Amendments to Application Notes in the Commentary to §2B1.1

The NYCDL believes the proposed method of valuation which would permit courts to estimate the loss by reference to "the reduction that resulted from the offense in the value of equity securities of other corporate assets" as it applies to equity securities is neither workable nor appropriate.

First, the NYCDL argues that an enormous number of factors effect the market valuation of a publically-traded company. Market value is often effected by general economic cycles, volatility in particular market sectors, the financial health and/or consolidation of peers, suppliers, and customers, or news unrelated to a specific company, like a threat of war or changes in the interest rates. According to the NYCDL, any effort to pin loss valuations on such a complex, multi-faceted analysis will require significant research, expert testimony, and complicated and lengthy sentencing hearings.

Second, even it if were feasible to efficiently and reliably link criminal conduct with stock value, the NYCDL argues this analysis will often offer an inappropriate measure of "loss." In those cases which triggered this proposed amendment, the share price of a company's stock falls to,

and often past, its true value when the accounting irregularities are eventually revealed to the public, and NYCDL argues that many shareholders will not suffer any real loss, having purchased shares before the value of the company was inflated.

Issue 3 §2J1.1 Fraud Related Contempt

The NYCDL urges the Commission to resist the Department of Justice's request to amend the guidelines so that all "fraud contempt" violations are governed by the fraud guidelines instead of the obstruction guidelines. It believes that such an amendment would in effect punish a defendant for committing a crime without the government having to prove its case beyond a reasonable doubt and would grossly distort the sentencing process so that a criminal contempt of a court order arising out of a civil fraud action would be sentenced more harshly than a criminal contempt arising out of a civil action unrelated to fraud.

The NYCDL argues the proposed changes contravene the spirit of the Application Notes and that the Department has failed to make the case that the Commission should limit the discretion it provided courts when it crafted §2J1.1

Issue 4 §2J1.2 Obstruction of Justice

Notwithstanding Congress' recent mandate for increased maximum penalties for defendants guilty of destroying or altering documents material to an on-going investigation, the NYCDL argues that the combined effect of these guideline changes is both unnecessary and unwise.

Because §2J1.2 already provides a three-level enhancement for any "substantial interference with the administration of justice" and the emergency amendment added a two-level enhancement, the amendment would appear to subject a defendant to a potential five-level enhancement under subsections (b)(2) and (b)(3). The NYCDL argues that the conduct set forth in proposed subsection (b)(3) is already taken into account by the "substantial interference" enhancement in subsection (b)(2). Therefore, adding the (b)(2) enhancement to the (b)(3) enhancement would constitute double counting.

Further, the NYCDL argues subsection (b)(3)(B) should be removed entirely from the guideline, because its text introduces an unacceptable level of subjectivity and doubt into the sentencing process without any guidance from the Application Notes. Moreover, the conduct described seems to the NYCDL to already be covered as an "attempt" under the current guidelines.

U.S. Commodity Futures Trading Commission (CFTC)
Daniel A. Nathan, Chief, Office of Cooperative Enforcement
Washington, D.C.

The U.S. Commodity Futures Trading Commission (CFTC) is the federal agency that enforces violations of the commodity laws, found in the “Commodity Exchange Act,” and refers such violations to the Department of Justice for criminal prosecution.

Issue 1B §2B1.1(b)(13)

Generally, the CFTC recommends that fraudulent conduct committed in the commodity futures and options industry be treated comparably to similar types of securities and corporate fraud that are explicitly referenced in the Sarbanes-Oxley Act and under the guidelines. More specifically, the CFTC recommends expanding the scope of §2B1.1(b)(13) to include individuals or entities other than officers and directors of public companies and entities and individuals who offer and manage securities or commodities futures or options but are not regulated under securities law. In addition, the CFTC states the Commission should extend the enhancements to bring these futures industry participants and futures-related acts within the guidelines, because the CFTC’s regulatory scheme parallels the securities laws, and criminal prosecutions with respect to the futures and options industry often address the same types of fraud and abuse as those brought with respect to the securities industry. Finally, the CFTC argues that securities fraud and commodities fraud involve substantially similar criminal conduct, and should be treated similarly in the guidelines.

LRN, The Legal Knowledge Company (LRN)
Dov Seidman
Chairman and Chief Executive Officer

Issue 1A Loss Table Revisions

The Legal Knowledge Company (LRN) believes that modifying the lower loss amounts in the loss table will likely have little or no impact in addressing the conduct that was the focus of the Sarbanes-Oxley Act. The LRN claims that any fraud committed by an officer or director of a public company, once revealed, will result in substantial loss of shareholder value and the lower loss amounts in the loss table will be largely irrelevant.

The LRN agrees with the Commission’s proposal to increase the base offense level in §2B1.1(a) from six to seven and suggests the following reading:

(a) Base Offense Level:

- (1) 7, if the defendant was convicted of an offence referenced to this guideline for which the maximum term of imprisonment prescribed by law is 20 years or more; or*
- (2) 6, otherwise.*

The LRN derives its twenty-year maximum from language in the Act it perceives as Congress's intent to address the most egregious cases.

Issue 1B. §2B1.1(b)(13)

The LRN believes the Commission should expand the scope of §2B1.1(b)(13) to include other individuals or entities that may have a fiduciary or similar statutory duty of trust and confidence to the investor, such as brokers, dealers, and investment advisors. According to the LRN, the "tone at the top" set by the most senior leaders of an organization plays a crucial role in how compliance and ethics are viewed by the rest of the organization. Therefore, the LRN agrees that a four-level enhancement for fraud offenses committed by officers and directors of publicly traded companies is appropriate.

The LRN, however, suggests that the Commission clarify certain elements of the emergency amendment. As currently drafted, it notes, the subsection applies in the case of a defendant convicted under a general fraud statute if the defendant's conduct also violated a securities law. Whether such "violation" must be proved by a preponderance of the evidence, the LRN claims, is not clear. The LRN notes that many securities prosecutions brought by the SEC may be settled without admitting or denying the allegations, but the SEC often makes findings in such settlements. Such findings, the LRN argues, could be tantamount to the *de facto* establishment of a securities law violation, without any additional evidence being presented. The LRN therefore suggests that the Commission provide guidance in the Application Notes as to its intent with regard to how a securities law "violation" is to be established.

In the opinion of the LRN, by including all "violations" of the securities laws, the amendment could have the effect of criminalizing the conduct that would otherwise purely be a technical violation. It would be possible that a single inaccurate, and possibly immaterial, record violation under Section 13 of the Exchange Act caused to be created by an individual could lead to an enhanced sentence. A technical violation, such as a one-day delay in making an appropriate filing, could lead to an enhanced sentence, it argues.

The LRN further argues that expanding the amendment to market professionals may have the unintended effect of bringing within it many persons who were not the focus of Congress when passing the Act. For example, the amendment would likely cover a registered representative employed at a broker-dealer who churns a single customer's account. The LRN suggests that, although this person may deserve punishment, the enhancement may not be consistent with congressional intent and it cites §3B1.3 as already addressing such scenarios. The LRN therefore suggests that the Commission narrowly apply the amendment to those market professionals who, because of their positions of trust, have the potential to cause the greatest amount of harm, and that for low-level employees, the Commission utilize already existing guidelines, as their status in the marketplace and their duties vis-a-vis the investing public do not rise to the same level as the officer or director of a public company.

If this argument is rejected and the Commission intends to extend the amendments to lower-level employees, the LRN notes that certain professionals, such as investment advisors, have statutorily-defined fiduciary duties under specified circumstances, and clearly are closer to the status of an officer or director of a public company because of their similar position of trust and confidence. However, other market professionals do not have statutory fiduciary duties, but may, under certain circumstances accept such a duty by offering certain products or services. The LRN therefore suggests that the Commission simply identify those market professionals to which the enhanced standard will apply, and that the Commission insert language into the guidelines explaining the intent for including these marketplace professionals and the types of duties or responsibilities the Commission expects would bring an individual into the provision as a “similar” person.

Mercatus Center
George Mason University
Regulatory Studies Program
Jonathan Klick, Ph.D.
Washington, D.C.

Dr. Klick states that the added loss categories at \$200,000,000 and z\$400,000,000 to address concerns in the Sarbanes-Oxley Act about “particularly extensive and serious fraud offenses” implies that the Commission sees value in, and imputes a mandate to, discourage larger frauds even more than relatively smaller frauds. While this makes sense, he argues that none of the proposed alternative loss tables is likely to achieve this goal.

Dr. Klick argues if the criminal sentences are to serve a deterrent value for corporate executives and there is a desire to deter especially egregious frauds at an even greater rate, one would expect that the incremental increase in the sentence would increase as the size of the fraud grows. However, he states that the options offered by the Commission show the exact opposite, and the average sentence per dollar of fraud loss is actually decreasing as the fraud grows. Dr. Klick provides three graphs to illustrate his points.

According to Dr. Klick, once a fraud is committed, is it rational for the executives to engage in more fraud because the punishment becomes cheaper on average as the fraud grows. However, he concedes that it might be true that larger frauds are more likely to be detected, which would dampen or reverse the declining average cost of fraud implied in the graphs. But, Dr. Klick argues that if the Commission holds the assumption that larger frauds are more likely to be detected, it should present some empirical evidence in support. However, he states that proving such a proposition would be difficult, as the data are effectively censored; we do not know the size of undetected frauds.

To Dr. Klick, it seems clear that none of the Commission’s proposals does an adequate job of providing relatively high deterrence for “particularly serious or extensive fraud offenses.”

Therefore, he believes that a superior loss table would provide increasing marginal deterrence whereby the average cost on the perpetrators of a fraud increases with the scale of the fraud, and that such a system would go a long way to discouraging especially egregious offenses.

Hunton & Williams

Steven P. Solow
Washington, D.C.

Mr. Solow writes as an individual attorney to address a particular issue that he believes is of substantial concern raised by one section of the Sarbanes-Oxley Act. Unlike other aspects of the Act, the section of the Act which added a new section 1519 is not limited to corporate accounting misconduct and its effects on capital markets that served as the instigation for the Act. Instead, Mr. Solow argues, Section 1519 creates a broad new law addressing obstruction of justice and does so in the broadest terms of any such statute to date.

As Mr. Solow indicates, Section 1519 now makes clear that the government can seek to prosecute an individual for document destruction prior to the existence of any official proceeding or investigation. In his view, this new language appears to expand the crime of obstruction to a new territory by creating potential criminal liability for the destruction of a document, even if done pursuant to an otherwise appropriate document retention policy and even if there was no federal proceeding or investigation under way at the time the document was destroyed. Because businesses routinely and legitimately destroy documents and other materials pursuant to document retention policies when such materials are no longer required to be maintained by law or business need, Mr. Solow argues it would impose a totally unreasonable burden if the retention of huge numbers of such records was thought to be required, perhaps indefinitely, because some future reviewer may conclude that it was "contemplated" at the time of destruction that such records might be of some interest to a then non-existent future government inquiry.

Mr. Solow states his belief that the Commission is well aware that provisions such as this Section and the direction provided to the courts under the guidelines have a powerful effect on corporate management practices. Further, it is his belief that the Commission sought to use the organizational guidelines to enroll organizations in the effort to prevent crime, by rewarding such efforts with meaningful reductions in liability when violations occur despite good faith efforts to comply. Mr. Solow urges the Commission to practice a similar effort regarding the implementation of Section 1519, stating that without further guidance regarding application of the Section, it will be extraordinarily difficult for companies to develop and implement appropriate document retention policies without fear that almost any failure to maintain a document could, in hindsight, be viewed as an act of obstruction.

Quoting from Senate Report 107-146, Mr. Solow agrees that Section 1519 "should be used to prosecute only those individuals who destroy evidence with the specific intent to impede or obstruct," and that it "should not cover the destruction of documents in the ordinary course of

business, even where the individual may have reason to believe that the documents may tangentially relate to some future matter within the conceivable jurisdiction of an arm of the federal bureaucracy.” Mr. Solow therefore urges the Commission to directly address these concerns either in the form of commentary or in downward adjustments to the offense levels for violations of this Section, as it did with the organizational guidelines.

At the very least, Mr. Solow argues, the Commission should include an invited downward departure where the defendant has made efforts to implement a document retention policy. Mr. Solow provides a suggested non-exhaustive list of factors that a court should be invited to consider as indicators of a sound document retention policy: providing a written document policy to employees involved in or responsible for records management activities; clear direction to employees who are uncertain as to what to do with a particular document or record to seek advice from the company’s counsel; and, a policy that directs that time periods set for destruction of records do not apply when there is a clear direction that certain records or categories of records should be retained.

Probation Officers Advisory Group

Cathy A. Battistelli, Chair
Concord, New Hampshire

The Probation Officers Advisory Group (POAG) states that the group has insufficient experience with the impact on the total offense level of the various specific offense characteristics which were added between November 1, 2001, and January 25, 2003. The POAG expresses concern about the proposed amendment’s impact to low level theft-type cases. The POAG does not support deconsolidating §2B1.1, and states that the amendments effective both in 2001 and 2003 may provide adequate sanctions for offenders targeted by the Sarbanes-Oxley Act.

If the Commission chooses to adopt an alternative base offense level, the POAG prefers applying the higher base offense level of 7 in cases involving a 20 year statutory maximum. The POAG states that this may address the concern that theft and fraud cases warrant different punishment.

Regarding the three options under consideration for amending the loss table in §2B1.1, the POAG notes that none of the options raise sanctions for cases involving less than \$70,000 loss amounts. The POAG states that all three options appear easy to apply.

The POAG supports the proposed expansion of §2B1.1(b)(13) to include non-registered brokers and dealers, thus closing a potential loophole. The POAG also supports the creation of an application note under §2J1.1 (Contempt) stating that §2B1.1 is the most analogous guideline in cases involving a violation of a judicial order enjoining fraudulent behavior.

The POAG supports an increase to the base offense level in §2J1.3 (Perjury) to conform to the increased base offense level in §2J1.2 (Obstruction of Justice), which became effective January

25, 2003. The POAG suggests that the Commission consider adding examples of "extreme violence" under §2J1.2, Application Note 4, stating that this would help officers identify aggravated obstruction cases falling outside the heartland.

Amendment No. 2, Campaign Finance

U.S. Department of Justice

Criminal Division

Eric H. Jaso, Counselor to the Assistant Attorney General

Washington, D.C.

Under emergency amendment authority, the Commission promulgated a temporary guideline amendment, effective January 25, 2003, to implement the Bipartisan Campaign Reform Act of 2002. The Department of Justice supports the temporary amendment and now favors the Commission's proposal to make the amendment permanent.

Probation Officers Advisory Group

Cathy A. Battistelli, Chair

Concord, New Hampshire

The POAG has no experience with the new emergency Campaign Finance guideline and offers no suggestions for change. Previously, the group supported a separate guideline, base offense level of 8, and use of the loss table in §2B1.1.

Amendment No. 3, Terrorism

Probation Officers Advisory Group

Cathy A. Battistelli, Chair
Concord, New Hampshire

The POAG suggests that the term "terrorism" should be deleted from §2S1.1(b)(1) (Money Laundering). This will prevent double-counting with the terrorism adjustment found in §3A1.4. The POAG believes that the proposed amendment to §2X3.1, Enhancement in Accessory After the Fact Guideline for Harboring Terrorists, is difficult to understand; therefore, the group anticipates some confusion in applying this guideline and recommends this guideline be revised for easier application.

Regarding the proposed amendment to §2M6.1 (Biological Agents and Toxins), the POAG suggests adding a definition under the application notes to define or explain the phrase "intent to injure the United States" which is found in §2M6.1(a)(1). Although this wording mirrors statutory construction and is an element of the offense, the POAG believes that the language will pose application difficulty for the field. While the POAG did not foresee any application problems posed by consolidating §2N1 and §2Q1, the group states that it does not have enough application experience with these particular guidelines to make a recommendation.

Amendment 4, Oxycodone

U.S. Department of Justice

Criminal Division

Eric H. Jaso, Counselor to the Assistant Attorney General

Washington, D.C.

The Department of Justice (DOJ) supports the Commission's proposal. However, it states that its support is with significant reservations, noting that the proposal will result in significantly lower sentences for combination (non-controlled release) formulations of oxycodone (*e.g.*, Percocet, Percodan, and Tylox). These pills, although weighing much more than the OxyContin formulations, each contain only approximately 5 mg of actual oxycodone. Thus, while approximately 460 Percocet pills presently corresponds to offense level 26, it would take almost 3,000 pills to achieve level 26 under the Commission's proposal. These sentence reductions are of significant concern to the DOJ.

The DOJ notes that given the significantly upward trends in OxyContin diversion and abuse, there is a significant federal interest in prosecuting those who illicitly distribute this frequently deadly drug. The higher sentences for the higher concentration OxyContin products that will result from the Commission's proposal will, it believes, more accurately reflect the harm attendant to offenses involving this drug and encourage appropriate federal prosecution.

However, the DOJ is concerned with the sentence reductions that would result with respect to the non-controlled release oxycodone products for several reasons, with a particular concern about losing the ability to effectively prosecute individuals who are registered to prescribe and dispense controlled substances (physicians, pharmacists, etc.) and who abuse this privilege by illicitly prescribing or distributing products such as Percocet and Tylox. In the DOJ's view, the ability to prosecute such defendants is key to maintaining the integrity of the registration system. Moreover, data from the Drug Abuse Warning Network (DAWN) indicate that, although emergency room mentions of "single-entity oxycodone" (OxyContin) have skyrocketed over the last several years, neither this nor any other data indicate that OxyContin abuse has supplanted the abuse of the combination oxycodone products.

With respect to oxycodone combination drugs, the DOJ states there is an obvious concern that the enforcement program related to these drugs will be significantly impacted if the guidelines sentences are grossly reduced, as was evidenced by the Commission's data analysis and recalculation of sentences for prior cases that would fit under its proposal. Nevertheless, even assuming that fewer prosecutions of cases involving combination (non-controlled release) oxycodone products would occur under the new guidelines, the DOJ states that it cannot at this time fully estimate how harmful the impact of such a loss would be.

Purdue Pharma L.P.

J. David Haddox, DDS, MD
Vice President, Health Policy
Stamford, CT

Purdue Pharma supports the proposed amendment regarding sentencing for oxycodone. Purdue Pharma states that the current sentencing scheme under-penalizes the illegal possession of oxycodone in the form of OxyContin and over-penalizes the illegal possession of oxycodone in the form of Percocet or similar formulations, because in the latter cases, a large part of the sentencing is due to the weight of non-opioid tablet constituents, the bulk of which is often acetaminophen. Further, Purdue Pharma states that the current scheme does not take into account the fact that tablets of OxyContin containing 10, 20, and 40 MG all weigh 135 MG, so sentencing under the current guidelines would be equivalent for the same number of tablets, despite the potential for a four-fold difference in the amount of oxycodone illegally possessed.

Purdue Pharma notes that the language in the proposed amendment only refers to oxycodone in tablet or capsule form. However, oxycodone also is available as an oral solution in the United States and is available in an injectable formulation in other countries. Therefore, Purdue Pharma suggests that the Commission alter the proposed language to cover all possible formulations of oxycodone as follows:

The term “oxycodone (actual)” refers to the total nominal weight of the controlled substance, its salts, esters, ethers, isomers and salts of isomers, esters and ethers contained in a licitly manufactured pharmaceutical formulation (including, but not limited to, solutions, tablets or capsules). In the case of oxycodone in any form that is not licitly manufactured for legitimate medical or scientific purposes, the term “oxycodone (actual)” shall refer to the total actual weight of the oxycodone salts, esters, ethers, isomers and salts of isomers, esters or ethers contained in the mixture.

Amy Campbell

Houston, Texas

Ms. Campbell believes that the insertion of the new paragraph defining “Oxycodone (actual)” as the “weight of the controlled substance itself, contained in the pill or capsule” such that the sentences for offenses involving oxycodone will be calculated based on the weight of the actual narcotic rather than the weight of the entire pill, including non-narcotic substances, is clearly a step toward fairness in sentencing for oxycodone offenses. It is her belief that persons convicted of offenses involving this narcotic and sentenced under the existing guidelines have been subject to inequities in sentencing, as such sentences were based on total weight of the pills or capsules instead of the weight of the actual narcotic, such that a person convicted of trafficking in Oxycontin could receive a five-year sentence for an offense involving more than nine times the

amount of oxycodone as a person receiving the same sentence for trafficking in Percocet.

However, Ms. Campbell states by basing some equivalencies on actual narcotic weight and others on weight of the narcotic mixture, the Commission may run afoul of the prohibition in the Administrative Procedure Act on arbitrary and capricious actions, because in her opinion, it seems arbitrary to treat certain narcotic offenses in this manner while offenses involving other narcotics, including those such as morphine which has an almost identical medical equivalency gram for gram compared to oxycodone are evaluated using the weight of the narcotic mixture.

Ms. Campbell additionally requests that in addition to the insertion of the term “oxycodone” into Application Note 9, for purposes of consistency, the term “oxycodone (actual)” should also be added to Note B of the Drug Quantity Table after “Methamphetamine (actual).”

Further, Ms. Campbell would like to request the Commission strike “1 gram Oxycodone = 500 grams marijuana” and instead insert “1 gram Oxycodone (actual) = 6700 grams marijuana.” She states that the proposed new equivalency appears to be based on the translation of the current equivalency using the actual oxycodone percentage by weight in 10-milligram dosages of Oxycontin branded oxycodone tablets. While this new equivalency clearly serves the stated purpose of substantially reducing penalties for trafficking in Percocet, the notice of proposed amendments provides no indication of the criteria considered in establishing this proposed equivalency.

Finally, Ms. Campbell requests that any amendment be retroactively applied to previously sentenced defendants.

Probation Officers Advisory Group

Cathy A. Battistelli, Chair
Concord, New Hampshire

The POAG believes the proposed amendment to §2D1.1 would remedy proportionality issues resulting from inequitable counting of oxycodone. Thus, the POAG supports the proposed amendment to increase the marijuana equivalency for oxycodone from 500 to 6,700 grams.

The POAG also supports the proposed amendment which adds red phosphorous to the Chemical Quantity Table.

Amendment 5 (January 17, 2003, Reader Friendly), Use of Body Armor

U.S. Department of Justice

Criminal Division

Eric H. Jaso, Counselor to the Assistant Attorney General

Washington, D.C.

The Department of Justice (DOJ) supports the proposed amendment to provide a new adjustment at §3A1.5 for the use of body armor in an offense involving a crime of violence or drug trafficking crime. In response to the issue for comment, it believes the adjustment should be based on all conduct within the scope of relevant conduct but should be triggered only if the defendant (1) used body armor himself or (2) otherwise knew that the offense involved the use of body armor. According to the DOJ, this formulation would ensure that the adjustment apply only to those who knowingly participate in conduct involving body armor – conduct that significantly increases the risk of harm to law enforcement and the public at large – and thus limit the applicability of the adjustment to those culpable for such increased risk.

Probation Officers Advisory Group

Cathy A. Battistelli, Chair

Concord, New Hampshire

The POAG understands and appreciates the need to provide an enhancement/enhanced punishment for crimes of violence and/or drug trafficking offenses in which the defendant used body armor. Offenses involving both a weapon and body armor have an increased potential for violence and should not be treated in the same manner as the person who is simply wearing body armor, yet, has no means to commit an act of violence. Both situations indicate an awareness of a heightened potential for violence and therefore, the POAG believes that enhancements are appropriate for both scenarios. Under a new guideline, §3B1.5, consideration should be given for an increased enhancement for the more egregious case of an offender possessing a dangerous weapon and wearing body armor.

In application note 1, the POAG suggests highlighting the fact that the definition under 18 U.S.C. § 16 for a crime of violence is different and broader than the definition found in Chapter 4.

Application Note 2 currently indicates this enhancement is defendant based. The POAG notes that the Congressional directive was worded in a defendant-specific manner; however, the POAG suggests that this enhancement include the relevant conduct of others. For example, four individuals planned and committed a bank robbery. Two wear body armor, two do not. Under current relevant conduct standards, all four would receive a weapon enhancement. The POAG recommends that this same principal should apply to offenses involving body armor if the defendants plan a crime together and decide that some participants will wear body armor and others will not.

Regarding proposed Application Note 4, the POAG finds the language “actively used the body armor in a manner to protect the defendant’s person” confusing and requests that the Commission consider adding examples to illustrate this principle.

Amendment 5 (December 20, 2002, Reader Friendly), §5G1.3

Probation Officers Advisory Group

Cathy A. Battistelli, Chair
Concord, New Hampshire

The POAG favors Option 1A of the proposed amendment because it is clearly stated in the case of a prior revocation, the sentence is to run consecutive to any prior undischarged term of imprisonment. The POAG believes the use of the case examples in this guideline would be extremely helpful to the field.

The POAG feels the requirement in §5G1.3(b)(A) addressing credit received by the Bureau of Prisons may create problems for courts, because it is our experience that information obtained from the Bureau of Prisons is problematic to determine. Officers frequently are unable to retrieve this information from the Bureau of Prisons in a timely fashion, or the Bureau is unable to assist the officer without receipt of the presentence report.

Regarding application note 3(D), the POAG believes the language should clearly state that the sentence imposed is by way of a downward departure, and that the use of the word “adjustment” should be avoided. The POAG suggests that the term “adjustment” is inconsistent with its use in other areas of the guidelines.

As an aside, the POAG notes that it might be helpful if the U.S. District Judges’ Bench Book contained language for imposing sentences under §5G1.3(b) and (c) as these areas have proven problematic throughout the circuits. Further, the POAG recommends that the amended language contain notice to the Bureau of Prisons as to when and how the “sentence alteration” has been rendered by courts.

Amendment 7, Involuntary Manslaughter

U.S. Department of Justice

Criminal Division

Eric H. Jaso, Counselor to the Assistant Attorney General

Washington, D.C.

While the Department of Justice (DOJ) recognizes the factors that have led the Commission to defer action on this issue, it strongly urges the Commission to make a comprehensive review of the assault and homicide guidelines a top priority in the next amendment year. As it has stated in the past, it believes the guideline penalties for homicide, other than for first degree murder, are seriously inadequate. The DOJ argues that while the number of homicides prosecuted in federal court is relatively few because of the limitations of federal jurisdiction, the relevant guidelines are extremely important because of the seriousness of the crimes involved. Similarly, it argues that offenses involving threats or assaults on federal judges and other federal officials, while very rare, are nonetheless of the utmost seriousness and should be appropriately addressed by the guidelines.

In addition, the DOJ notes that the Commission's Native American Working Group is specifically examining federal homicide and assault crimes. The DOJ thinks the Commission should ask the Native American Working Group to complete its work on these issue by this summer so that the Commission can promptly revisit all of the homicide and assault guidelines in the next amendment year and make adjustments to the guidelines as warranted and as required by recent legislation.

Amendment No. 8, Cybersecurity

U.S. Department of Justice

Criminal Division

Eric H. Jaso, Counselor to the Assistant Attorney General

Washington, D.C.

The Department of Justice (DOJ) believes that several of the factors identified for review by Congress – specifically, level of sophistication and restitution – are adequately addressed by the current guidelines. The current guidelines do not reflect, however, the dramatic increase in reported computer crimes, Congress’s express intent to increase penalties to better reflect the seriousness of cyber crime, and the fact that such crimes often cause egregious non-monetary harms. After summarizing the statutory scheme, recent amendments, and the guidelines’ current treatment of 18 U.S.C. §§ 1030 and 2701, the DOJ suggests several specific amendments to the guidelines to address these issues. The DOJ also suggests amending Appendix A to reference violations of 18 U.S.C. § 2701 to §2B1.1.

- **Loss:** To avoid confusion and promote consistency, the DOJ believes the guideline loss definition should be amended to mirror the new definition contained in 18 U.S.C. § 1030. As amended, the definition of loss will be sufficiently broad to capture the monetary harm caused by computer crimes (it does *not*, however, adequately address non-monetary harms such as invasion of privacy, damage to critical infrastructures, and bodily injury or death, which are addressed specifically later in these comments). The DOJ thus recommends that §2B1.1, note 2(A)(v)(III) be amended as follows:

Protected Computer Cases.—In the case of an offense involving unlawfully accessing, or exceeding authorized access to, a “protected computer” as defined in 18 U.S.C. § 1030(e)(2), actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: ~~reasonable costs to the victim of conducting a damage assessment, and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.~~ **any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.**

- **Commercial Advantage or Private Financial Benefit:** Because computer crimes committed with these purposes have higher statutory maximum sentences (*see* 18 U.S.C. §§ 1030(c)(2)(B)(I), 2701(b)(1), 2701(b)(2)), the DOJ recommends adding the following specific offense characteristic to §2B1.1(b) so as to place an offender in Zone C, at a minimum, of the sentencing table:

If the offense involves violation of 18 U.S.C. §§ 1030 or 2701 and was committed for purposes of commercial advantage or private financial gain and the offense level is less than 12, increase to 12.

- Intent to Cause Harm: Congress provided in the USA-PATRIOT Act for higher statutory maximum sentences for violations of 18 U.S.C. § 1030(a)(5)(A)(I), which applies to computer criminals who act with intent to cause damage. For a first offense, Congress raised the maximum sentence to 10 years, *see* 18 U.S.C. § 1030(c)(4)(A); for any subsequent offense, Congress raised the maximum sentence to 20 years, *see* 18 U.S.C. § 1030(c)(4)(c). The DOJ recommends that the guidelines increase the offense level of such offenders by 4, to not less than 14, placing them in Zone D and assuring that, absent a departure, their sentence will include a term of imprisonment. The DOJ suggests that the following specific offense characteristic be added to §2B1.1:

If the offense involved intentionally causing or attempting to cause damage to a protected computer in violation of 18 U.S.C. § 1030(a)(5)(A)(I), increase by 4 levels; if the resulting offense level is less than 14, increase to 14.

- Violations of Privacy: The DOJ recommends increasing by two the offense level of offenders who obtain important private information. In addition, because a violation of the privacy of 50 people causes more harm than a violation of the privacy of a single person, the DOJ recommends amending the Application Note for §2B1.1(b)(2) to clarify that every individual about whom such information is obtained as a result of a computer intrusion is a “victim” for the purposes of the guidelines. Thus, if a hacker accesses a medical records database and steals 100 people’s records, the number of victims would include these 100, not just the computer owner. The DOJ proposes (1) adding the following specific offense characteristic:

(A) If the offense involved knowingly accessing a computer without authorization or exceeding authorized access in violation of 18 U.S.C. §§ 1030 or 2701 and obtaining personal information as a result, increase by 2 levels.

(2) adding the following Application Note to the Commentary:

1. Definitions.—*For the purposes of this guideline:*

* * *

“Personal information” means sensitive or private information, including but not limited to medical records, financial records, social security numbers, wills, diaries, private correspondence including email, photographs of a sensitive or private nature, or similar information, including such information in the possession of a third party.

(3) amending application note 3(A)(ii) as follows:

(ii) *“Victim” means (I) any person who sustained any part of the actual loss determined under subsection (b)(1); or (II) any individual who sustained bodily injury as a result of the offense; or (III) any individual whose personal information was accessed during a violation of 18 U.S.C. §§ 1030 or 2701. “Person” includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.*

- Computers Used by the Government in Furtherance of National Defense, National Security, or the Administration of Justice & Disruptions of Critical Infrastructures: The DOJ recommends the following amendment to apply cumulatively where appropriate with the specific offense characteristic for creating a risk of death or serious bodily injury and the specific offense characteristic for causing injury or death. The DOJ suggests the Commission also consider including as a ground for upward departure violations disrupting a critical infrastructure so severely as to incapacitate the economy, public health, or national defense or security.

The DOJ proposes adding the following specific offense characteristic:

() (A) If the offense violated 18 U.S.C. § 1030 and involved a computer system used to maintain or operate a critical infrastructure or a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 4 levels.

(B) If the offense violated 18 U.S.C. § 1030(a)(5)(A)(I) and caused a substantial disruption of a critical infrastructure, increase by 6 levels. If the resulting offense level is less than level 28, increase to level 28.

The DOJ also suggests adding the following Application Notes to the Commentary:

1. Definitions.—*For the purposes of this guideline:*

* * *

“Critical infrastructure” means systems and assets vital to the national defense, national security, economic security, public health or safety, or any combination of those matters.

. Critical Infrastructures under Subsection (b)(16).—*Examples of critical infrastructures to which subsection (b)(16) applies are systems and facilities, whether publicly or privately held, that provide essential services in support of the economy and national defense and national security. Such infrastructures include, but are not*

limited to, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services, medical care, and transportation links such as interstate highways, airlines, and rail systems. Substantial disruptions in the services provided by such infrastructures jeopardizes the health, safety, security, or economic welfare of a substantial number of people. The enhancement provided for in subsection (b)(16) reflects the seriousness of substantially disrupting a critical infrastructure such as by impairing 9-1-1 phone service to a town or city for several hours or by eliminating electrical power to a county for a similar period of time. Subsection (b)(16) should be applied cumulatively with subsections (b)(11) and (b)(17).

- Threat to Public Health & Safety; Risk of Bodily Injury and Death: The DOJ believes §2B1.1 should be amended to reflect both the wider scope of section 1030 violations that Congress intended to punish more severely, and the stronger penalties Congress intended for offenders whose conduct has such dire consequences. The DOJ recommends including a specific offense characteristic in §2B1.1 that reflects the physical harm caused by the offense.

It suggests adding the following specific offense characteristic:

If the offense resulted in: (A) bodily injury, add 2 levels; (B) serious bodily injury, add 4 levels; (C) permanent or life-threatening bodily injury, add 6 levels; and (D) death, add 8 levels.

And adding the following cross reference:

If the offense involved a violation of 18 U.S.C. § 1030 and any person was killed under circumstances that would constitute homicide, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the application of that section results in a higher offense level than application of this section.

- Number of Victims: Because the DOJ believes the definition of "victim" should be amended to reflect that each computer damaged by a computer intrusion constitutes a victim for the purposes of subsection (b)(2), it suggests amending Application Note 3(A)(ii) as follows:

(ii) *"Victim" means (I) any person or computer that who sustained any part of the actual loss determined under subsection (b)(1); or (II) any individual who sustained bodily injury as a result of the offense.; or (III) any individual whose personal information was accessed during a violation of 18 U.S.C. §§ 1030 or 2701. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.*

**National Association of Criminal Defense Lawyers
The Electronic Frontier Foundation
The Sentencing Project**

The National Association of Criminal Defense Lawyers, the Electronic Frontier Foundation, and the Sentencing Project (hereinafter “the Group”) collectively submit public comment regarding Cyber Security.

I. Special Factors Identified by Congress

The Group believes that the current sentencing guidelines adequately address the eight factors identified by Congress in 18 U.S.C. § 1030. The Group states that the heartland computer crime case is analogous to economic fraud; thus, §2B1.1 should continue to address the heartland case of a computer intrusion that causes economic harm. Extraordinary cases where the government proves that the defendant intended to cause physical harm or compromised national security may be enhanced pursuant to §3A4.1, or receive an upward departure. The Group further suggests that computer crime statutes should be referenced to specific guidelines in Appendix A, rather than by cross-referencing because they believe that cross-referencing undermines predictability in calculating loss.

A. Whether the Offense was Committed for Purposes of Commercial Advantage or Private Financial Benefit

The Group believes that the guidelines should not provide for a special enhancement for a computer criminal acting with a commercial purpose because such an enhancement would result in double-counting, as well as disproportionate sentencing as compared with other felony violations of section 1030. The Group asserts that there is no need for a specific offense characteristic for computer access crimes that are perpetrated for commercial advantage or private financial gain because the statute already provides for a heightened statutory maximum penalty if the crime was perpetrated for commercial gain; thus such an enhancement would amount to double punishment. The Group also suggests that providing an enhancement for commercial purpose would punish commercially motivated computer access crimes disproportionately in comparison with computer crimes committed for other purposes. The Group does not believe that a defendant acting with commercial motivation is more culpable than one acting in furtherance of another criminal or tortious act such that a special enhancement should apply.

B. Computer used by the Government in Furtherance of National Defense, National Security or the Administration of Justice

For computer access crimes involving computers used by the government in furtherance of national defense, national security, or the administration of justice, the Group states that upward departures pursuant to §5K2.7 (Disruption of Governmental Function) or §3A1.4 (Terrorism)

should be sufficient. If, however, the Commission believes this insufficient, then the Group suggests a targeted enhancement modeled after §3C1.1. The Group also suggests that the Commission may wish to increase the offense level by 2 levels if the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice or harming national defense or national security. The Group states that this enhancement only should apply to convictions under 18 U.S.C. § 1030(a)(5)(A)(i) that caused proven damage under section (a)(5)(B)(v).

C. Malicious Intent to Cause Harm

The Group believes that the guidelines should not provide for a special enhancement for sentencing a computer criminal that acted with the malicious intent to cause harm because such an enhancement would result in double counting. The Group asserts that because malice must be proved under 18 U.S.C. § 1039(a)(5)(A)(i), a defendant convicted under that subsection will face an increased statutory maximum; therefore, application of an additional enhancement will result in double counting.

D. Violation of Privacy Rights

The Group asserts that the guidelines already take into account violations of privacy rights by providing for an upward departure if the offense caused or risked substantial non-monetary harm.

E. Intent or Effect of Significant Interference with Critical Infrastructure and Intent to or Effect of Threat to Public Health or Safety or Injury

The Group states that the guidelines currently provide for a two level enhancement and a minimum offense level of 14 under §2B1.11 for offenses involving a conscious or reckless risk of death or serious bodily injury. The Group asserts that it would overstate a defendant's culpability to apply a greater enhancement in cases where the threat of harm was not intentional. The Group states that existing upward departures under §5K2.14 (Public Welfare) and §3A1.4 (Terrorism) provide sufficient punishment for defendants who both intend and succeed in causing harm to public health or safety through unauthorized computer access.

F. Level of Sophistication or Planning

The Group believes that a defendant's level of sophistication or planning is more than adequately accounted for in §2B1.1(b)(8)(C), which provides for a two level increase and a minimum offense level of 12. The Group asserts that any further enhancement would overstate the defendant's culpability because such defendants frequently receive an enhancement for use of special skill.

II. Loss Calculation in Computer Crime Cases

The Group believes that the Commission should abandon the special calculation of loss in computer crime cases and adopt a definition like that used in other economic crime cases. The Group states that the cost of conducting a damage assessment in computer crime cases depends more on the victim's actions than it does on the actions of the perpetrator or his intent to cause damage; thus, the definition of loss is susceptible to manipulation by victims, investigators, and prosecutors.

The Group identifies two separate problems with the assessment of loss in computer crime cases. First, the definition of loss results in computer crimes being treated more harshly than other crimes by including unforeseeable losses. The Group suggests that this problem can be alleviated by having the definition of loss for sentencing of computer crimes conform to the standard definition of loss for white-collar offenses. Second, the elements of loss are too difficult to accurately quantify. The Group believes that this problem is alleviated by adhering to an objective definition of loss that does not single out and encourage impractical measures of harm, but uses "reasonable foreseeability" as a guide to the sentencing court.

The Group suggests that the definition of "loss" should include "only pecuniary losses that were reasonably foreseeable to the defendant at the time of the offense and which were proximately caused by the defendant's actions." The Group believes that this will prevent erroneous loss calculations that might be based on, for example, the cost of upgrading a network system to make it *more* secure than before an attack.

The Group also suggests that the Commission consider placing a cap on damages where the defendant did not intend to cause harm under 18 U.S.C. § 1030(a)(5)(A)(iii). The Group suggests that the cap should be no more than a four level enhancement for the amount of loss.

Finally, the Group suggests that for violations of 18 U.S.C. § 2701, the Commission should establish a simple guideline with a base offense level of six and make clear that harm is taken into account in that base offense level.

U.S. Internet Service Provider Association (ISPA)

The United States Internet Service Providers Association (ISPA) is an organization comprised of major Internet Service Providers (AOL Inc., Cable & Wireless, eBay, EarthLink, Microsoft, SBC Communications, Teleglobe, Verizon Online, WorldCom, and Yahoo) throughout the United States.

The ISPA notes that computer crime has continued to steadily increase over the last decade, and that some estimates of economic loss as a result of recent virus attacks add up to billions of dollars. Aside from the economic loss, the ISPA notes that our society's increasing dependence

on computers means that the disruption of networks could seriously impair public safety, national security, and economic prosperity.

The ISPA further notes that current sentences for violations of the Computer Fraud and Abuse Act are treated primarily as white collar fraud cases, and sentences are determined by calculating actual or intended pecuniary harm, something that is often difficult to quantify in the typical computer crime case. As the ISPA points out, under §2B1.1, significant economic loss is required before a defendant would even be eligible for imprisonment, giving the example of the “Melissa” virus where a simple program caused worldwide damage to millions of computers and computer systems, yet the perpetrator faced less than four years in prison even after proven damages in excess of \$80 million. The ISPA believes this lack of significant criminal penalty eliminates the deterrent effect of a conviction, and makes the crime less likely to be prosecuted in the future.

Further, the ISPA notes that newly emerging threats to the Internet, such as unsolicited bulk email, or spam, go largely unprosecuted because the type of harm spam causes is not currently addressed in the guidelines. Even though spammers send millions of unsolicited emails, the significant interference to the critical infrastructure caused by the abuse of spammers is not currently considered as a factor in the guidelines, as the ISPA points out. Similarly, the ISPA notes that a common method for spammers to send bulk email, in an effort to by-pass spam blocking technology, is to steal personal email accounts and use their identities. The ISPA argues this unauthorized access into the subscriber’s account is a significant violation of the individual’s privacy rights, yet neither the violation of the person’s privacy rights nor the spammer’s financial gain from this illegal activity is taken into account in the guidelines, making prosecution for this type of offense extremely unattractive.

Moreover, the ISPA argues, the guidelines do not take into account the potential or actual harm caused by other types of crimes that may not cause economic loss, but have profound societal consequences: crimes that involve interference with important governmental functions, such as national security, national defense, and the administration of justice. This type of substantial harm to the public cannot be quantified in economic terms; and, if the perpetrators who created these viruses are finally caught, the disruptions they caused to these emergency services will probably not be used during the sentencing, argues the ISPA.

Therefore, the ISPA believes cyber crimes should be viewed in the context of the overall incidence of the offense and the extent to which they contribute a threat to civil peace and economic prosperity. In its view, the guidelines should not look just at the monetary damage a violation may cause, but at the important intangible loss of personal privacy and critical services that often results from cyber crime.

The ISPA urges the Commission to amend the guidelines applicable to offenses under 18 U.S.C. § 1030 to take full account of the eight factors listed in Section 225(b) of the Homeland Security Defense Act of 2002, particularly those factors that are not accounted for anywhere else in the

applicable guidelines, such as whether the offense was committed for purpose of commercial advantage or private financial benefit; whether the defendant acted with malicious intent to cause harm in committing the offense; the extent to which the offense violated the privacy rights of individual harmed; whether the offense involved a computer used by the government in furtherance of national defense, national security, or the administration of justice; whether the violation was intended to or had the effect of significantly interfering with or disrupting a critical infrastructure; and whether the violation was intended to or had the effect of creating a threat to public health or safety, or injury to any person.

Probation Officers Advisory Group

Cathy A. Battistelli, Chair

Concord, New Hampshire

The POAG believes that an increase of four levels, rather than two, more accurately accounts for the increased risk of serious bodily injury or death which may occur as a result of conduct described in 18 U.S.C. § 1030(a)(5)(A)(i). The POAG states that the proposed loss definition language for protected computer cases mirrors the statute. The POAG states that this definition addresses consequential damages without using said terminology, and the POAG is concerned about the difficulty in ascertaining these loss amounts and the sentencing delays that may result because the U.S. Attorney's Offices do not always produce the requisite information.

The POAG believes the proposed offense level increases at §2B1.1(b)(14)(A) accurately reflect the Congressional directive that the Guidelines account for (1) whether the offense involved a computer used by the government in furtherance of national defense, national security, or the administration of justice; and (2) whether the violation was intended or had the effect of significantly interfering with or disrupting a critical infrastructure.

The POAG requests that the Commission examine the terminology used in the proposed upward departure at §2B1.1, comment. (n.16(B)), to the extent that an upward departure under this provision seems to require a higher degree of "disruption" than that required under §5K2.7. The POAG specifically identifies the difference in terms. Compare the proposed application note which provides that "[a]n upward departure would be warranted in a case in which subsection (b)(14)(A)(ii) applies and the disruption of public or governmental functions or services *is so substantial as to have a debilitating impact* . . ." with §5K2.7 requiring only that the " . . . conduct resulted in a *significant* disruption of a governmental function." (Emphasis added). The POAG foresees a possible application problem given the apparent differences between the two provisions in the degree of governmental disruption required for an upward departure. Thus, the POAG suggests that the Commission consider amending the language in one or both provisions, eliminating the reference to §5K2.7, and adding examples to clarify use.

The POAG foresees no application problems with the amendments proposed at §§2B1.1, comment. (n.2(A)(v)(III)), 2B2.3, or 2B3.2.

Proposed Amendment, Immigration

Probation Officers Advisory Group

Cathy A. Battistelli, Chair
Concord, New Hampshire

With regard to the options at §2L1.2(b)(1)(B), the POAG recommends Option Two. The group believes that this option will result in sufficient punishment, and with the definition added for "sentence of imprisonment," application of the guideline should be facilitated. The group also prefers the second option in the revised proposal of sixty days at §2L1.2(b)(1)(B). However, the POAG believes a conflict may exist. The definition provided for "sentence of imprisonment" in the case of a totally suspended sentence seems to be at odds with the definition in the statute at 8 U.S.C. § 1101(A)(48)(b). Additionally, the POAG recommends that if Option Two is adopted, the amendment not be retroactive applied this would have an adverse effect on caseloads in courts in the border districts.

The POAG supports the definitions provided for "child pornography offense," "crime of violence," "drug trafficking offense," "firearms offense," "human trafficking offense," and "terrorism offense." The group also supports the revised definition of "alien smuggling offense," which eliminated the term "for profit." However, the POAG suggests that another conflict may exist between these definitions and the list of "aggravated felonies" provided at 8 U.S.C. § 1101(a)(43).

Regarding §2L1.2, (comment. n.3), the POAG recommends Option 2 with the terminology "under such section" being replaced with 21 U.S.C. § 844.

Miscellaneous Comment

The Commission received letters from 5 inmates regarding criminal history, the retroactivity of §5G1.3, and crack cocaine.

PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

Cathy A. Battistelli
Chair, 1st Circuit

U.S. Probation Office
Warren Rudman Courthouse
55 Pleasant St.
Concord, NH 03301

Phone # 603-225-1428
Fax # 603-225-1482



David Wolfe, Vice Chair
Colleen Rahill-Beuler, 2nd Circuit
Joan Leiby, 3rd Circuit
Elisabeth F. Ervin, 4th Circuit
Barry C. Case, 5th Circuit
James T. Searcy, Sr., 6th Circuit
Rex S. Morgan, 7th Circuit
Jim P. Mitzel, 8th Circuit
Felipe A. Oriz, 9th Circuit
Ken Ramsdell, 9th Circuit
Debra J. Marshall, 10th Circuit
Raymond F. Owens, 11th Circuit
P. Douglas Mathis, Jr., 11th Circuit
Theresa Brown, DC Circuit
Cynthia Easley, FPPOA Ex-Officio
John Fitzgerald, OPSS Ex-Officio

March 22, 2003

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

Dear Judge Murphy:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on March 6 and 7, 2003 to discuss and formulate recommendations to the United States Sentencing Commission regarding the proposed amendments for the amendment cycle ending May 1, 2003. We are submitting comments relating to the following proposed amendments.

Proposed Amendment – Corporate Fraud

POAG considered the issues that remain outstanding and were published for comment on January 17, 2003. To date, we have insufficient experience with the impact on the total offense level of the various specific offense characteristics which were added between November 1, 2001, and January 25, 2003. There is also a concern that charge bargaining will increasingly occur as a result of some of these changes. POAG discussed the sweeping changes to §2B1.1, effective November 1, 2001 and January 25, 2003. Given the recent amendments to §2B1.1, which have raised issues of *ex post facto* for offenses committed prior to enactment, POAG believes the field has not had sufficient opportunity to consistently apply this guideline. The group remains concerned about the impact to low level theft type cases which are now captured in this consolidated guideline. That being said, however, the group does not support this guideline being deconsolidated. The amendments effective November 1, 2001 and January 25, 2003 may provide adequate sanctions to the type of offender targeted under *Sarbanes-Oxley*. Notwithstanding these concerns, POAG's positions with respect to the proposed amendments are outlined below.

With the increased statutory penalties from ten to twenty years for fraud offenders, POAG recognizes the need to provide alternative base offense levels to reflect these penalties. If alternative base offense levels are implemented, POAG prefers applying the higher base offense level of 7 in cases involving offenses for which the maximum term of imprisonment prescribed by law is at least twenty years. This option would assign the higher base offense level to many cases involving fraud; the lower base offense level of 6 would almost always apply in theft cases. This might to some extent address the concern that theft and fraud cases warrant different punishment.

There are three options under consideration for amending the loss table in §2B1.1. POAG notes that none of the options raise sanctions for offenders whose frauds involve \$70,000 or less. If the table is altered, POAG noted ease of application exists for all three loss tables.

With respect to §2B1.1(b)(13), POAG supports expansion of this guideline as proposed. POAG members noted limited experience with cases where this enhancement would apply but surmise that this specific offense characteristic will specifically provide for the inclusion of non registered brokers and dealers and thus will close a potential loophole.

Likewise, POAG supports the creation of an application note under §2J1.1 (Contempt) regarding application of §2B1.1 as the most analogous guideline in cases involving a violation of a judicial order enjoining fraudulent behavior. Again, POAG members voiced limited experience concerning these types of cases.

POAG supports an increase to the base offense in §2J1.3 (Perjury) to conform to the increased base offense level in §2J1.2 (Obstruction of Justice), which became effective January 25, 2003. These types of offenses are similar and should have the same base offense level. POAG recommends that, under application note 4 at §2J1.2, which lists potential considerations for upward departure, examples of "extreme violence" would be helpful. This would assist officers in identifying the types of aggravated obstruction cases falling outside the heartland.

Proposed Amendment - Campaign Finance

POAG has had no experience with the new emergency Campaign Finance Fraud guideline and offers no suggestions for change. The group previously agreed with the establishment of a separate guideline, a base offense level of 8 and use of the loss table in §2B1.1 to address the value of the illegal transactions. POAG notes that the new guideline will eliminate possible disparity as previously, the instruction was to apply the most analogous guideline.

Proposed Amendment - Use of Body Armor in a Crime of Violence or Drug Trafficking Crime

POAG understands and appreciates the need to provide an enhancement/enhanced punishment for crimes of violence and/or drug trafficking offenses in which the defendant used body armor. Offenses involving both a weapon and body armor have an increased potential for violence and should not be treated in the same manner as the person who is simply wearing body armor, yet, has no means to commit an act of violence. Both situations indicate an awareness of a heightened potential for violence and therefore, it is our position that enhancements are appropriate for both scenarios. Under a new

guideline, §3B1.5, consideration should be given for an increased enhancement for the more egregious case of an offender possessing a dangerous weapon and wearing body armor.

In application note 1, it would be helpful to highlight that the definition under 18 U.S.C. § 16 for a crime of violence is different and broader than the definition found in Chapter 4.

Application note 2 currently indicates this enhancement is defendant based. We understand that the Congressional directive was worded in a defendant specific manner. It is our position that this enhancement should include relevant conduct of others. For example, four individuals planned and committed a bank robbery. Two wear body armor, two do not. Under current relevant conduct standards, all four would receive a weapon enhancement. It is our recommendation that this same principal should apply to offenses involving body armor if the defendants plan a crime together and decide that some participants will wear body armor and others will not.

Finally, in regard to application note 4, POAG found the language “actively used the body armor in a manner to protect the defendant’s person” confusing. Perhaps some examples to illustrate this principal would assist officers in making this determination.

Proposed Amendments - Oxycodone and Red Phosphorous

POAG believes the proposed amendment to §2D1.1 would remedy proportionality issues resulting from inequitable counting of oxycodone. Based on the increasing levels of abuse and the addictive nature of oxycodone, POAG supports the amendment to resolve oxycodone calculation difficulties and increase its marijuana equivalency from 500 to 6,700 grams.

POAG supports the amendment which adds red phosphorous to the Chemical Quantity Table in §2D1.11. The conversion method suggested by staff appears to be sound and, like the precursor ephedrine, is based on the amount of methamphetamine which could be manufactured from the precursor.

Proposed Amendment - Cybercrime

POAG discussed the proposed promulgation of amendments pursuant to the Cyber Security Enhancement Act of 2002. The Group believes that an increase of four levels, rather than two, more accurately accounts for the increased risk of serious bodily injury or death which may occur as a result of conduct described in 18 U.S.C. § 1030(a)(5)(A)(i). The expanded language proposal in the loss definition for protected computer cases in application note 2 mirrors the loss language in the statute. This definition addresses consequential damages without using said terminology and POAG is concerned about the difficulty in ascertaining these loss amounts and the sentencing delays that may result. Although the U.S. Attorney’s Offices are to produce this information, it is often not provided.

POAG discussed the proposed specific offense characteristic at §2B1.1(b)(14)(A), which provides for alternative offense level increases of two levels, or four levels. POAG believes these offense level increases accurately reflect the Congressional directive that the Guidelines account for (1) whether the offense involved a computer used by the government in furtherance of national defense, national security, or the

administration of justice, and (2) whether the violation was intended or had the effect of significantly interfering with or disrupting a critical infrastructure.

POAG requests that the Commission examine the terminology used in the proposed upward departure at §2B1.1, comment. (n.16(B)), to the extent that an upward departure under this provision seems to require a higher degree of "disruption" than that required under §5K2.7. The proposed application note provides that "[a]n upward departure would be warranted in a case in which subsection (b)(14)(A)(ii) applies and the disruption of public or governmental functions or services *is so substantial as to have a debilitating impact* on national security, national economic security, national public health or safety, or any combination of those matters. *See, e.g., §5K2.7 (Disruption of Governmental Function).*" In contrast, §5K2.7 requires only that the "... conduct resulted in a *significant* disruption of a governmental function." (Emphasis added). POAG foresees a possible application problem given the apparent differences between the two provisions in the degree of governmental disruption required for an upward departure. To the extent that the Commission is concerned with maintaining consistency between guideline sections, POAG suggests the Commission consider amending the language in one or both provisions, eliminating the reference to §5K2.7, and adding examples to clarify use.

POAG foresees no application problems with the amendments proposed at §§2B1.1, comment. (n.2(A)(v)(III)), 2B2.3, or 2B3.2.

Proposed Amendment - Terrorism

In discussing the proposed change in the Money Laundering Guideline, POAG agreed the term "terrorism" should be deleted from §2S1.1(b)(1). This will prevent double-counting with the terrorism adjustment found in §3A1.4. POAG thought the proposed amendment to §2X3.1, Enhancement in Accessory After the Fact Guideline for Harboring Terrorists, was difficult to understand. We anticipate there may be some confusion in applying this guideline and recommend this guideline be revised for easier application. POAG discussed the proposed amendment to §2M6.1, Biological Agents and Toxins, and suggests a definition be added under the application notes to define or explain the phrase "intent to injure the United States" which is found in §2M6.1(a)(1). We recognize that this wording is statutory construction and an element of the offense, however, we believe the language will pose application difficulty for the field. POAG also discussed the proposed amendment pertaining to the Safe Drinking Water Provision which provides for the consolidation of guidelines found in §2N1 and §2Q1. While POAG could not foresee any application problems by consolidating the guidelines, we simply do not have enough application experience with these particular guidelines to make a recommendation.

Proposed Amendment - Immigration

The proposed amendment to §2L1.2 contains two options for a slight change to the specific offense characteristics regarding prior drug trafficking offenses, and also adds or amends several definitions. With regard to the options at §2L1.2(b)(1)(B), POAG recommends Option Two. We believe that this option will result in sufficient punishment, and with the definition added for "sentence of imprisonment," application of the guideline should be facilitated. The group also prefers the second option in the revised proposal of sixty days at §2L1.2(b)(1)(B). However, we believe a conflict may exist. The definition provided for "sentence of imprisonment" in the case of a totally suspended sentence would seem to be at odds with the definition in the statute at 8 U.S.C. § 1101(A)(48)(b). Additionally, we would recommend if Option Two

is adopted, that it not be retroactive as retroactivity would have an adverse effect on the caseloads in courts in the border districts.

POAG supports the definitions provided for "child pornography offense," "crime of violence," "drug trafficking offense," "firearms offense," "human trafficking offense," and "terrorism offense." We also support the revised definition of "alien smuggling offense," which eliminated the term "for profit." However, another conflict may exist between these definitions and the list of "aggravated felonies" provided at 8 U.S.C. § 1101(a)(43).

Regarding §2L1.2, (comment. n.3), POAG recommends Option 2 with the terminology "under such section" being replaced with 21 U.S.C. § 844. The group recognized sentencing disparity issues exist regarding the treatment of drug possession cases. A conviction for simple possession in one jurisdiction may be charged as distribution elsewhere, thus resulting in disparity. In addition, officers may encounter difficulties in obtaining documents outlining the criminal conduct.

Proposed Amendment - §5G1.3

POAG favors Option 1A of the proposed amendment since it is clearly stated in the case of a prior revocation, the sentence is to run consecutive to any prior undischarged term of imprisonment. It was the opinion of POAG that this option consistently uses the term "shall" in addressing cases falling under §5G1.3(a). POAG remains supportive of the Commission's past approach to revocation sentencing as a sanction for the breach of trust of supervision, and not punishment of new offense behavior.

POAG believes the use of the case examples in this guideline would be extremely helpful to the field. This guideline has traditionally caused great confusion to probation officers and examples demonstrating how this guideline is to be applied will assist the field in ease of application.

POAG feels the requirement in §5G1.3(b)(A) addressing credit received by the Bureau of Prisons may create problems for courts, since it is our experience that information obtained from the Bureau of Prisons is problematic to determine. Many times officers are unable to retrieve this information from the Bureau of Prisons in a timely fashion, or the Bureau is unable to assist the officer without receipt of the presentence report.

Regarding application note 3(D), POAG believes the language should clearly state that the sentence imposed is by way of a downward departure, and that the use of the word "adjustment" should be avoided. The term "adjustment" is inconsistent with its use in other areas of the guidelines.

As an aside, it might be helpful if the U.S. District Judges' Bench Book contained language for imposing sentences under §5G1.3(b) and (c) as these areas have proven problematic throughout the circuits. It is recommended that the amended language contain notice to the Bureau of Prisons as to when and how the "sentence alteration" has been rendered by courts.

Closing

We trust you will find our comments and suggestions beneficial during your discussion of the proposed amendments and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarification, please do not hesitate to contact us.

Respectfully,

Cathy A. Battistelli
Chair

Notes

Eliminate all unmentioned.

Chg. encouraged to discouraged.

Put all rest of departures in one place.

Similar cases treated alike, diff. cases treated differently.

10 Clg Gargans 2
1 yr.

Since 1995 DOS has been looking at regularizing
Fast Track

problem - Outliers - 10 dists above 20% - Distinct by district.

We will look forward to working with you.

Protect Act doesn't dig SRA

Requires wait as acting: Transparency - Why

Departures - specificity,

Common needs to study issue

Musty grounds:

pursuant to plea agmt
unspecified reasons.

AZ - 2500 - 3000 cases

Tucson - pursuant to plea agmt

Phoenix 5K2.0 -

Q o A

Put factors in the Gh. as adjustments. Addresses variations
between districts. Then severely restrict departures.

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