

INTRODUCTION

A. AUTHORITY

The United States Sentencing Commission submits this report in direct response to section 401(m) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 [the “PROTECT Act”], and as part of its overall fifteen year review of the federal sentencing guidelines. The PROTECT Act was enacted on April 30, 2003, and directed the Commission, not later than 180 days after the enactment of the Act, to:

(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and

(2) promulgate, pursuant to section 994 of title 28, United States Code –

(A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are [sic] substantially reduced;

(B) a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney; and

(C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by this Act, including a revision of paragraph 4(b) of part A of chapter 1 and a revision of section 5K2.0.

In addition, section 401(j)(2) of the PROTECT Act directs that the Commission, on or before May 1, 2005, “shall not promulgate any amendment to the sentencing guidelines, policy statements, or official commentary of the Sentencing Commission that . . . adds any new grounds for departure to Part K of Chapter 5.”

The PROTECT Act directives do not require an accompanying report, but the Commission submits this report pursuant to both its general statutory authority under 28 U.S.C.

§§ 994–95 and its specific responsibility under 28 U.S.C. § 995(a)(20) to advise Congress on sentencing policy.¹

B. DEPARTURE AUTHORITY IN THE FEDERAL SENTENCING GUIDELINES SYSTEM

1. Statutory Authority Prior to the PROTECT Act

The overarching principles of the federal sentencing guideline system were outlined by Congress in the Sentencing Reform Act of 1984.² The Sentencing Reform Act directed the Commission to establish sentencing policies and practices for the federal criminal justice system that:

provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices³

¹ The Sentencing Reform Act of 1984 created the Commission as an independent agency in the judicial branch of government. Pub. L. No. 98-473, 98 Stat. 1837 (1984). The Sentencing Reform Act directed the Commission to establish and maintain sentencing policies and practices for the federal criminal justice system through a detailed framework of sentencing guidelines. *See generally* 28 U.S.C. § 994 (Duties of the commission) (West Supp. 2003). In addition, the Sentencing Reform Act requires the Commission to monitor and report periodically on the operation of the sentencing guidelines and gives the Commission ongoing sentencing and crime policy research responsibilities. *See* 28 U.S.C. § 995(a)(8), (9), (12)(A), (13)–(16), (21) (2003). The Commission also is required to “make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary to carry out an effective, humane, and rational sentencing policy.” *See* 28 U.S.C. § 995(a)(20) (2003). The Commission’s duties and authorities are set forth fully in chapter 58 of title 28, United States Code.

² A detailed legislative history of the Sentencing Reform Act of 1984, focusing in particular on matters relating to departures from the sentencing guidelines, and subsequent relevant legislation, is set forth in Appendix B.

³ 28 U.S.C. § 991(b) (2003). The statutory purposes of sentencing are set forth at 18 U.S.C. § 3553(a)(2) as follows:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

In promulgating guidelines and policy statements, the Commission was directed to pay particular attention to the requirements of providing certainty and fairness in sentencing and reducing unwarranted sentencing disparities.⁴ Built into the Sentencing Reform Act, however, was a recognition that the Commission could not possibly establish guidelines that would adequately take into account every conceivable set of offense and offender characteristics. As a result, the Sentencing Reform Act sought to strike some balance between the goals of certainty and uniformity in sentencing and the need to retain sufficient flexibility to individualize sentences.

This balance is reflected in part in 18 U.S.C. § 3553(b) (Application of the guidelines in imposing a sentence), which codified the limited authority of sentencing courts to impose a sentence outside the sentencing guideline range:

[T]he 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.⁵

2. Guideline Authority

When promulgating the initial set of guidelines in 1987, the Commission observed that, because of the criteria prescribed by 18 U.S.C. § 3553(b), by specifying that it had adequately considered a particular factor, the Commission in principle could prevent a court from using it as ground for departure.⁶ After careful deliberation, the Commission chose not adopt this approach. Like Congress, the Commission recognized that departures play an important role in the guideline system because of the “difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.”⁷ The Commission provided the following guidance on the use of departures at that time:

The Commission intends the sentencing courts to treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

⁴ See 28 U.S.C. § 994(f) (West Supp. 2003).

⁵ 18 U.S.C. § 3553(b) (West Supp. 2003).

⁶ USSG, Ch.1, Pt.A (4)(B), intro. comment. (Apr. 13, 1987).

⁷ USSG, Ch.1, Pt.A (4)(B) (Apr. 13, 1987)

guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.⁸

The Commission recognized that, similar to the difficulty noted in establishing guidelines to cover every possible offender and offense characteristic, “[c]ircumstances that may warrant a departure from the guidelines cannot . . . by their very nature, be comprehensively listed and analyzed in advance.”⁹ Therefore, when the Commission promulgated the initial set of guidelines, with some specific exceptions,¹⁰ it did not restrict the kinds of factors, whether or not mentioned in the guidelines, that could constitute grounds for departure in an unusual case.¹¹

Pursuant to 28 U.S.C. § 994(d)¹² and (e),¹³ the Commission did, however, adopt several policy statements limiting the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range in Chapter Five, Parts H and K. The Commission determined that certain factors, particularly those listed in 28 U.S.C. § 994(e), “are not ordinarily relevant” to the determination of whether a sentence should be outside the applicable guideline range but did not foreclose them from consideration in an exceptional case.

⁸ *Id.*

⁹ USSG §5K2, p.s. (General Provisions) (Apr. 13, 1987).

¹⁰ USSG §5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of §5K2.12 (Coercion and Duress) list factors that the court cannot take into account as grounds for departure. The Commission subsequently promulgated amendments prohibiting the court from considering additional factors as grounds for departure in §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances) and §5K2.19 (Post-Sentencing Rehabilitative Efforts).

¹¹ USSG, *supra* note 7.

¹² 28 U.S.C. § 994(d) directs the Commission to take into account, “only to the extent that they do have relevance,” the defendant’s: (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant’s culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood.

Section 994(d) further directs the Commission to “assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.”

¹³ 28 U.S.C. § 994(e) directs the Commission to “assure that the guidelines and policy statements . . . reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”

The original Commission foresaw that departures could perform important functions. The initial guidelines, offense by offense, sought to take into account those factors that the Commission's data indicated were empirically important in relation to the particular offense (*e.g.*, the presence of physical injury in the case of robbery or assault). The Commission acknowledged at the time, however, that there are guidelines that do not specify a sentence adjustment for a factor because it infrequently occurs in connection with a particular offense, but that the factor may be important in the rare case in which it does occur.¹⁴ Such a circumstance, therefore, could be adequately accounted for only by permitting the court to depart from the guidelines in such an atypical case.

In addition, departures were considered an important mechanism by which the Commission could receive and consider feedback from courts regarding the operation of the guidelines. The Commission envisioned that such feedback from the courts would enhance its ability to fulfill its ongoing statutory responsibility under the Sentencing Reform Act to periodically review and revise the guidelines.¹⁵

The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted.¹⁶

The Commission, therefore, foresaw that a high or increasing rate of departures for a particular offense, for example, might indicate that the guideline for that offense does not take into account adequately a particular recurring circumstance and should be amended accordingly.

3. *Koon v. United States*

The Supreme Court's 1996 decision in *Koon v. United States*¹⁷ was a significant decision in guidelines jurisprudence. *Koon* provided the analytical basis for many subsequent court

¹⁴ USSG, *supra* note 7.

¹⁵ See 18 U.S.C. § 994(o) (West Supp. 2003) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.").

¹⁶ USSG, *supra* note 7.

¹⁷ *Koon v. United States*, 518 U.S. 81 (1996).

opinions regarding departures and was cited by sponsors of the PROTECT Act in its legislative history.¹⁸

In *Koon*, the Supreme Court held that departure decisions by district courts were due deference and that appellate courts should use an abuse of discretion standard in reviewing trial courts' application of the guidelines to the facts.¹⁹ In reaching its conclusion, the Court suggested that Congress "did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions."²⁰ It pointed to 18 U.S.C. § 3742(e)(4), as enacted by the Sentencing Reform Act, which provided that "[t]he court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous."²¹ It further noted that the statute was amended in 1988 to require courts of appeals to "give due deference to the district court's application of the guidelines to the facts."²²

The Court also commented on the "institutional advantage" district courts hold over appellate courts in making the factual findings necessary to determining whether a particular case warrants departure, particularly because the district courts "see so many more Guidelines cases than appellate courts do."²³

The Court also considered the standard by which courts should determine whether as a categorical matter a factor is a permissible basis for departure. The Court held that:

a federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer is no . . . the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline.²⁴

¹⁸ See *infra*, Appendix B, at p. B-31 to B-33 (setting forth legislative history of the PROTECT Act).

¹⁹ *Koon*, *supra* note 17, at 91.

²⁰ *Id.* at 97.

²¹ *Id.*

²² *Id.* (quoting 18 U.S.C. § 3742(e)).

²³ *Koon*, *supra* note 17, at 98.

²⁴ *Id.* at 109.

Since the “statute says nothing about requiring each potential departure factor to advance” one of the statutory purposes of sentencing, the Court reasoned that any factor not explicitly disapproved by the Commission could potentially serve as a ground for departure, “[s]o long as the overall sentence is ‘sufficient, but not greater than necessary, to comply’ with those goals.”²⁵

C. THE PROTECT ACT

The PROTECT Act contains the most significant legislation enacted since the Sentencing Reform Act of 1984 in the area of sentencing court departure authority and appellate review of departure decisions. The legislative history of the PROTECT Act, which is more fully set forth in Appendix B, expresses congressional concern that the increasing rate of downward departures from the sentencing guidelines is undermining the goals of the Sentencing Reform Act, particularly the goals of certainty and uniformity in sentencing and of avoiding unwarranted disparity.

Members of Congress cited Commission sentencing data indicating that the rate of downward departures for reasons other than the defendant’s substantial assistance in the investigation or prosecution of other crimes had increased from 5.8 percent in fiscal year 1991 to 18.1 percent in fiscal year 2001. This trend was considered particularly troublesome in the area of certain sexual and kidnapping crimes, cases for which Commission statistics showed downward departures granted in 19.2 percent of sexual abuse cases, 21.4 percent of pornography and prostitution cases, and 12.8 percent of kidnapping cases in fiscal year 2001.²⁶

Although the legislative history does not suggest similarly urgent congressional concern regarding substantial assistance departures pursuant to §5K1.1 (Substantial Assistance to Authorities),²⁷ the increase in the substantial assistance departure rate from 11.9 percent in fiscal year 1991 to 17.4 percent in fiscal year 2001 also contributed to the decline in the percentage of cases sentenced within the guideline sentencing range. In fiscal year 2001, less than two-thirds (63.9%) of cases were sentenced within the guideline sentencing range, compared to 80.7 percent in 1991.

²⁵ *Id.* at 108 (quoting 18 U.S.C. § 3553(a)(2)).

²⁶ *See infra*, Appendix B, at p. B-29, and note 175 (citing Commission departure statistics).

²⁷ USSG §5K1.1 provides in pertinent part that “[u]pon motion of the government that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.” *See also* 18 U.S.C. § 3553(e) (Limited authority to impose a sentence below a statutory minimum) (West Supp. 2003) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”).

1. Kidnapping and Child Sex Offenses

In response to these concerns, the PROTECT Act contains several provisions aimed at reducing the incidence of downward departure from the sentencing guidelines. The most direct action relates to certain child abduction and child sex offenses, specifically for offenses under section 1201 (Kidnapping), involving a minor victim, and any offense under section 1591 (Sex trafficking of children or by force, fraud or coercion), or chapters 71 (Obscenity), 109A (Sexual abuse), 110 (Sexual exploitation and other abuse of children), or 117 (Transportation for illegal sexual activity and related crimes) of title 18, United States Code.

For these enumerated offenses, the PROTECT Act amended 18 U.S.C. § 3553(b) to permit the sentencing court to impose a sentence below the applicable sentencing guideline range only if the court finds that there exists a mitigating circumstance of a kind or to a degree that has been *affirmatively and specifically identified* as a permissible ground of downward departure in the sentencing guidelines or policy statements, taking account of any amendments to such sentencing guidelines or policy statements by Congress.²⁸

The PROTECT Act also made direct amendments to the *Guidelines Manual* that further restrict the availability of downward departures for these enumerated offenses. The PROTECT Act directly amended §5K2.0 (Grounds for Departure) to provide that “the grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as a permissible ground of departure” in these child abduction and sex offenses.²⁹ Departure grounds provided elsewhere in the *Guidelines Manual* therefore cannot apply in these cases.

In addition, the PROTECT Act directly amended sections 5H1.6 (Family Ties and Responsibilities), 5K2.13 (Diminished Capacity), and 5K2.20 (Aberrant Behavior) to prohibit consideration of these factors as grounds for departure for defendants convicted under the statutes enumerated above. The PROTECT Act also enacted a new policy statement, section 5K2.22 (Specific Offender Characteristics as Grounds for Departure in Child Crimes and Sexual Offenses), which permits sentencing courts to depart in these cases for age and extraordinary physical impairment to the extent permitted by sections 5H1.1 (Age) and 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), respectively, with the exceptions

²⁸ 18 U.S.C. § 3553(b)(2) (Child crimes and sex offenses) (West Supp. 2003) (emphasis added). A court also may depart if it finds on motion of the government that the defendant has provided substantial assistance in the investigation or prosecution of another person and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission that should result in a sentence lower than prescribed by the guidelines. *Id.*

²⁹ Pub. L. No. 108-21, § 401(b), 117 Stat. 650 (2003).

of impairments based on drug, alcohol, or gambling dependence or abuse. These statutory and guideline amendments became effective April 30, 2003.³⁰

2. Statutory Procedural Requirements

The PROTECT Act also enacted several additional provisions effective April 30, 2003 that will have a less direct, but significantly broader, effect on departure practices. First, the PROTECT Act amended 18 U.S.C. § 3553(c) (Imposition of a sentence) to require the court to include specific *written* reasons for departures in the judgment and commitment order (unless the court relied on *in camera* evidence under Fed. R. Crim. P. 32) and to provide these written reasons to the Sentencing Commission.³¹ The potential impact of these statutory requirements on the incidence of downward departures and their potential effect on the Commission's data collection and reporting are discussed in Chapter 2.

Second, by amending 18 U.S.C. § 3742 (Review of a sentence), the PROTECT Act specifically requires sentencing courts to base departures on a factor that advances the statutory purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

Third, the PROTECT Act requires *de novo* review of the district court's departure decision in a case in which:

(A) the district court failed to provide the written statement of reasons required under section 3553(c); [or]

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case.³²

The appellate court shall set aside the sentence and remand the case with specific instructions if it finds that the district court failed to provide the required statement of reasons in the judgment and commitment order, the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.³³

³⁰ *Id.*

³¹ *Id.* at § 401(c) (emphasis added).

³² *Id.* at § 401(d). In reviewing the reasonableness of the extent of departure, however, the appellate court is to give due deference to the district court's determination. *Id.*

³³ *Id.*

Fourth, the PROTECT Act also provides new safeguards to ensure appellate decisions regarding departures are followed by the lower courts. Newly enacted 18 U.S.C. § 3742(g) prohibits the district court, upon remand, from sentencing outside the applicable guideline range, unless it is based on a ground that was (i) “specifically and affirmatively” included in the written statement of reasons given by the district court pursuant to section 3553(c) in connection with sentencing of the defendant prior to the appeal *and* (ii) was held by the court of appeals, in remanding the case, to be a permissible ground for departure.³⁴ The implications of these statutory changes on the incidence of downward departures are discussed in more detail in Chapter 5.

3. Directives to the Department of Justice

Congress intended that the Department of Justice’s prosecution, sentencing, and appeal policies would complement and further the goals of the Sentencing Reform Act. This congressional intent was implicit in the Sentencing Reform Act of 1984, through the provision making the Attorney General or the Attorney General’s designee an *ex officio* nonvoting member of the Commission, and explicit in the PROTECT Act’s specific directives to the Department of Justice. These directives in turn have resulted in the recent issuance of several policies that could significantly impact departure practices. The PROTECT Act directed the Department of Justice to adopt detailed policies and procedures to:

(A) ensure that the Department of Justice attorneys oppose sentencing adjustments, including downward departures, that are not supported by the facts and the law;

(B) ensure that the Department of Justice attorneys in such cases make a sufficient record so as to permit the possibility of an appeal;

(C) delineate objective criteria, specified by the Attorney General, as to which such cases may warrant consideration of an appeal, either because of the nature or magnitude of the sentencing error, its prevalence in the district, or its prevalence with respect to a particular judge;

(D) ensure that the Department of Justice attorneys promptly notify the designated Department of Justice component in Washington concerning such adverse sentencing decisions; and

(E) ensure the vigorous pursuit of appropriate and meritorious appeals of such adverse decisions.³⁵

³⁴ *Id.* at § 401(e) (emphasis added).

³⁵ *Id.* at § 401(l).

The congressional directive required the Department of Justice to adopt such policies and procedures within 90 days of the enactment of the PROTECT Act, or alternatively to comply with more stringent reporting provisions.³⁶

4. Objections to and Appeals of Downward Departures

In response to the PROTECT Act, on July 28, 2003, Attorney General John Ashcroft issued a memorandum to all federal prosecutors underscoring the importance Congress attaches to objections to and appeals of unjustified downward departures. “The Department of Justice has a responsibility to litigate vigorously in the district courts, and to pursue appeals in appropriate cases, so as to ensure that the policies of the Sentencing Reform Act and the PROTECT Act are faithfully implemented.”³⁷

With respect to objections to and appeals of downward departures, the memorandum states in further detail that:

Department attorneys have an affirmative obligation to *oppose* any sentencing adjustments, including downward departures, that are not supported by the facts and the law Department attorneys must take all steps necessary to ensure that the district court record is sufficient to permit the possibility of an appeal with respect to the improper adjustment. . . .³⁸

The memorandum establishes four mandatory procedural mechanisms to facilitate appeals of unjustified downward departures. First, the memorandum lists categories of adverse decisions that prosecutors must report within 14 days of judgment to the appropriate officials at “Main Justice.” Among the departure categories required to be reported by prosecutors are:

- (1) departures that reduce the sentencing range from Zone C or D to a lower zone in cases in which no term of imprisonment is imposed;

³⁶ Those alternative reporting provisions would have required the Attorney General, within 15 days after a district court’s grant of a nonsubstantial assistance downward departure in any case, to submit a report to the House and Senate Judiciary Committees identifying the case, the facts involved, the identity of the district court judge, the district court’s stated reasons, whether the district court provided the government with advance notice of its intent to depart, the position of the parties with respect to the downward departure, and whether the government filed or intended to file a motion for reconsideration. The Attorney General further would have been required, within five days after a decision by the Solicitor General regarding the authorization of an appeal of departure, to submit to the House and Senate Judiciary Committees a report describing that decision and the basis for such decision. *Id.*

³⁷ Memorandum from Attorney General John Ashcroft, United States Department of Justice, to All Federal Prosecutors 4 (July 28, 2003) (regarding Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals) [hereinafter Ashcroft Appeals Memo].

³⁸ *Id.* at 3 (emphasis added).

(2) departures of two or more criminal history categories based on over representation of the seriousness of the defendant's criminal history (*see* USSG §4A1.3);

(3) departures of three or more offense levels based on a “discouraged” factor, an “unmentioned” factor, a combination of factors where no single factor justifies departure, or an “impermissible” factor as defined in 18 U.S.C. § 3742(j)(2), for an offense which, prior to the departure, resulted in an offense level of level 16 or greater;

(4) departures in child victim or sexual abuse cases governed by 18 U.S.C. § 3553(b)(2), as amended by the PROTECT Act (*i.e.*, “an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapters 71, 109A, 110, or 117”);

(5) departures granted on remand that do not comply with the new requirements for sentencing after remand set forth at 18 U.S.C. § 3742(g); and

(6) departures not otherwise required to be reported that are improperly granted in a manner that has become prevalent in the district or with a particular judge.³⁹

Second, the memorandum directs prosecutors to protect the government's right of appeal by filing a timely notice of appeal when a government appeal is under consideration.

Third, the memorandum provides for review upon notification of adverse departure decisions by the appropriate division at Main Justice. If an appeal is recommended by Main Justice or the United States Attorney, the Solicitor General's Office must review the case to determine whether an appeal would be appropriate and meritorious.

Finally, in cases in which an appeal is authorized, the memorandum requires prosecutors to “vigorously and professionally” pursue the appeal.

On September 22, 2003, the Attorney General issued another memorandum addressing downward departures, among other things.⁴⁰ The memorandum states that the circumstances in which federal prosecutors will request or accede to downward departures in the future will be “properly circumscribed” and “rare” and directs prosecutors to “affirmatively oppose downward

³⁹ *See id.* at A-1 to A-2 (Amendment to section 9-2.170(B) of the U.S. Attorney's Manual) (effective July 28, 2003).

⁴⁰ Memorandum from Attorney General John Ashcroft, United States Department of Justice, to All Federal Prosecutors 6–7 (Sept. 22, 2003) (regarding Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing) [hereinafter Ashcroft Charging Memo].

adjustments that are not supported by the facts and the law,” and not “stand silent” with respect to such departures.⁴¹

Furthermore, the Attorney General’s memorandum seeks to make those instances in which departures are agreed to by prosecutors more readily transparent. Reiterating existing policies, the memorandum states that “[i]n those cases where federal prosecutors agree to support departures, they are expected to identify departures for the courts. For example, it would be improper for a prosecutor to agree that a departure is warranted, without disclosing such agreement, so that there is neither a record of nor judicial review of the departure.”⁴²

The implications of these Department of Justice policies on the incidence of downward departures are discussed in more detail in Chapter 4 of this report.

5. Charging and Plea Bargaining Policies

The Attorney General’s September 22, 2003 memorandum also sets forth revised policies concerning charging and plea bargaining practices. The Attorney General stated:

The fairness Congress sought to achieve by the Sentencing Reform Act and the PROTECT Act can be attained only if there are fair and reasonably consistent policies with respect to the Department’s decisions concerning what charges to bring and how cases should be disposed. Just as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case.⁴³

Some commentators have referred to charge bargaining and fact bargaining as giving rise to “hidden departures.”⁴⁴

The policy generally requires prosecutors to charge and pursue “the most serious, readily provable offense or offenses that are supported by the facts of the case.”⁴⁵ The most serious

⁴¹ *Id.* at 7.

⁴² *Id.*

⁴³ *Id.* at 2.

⁴⁴ *See, e.g., infra* ch. 4, at note 159.

⁴⁵ Ashcroft Charging Memo, *supra* note 40, at 2.

offense or offenses are those that generate the most substantial sentence under the sentencing guidelines or mandatory minimum sentences, and a charge is considered to be not “readily provable” if the prosecutor has a good faith doubt, for legal or evidentiary reasons, as to the government’s ability to prove a charge at trial.⁴⁶

The policy also provides that any sentencing recommendation contained in a plea agreement “must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant’s history and conduct.”⁴⁷ Furthermore, prosecutors must disclose to the court “readily provable facts [that] are relevant to calculations under the Sentencing Guidelines,” and cannot “fact bargain” or enter a plea agreement that results in the sentencing court having “less than a full understanding of all readily provable facts relevant to sentencing.”⁴⁸

6. Early Disposition or Fast Track Programs

As set forth above, the PROTECT Act directs the Commission to promulgate a policy statement authorizing a downward departure of not more than four offense levels if the Government files a motion for such departure pursuant to an early disposition program

⁴⁶ *Id.* The policy provides six limited exceptions to this general policy:

- (1) readily provable charges that would not affect the applicable guideline range or mandatory minimum sentence;
- (2) readily provable charges not pursued pursuant to an authorized early disposition or “fast-track” program;
- (3) a most serious offense that, post-indictment and in good faith, is determined to be not readily provable because of a change in the evidence or some other justifiable reason (*e.g.*, the unavailability of a witness);
- (4) “rare circumstances” in which a prosecutor agrees to decline to charge or to pursue a readily provable charge as part of a plea agreement that properly reflects substantial assistance provided by the defendant in the investigation or prosecution of another person;
- (5) statutory enhancements, specifically 18 U.S.C. §§ 851 and 924(c), that would result in statutory sentences exceeding the applicable sentencing guidelines range, but only in the context of a negotiated plea agreement and subject to additional limitations; and
- (6) other “rare” exceptional circumstances, with the approval of the Assistant Attorney General, United States Attorney, or designated supervisory attorney. *Id.* at 2–5.

⁴⁷ *Id.* at 5.

⁴⁸ *Id.*

authorized by the Attorney General and the United States Attorney.⁴⁹ On September 22, 2003, the Attorney General issued a memorandum outlining the criteria for authorization of early disposition or fast track programs.⁵⁰

The premise on which fast track programs are based is that defendants who promptly agree to participate in such a program save the government significant scarce resources that can be used in prosecuting other defendants and demonstrate acceptance of responsibility above and beyond what is taken into account under §3E1.1 (Acceptance of Responsibility).⁵¹ The Attorney General cautioned, however, that:

These programs are properly reserved for exceptional circumstances, such as where the resources of a district would otherwise be significantly strained by the large volume of a particular category of cases. Such programs are not to be used simply to avoid the ordinary application of the Guidelines to a particular class of cases.⁵²

Accordingly, the policy sets forth specific criteria which must be met in order for a fast track program to be approved. The United States Attorney must demonstrate that:

- (1) the district either (i) confronts an exceptionally large number of a specific class of offenses within the district, and failure to handle such cases on an expedited basis would significantly strain prosecutorial and judicial resources in the district, or (ii) confronts some other exceptional local circumstance with respect to a specific class of cases that justifies expedited disposition of such cases;
- (2) state prosecution of such cases is either unavailable or unwarranted;
- (3) the specific class of cases are comprised of highly repetitive and substantially similar fact scenarios; and

⁴⁹ Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003).

⁵⁰ Memorandum from Attorney General John Ashcroft, United States Department of Justice, to All United States Attorneys 5 (Sept. 22, 2003) (regarding Department Principles for Implementing an Expedited Disposition or “Fast-Track” Prosecution Program in a District) [hereinafter Ashcroft Fast Track Memo].

⁵¹ *Id.* at 1.

⁵² *Id.* at 1–2.

(4) the cases do not involve an offense designated by the Attorney General as a “crime of violence.”⁵³

The policy requires that, at a minimum, the defendant must enter into a written plea agreement that includes an accurate description of the defendant’s offense conduct. In addition, the defendant must agree (1) not to file any of the motions described in Rule 12(b)(3) of the Federal Rules of Criminal Procedure; (2) to waive appeal; and (3) to waive the opportunity to challenge the conviction under 28 U.S.C. § 2255, except with respect to ineffective assistance of counsel.⁵⁴

Beyond these minimum requirements, the policy leaves discretion to the United States Attorney to decide whether the benefit to a defendant under a fast track program is an agreement to a departure or an agreement not to charge or pursue the most serious readily provable offense. An early disposition plea agreement may leave the extent of any departure to the discretion of the sentencing court, or the parties may agree to bind the district court to a departure of a specific number of levels, not to exceed four, pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. A fast track program that uses charge bargaining instead of downward departures is to provide commensurate sentencing reductions.⁵⁵

The implications of early disposition or fast track programs on the incidence of downward departures are discussed in more detail in Chapter 4 of this report.

D. COMMISSION IMPLEMENTATION OF THE PROTECT ACT

1. Commission Actions Prior to Enactment of the PROTECT Act

The Commission has been aware of and concerned about the increasing incidence of downward departures and has taken several actions to address specific areas of concern prior to enactment of the PROTECT Act. These actions, which are discussed briefly here, are covered in more detail in Chapter 5.

The Commission, as reconstituted in November 1999, promulgated two amendments during its initial amendment cycle aimed at reducing the incidence of certain types of departures. Addressing a circuit conflict, the Commission created a new policy statement, §5K2.19 (Post-Sentencing Rehabilitative Efforts), that strictly prohibits departures upon resentencing based on a defendant’s post-sentencing rehabilitative efforts, even if exceptional.⁵⁶ The Commission

⁵³ *Id.* at 2 (referencing 28 C.F.R. § 28.2).

⁵⁴ Ashcroft Fast Track Memo, *supra* note 50, at 3.

⁵⁵ *Id.*

⁵⁶ *See* USSG App. C, amend. 602.

determined that departures based on such post-sentencing rehabilitative measures are inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person, and inequitably benefit only those offenders who gain the opportunity to be resentenced *de novo*.

During that initial amendment cycle of the newly reconstituted Commission, the Commission also addressed another specific departure of concern, aberrant behavior. The Commission resolved a circuit conflict regarding when a departure based on aberrant behavior may be warranted by creating a new policy statement, §5K2.20 (Aberrant Behavior). The Commission rejected the “totality of circumstances approach” endorsed by some circuits at the time, concluding that it was overly broad and vague. Instead, the Commission structured the new policy statement to limit consideration of aberrant behavior to certain types of offenses and offenders, and categorically prohibited offenders convicted of certain serious offense conduct or who have significant prior criminal records from being considered for a departure premised on the aberrant nature of their behavior.⁵⁷

In 2001, the Commission took action to reduce departures in another category of concern, illegal reentry offenses. The Commission acted to reduce departures in illegal reentry cases by making comprehensive revisions to the guideline covering illegal reentry, §2L1.2 (Unlawfully Entering or Remaining in the United States), to provide more graduated enhancements for prior convictions, depending on the seriousness of the prior aggravated felony and the dangerousness of the defendant. Equally important, the Commission deleted the application note that had invited a downward departure based on the seriousness of the prior aggravated felony.⁵⁸ The revised guideline became effective November 1, 2001, and data is not yet available to determine the extent to which it has reduced the incidence of departures.

Also during this time, the Commission began to study departures more comprehensively as part of its fifteen year review of the operation of the federal sentencing guideline system. The timeline for completion of this project obviously was shortened significantly by enactment of the PROTECT Act.

2. Commission Actions within 180 Days of Enactment of the PROTECT Act

The PROTECT Act includes a number of provisions aimed at reducing the incidence of departures, among them stricter sentencing documentation and submission requirements and other procedural reforms. The Commission already has observed a noticeable impact from these changes, including a surge in the volume of sentencing documents it receives. Although empirical evidence is not available, the Commission has received comments at recent training sessions and conferences suggesting courts understand the concerns expressed in the PROTECT Act and are reacting accordingly.

⁵⁷ *See id.*, amend. 603.

⁵⁸ *See id.*, amend. 632.

The PROTECT Act also made direct congressional amendments to the sentencing guidelines to restrict the availability of departures for certain child crimes and sex offenses. The Commission implemented those changes and, as directed, distributed those guideline amendments to the federal criminal justice community on April 30, 2003.

The PROTECT Act directs the Commission to take steps to ensure that the incidence of downward departures is substantially reduced more broadly. The Commission was created by the Sentencing Reform Act to serve as an expert body on federal sentencing policy and a national clearinghouse for federal sentencing data, and it has worked diligently and drawn on its considerable expertise to implement the directives in a timely manner. During its deliberative process, the Commission: (1) considered the legislative history of the Sentencing Reform Act of 1984 and other sentencing legislation, with particular emphasis on the role of departures; (2) identified particular concerns regarding downward departures raised by Congress in the PROTECT Act; (3) conducted an extensive empirical study of frequently cited reasons for downward departures; (4) reviewed departure case law and literature; (5) solicited and weighed public comment;⁵⁹ and (6) held two public hearings at which the Commission received testimony from the Department of Justice, judges, federal defenders and prosecutors, and experts in the criminal law on downward departures generally, and early disposition or fast track programs specifically.

On October 8, 2003, the Commission unanimously adopted an emergency amendment implementing the PROTECT Act directives effective October 27, 2003. The emergency amendment is discussed in more detail in Chapter 5 and is provided in its entirety in Appendix A. The amendment prohibits several factors as grounds for departure, restricts the availability of certain departures, clarifies when certain departures are appropriate, and limits the extent of departure permissible for certain offenders.

The Commission added provisions that prohibit or restrict departures in §5K2.0 (Grounds for Departure), §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), §5H1.6 (Family Ties and Responsibilities), §5H1.7 (Role in the Offense), §5H1.8 (Criminal History), §5K2.10 (Victim's Conduct), §5K2.12 (Coercion and Duress), §5K2.13 (Diminished Capacity), §5K2.20 (Aberrant Behavior), §4A1.3 (Departures Based on Inadequacy of Criminal History Category), and §6B1.2 (Standards for Acceptance of Plea Agreements), among other changes.

Included among the newly forbidden grounds for departure are:

- the defendant's acceptance of responsibility for the offense;
- the defendant's aggravating or mitigating role in the offense;

⁵⁹ 68 Fed. Reg. 39,173 (July 1, 2003).

- the defendant’s decision, by itself, to plead guilty to the offense or to enter into a plea agreement with respect to the offense;
- the defendant’s fulfillment of restitution obligations only to the extent required by law, including the guidelines;
- the defendant’s addiction to gambling;
- the defendant’s aberrant behavior if the defendant has any significant prior criminal behavior, even if the prior conduct did not result in a federal or state felony conviction;
- the defendant’s aberrant behavior if the defendant is subject to a mandatory minimum term of imprisonment of five years or more for a drug trafficking offense, regardless of whether the defendant meets the “safety valve” criteria at §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases);
- the overrepresentation by the defendant’s criminal history category of the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, if the defendant is an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and
- the overrepresentation by the defendant’s criminal history category of the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, if the defendant is a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

The amendment also imposes increased restrictions on the availability of departures based on:

- multiple circumstances (previously referred to as a combination of factors);
- the defendant’s family ties and responsibilities, particularly if the basis for consideration is financial or caretaking responsibilities;
- victim’s conduct;
- coercion and duress; and
- diminished capacity.

The amendment will impact the incidence of departures more generally by restructuring departure provisions throughout the *Guidelines Manual*, particularly in §5K2.0 (Grounds for Departure), to track more closely both the statutory criteria for imposing a sentence outside the guideline sentencing range and the newly enacted statutory requirement that reasons for departure be stated with specificity in the written order of judgment and commitment.⁶⁰

To emphasize the importance of specific written reasons for departure decisions, the Commission added specific documentation requirements in three policy statements, sections 5K2.0 (Grounds for Departure), 4A1.3 (Departures Based on Inadequacy of Criminal History Category), and 6B1.2 (Standards for Acceptance of Plea Agreements). The Commission determined that requiring sentencing courts to document reasons for departure with greater specificity will complement the findings and documentation required of sentencing courts by the PROTECT Act, facilitate appellate review, and improve the Commission's ability to monitor departure decisions and refine the guidelines as necessary.

The need for greater specificity and standardization in departure documentation was particularly brought to light by certain data limitations the Commission encountered when conducting the empirical analysis for this report. In particular, the Commission is concerned that the Statements of Reasons often do not provide sufficient detail to enable the Commission to understand the sentencing court's substantive reasons for departure. In such instances the usefulness of departure decisions as a feedback mechanism regarding the operation of the guidelines is lessened. The Commission's data collection process is discussed in more detail in Chapter 2 of this report.

The Commission also added a new policy statement, §5K3.1 (Early Disposition Programs), that restates the language contained in the directive at section 401(m)(2)(B) of the PROTECT Act. The new policy statement provides that, upon motion of the government, the court may depart downward not more than four offense levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides. The Commission determined that this action is appropriate at this time despite several concerns that are discussed in Chapter 4 and pending further study.

The Commission is unable to determine the full impact of early disposition programs (often referred to as fast track programs) on the departure rate, but the impact is believed to be significant. The Commission estimates that in fiscal year 2001 the government initiated approximately 40 percent of all nonsubstantial assistance downward departures. The Commission, however, cannot isolate which departures were pursuant to a fast track program because courts in districts with fast track programs frequently cite reasons other than fast track when granting a government initiated departure, and fast track programs are not exclusive to

⁶⁰ See 18 U.S.C. §§ 3553 (Imposition of a sentence) and 3742(e) (Review of a sentence) (Consideration) (West Supp. 2003).

districts along the southwest border. When government initiated departures are excluded, the downward departure rate is 10.9 percent, which is significantly lower than the overall reported downward departure rate of 18.1 percent.⁶¹

An alternative method of estimating the impact of fast track programs is to exclude from the departure analysis the judicial districts along the southwest border, which are coping with significantly increased caseloads of immigration and immigration related offenses. In fiscal year 2001, the southwest border districts had a combined departure rate of 38.2 percent. In contrast, the departure rate for the rest of the nation was 10.4 percent, which also is significantly lower than the overall departure rate of 18.1 percent.⁶² Circumstances unique to the southwest border thus appear to be driving the overall national departure rate significantly higher than it otherwise would be.

3. Ongoing Commission Review

The Commission believes that its emergency amendment will work together with the many statutory and guideline changes enacted by the PROTECT Act, and the recently implemented Department of Justice policies regarding appeals, fast track, and plea bargaining to reduce substantially the incidence of downward departures. The Commission worked diligently to implement the directive, but its efforts in this area are ongoing and will extend beyond the 180 day time period established by the PROTECT Act.

The Commission is continuing to work on several specific areas that affect the incidence of departures. This nonexhaustive list includes possible refinements to the criminal history calculations to take into account data that is now becoming available from the Commission's multi-year comprehensive recidivism study. Refinements to the criminal history calculations would enable the Commission to restrict even further criminal history departures, and perhaps eliminate aberrant behavior departures. The Commission has furthered this process by voting to publish an issue for comment in the *Federal Register* regarding whether aberrant behavior departures should be prohibited.

The Commission also has identified immigration offenses as a priority for the current amendment cycle.⁶³ Immigration offenses account for a substantial proportion of downward departures – one-third of all downward departures in fiscal year 2001 – and data regarding the impact of the Commission's 2001 illegal reentry amendment on the departure rate for such offenses will be available soon. Further refinements to the guidelines for immigration offenses may further reduce the incidence of departures.

⁶¹ See *infra* ch. 4, fig. 14.

⁶² See *infra* ch. 4, fig. 16.

⁶³ Sentencing Guidelines for the United States Courts, 68 Fed. Reg. 52264–65 (Sep. 2, 2003).

Related to immigration offenses, the Commission intends to study and monitor closely the operation of early disposition programs and the new policy statement at §5K3.1 (Early Disposition Programs). As explained in Chapter 4, early disposition programs and the departure provision as promulgated have the potential to increase unwarranted sentencing disparity based on geography, which gives cause for further study.

In addition, the Commission intends to study whether collateral consequences such as inmate classification and facility designation decisions, crediting policies for previous time served and satisfactory behavior, correctional employment and other program opportunities or policies, furlough and work release policies, post-release incarceration policies, and similar factors relating to the place and manner in which a sentence is to be served and the defendant's eligibility for release thereafter, should be prohibited grounds for departure.

More generally, the Commission continues to review departure provisions throughout the *Guidelines Manual* and to consider whether any circumstances warranting departure should be incorporated as guideline adjustments.

E. ORGANIZATION OF REPORT

Chapter 2 describes the Commission's overall data collection processes and some of its limitations.

Chapter 3 presents findings from the Commission's data analysis of downward departures.

Chapter 4 discusses various contributors to the increasing incidence of downward departures.

Chapter 5 discusses Commission actions to reduce the incidence of downward departures taken both in the recent past and in direct response to the PROTECT Act, and sets forth the specific plans for continued work in this area in the near future.

Appendix A sets forth the emergency amendment, effective October 27, 2003, promulgated by the Commission in direct response to the directives contained in the PROTECT Act.

Appendix B presents a detailed legislative history of sentencing reform provisions, focusing on the role of departures in the guideline sentencing system.

Appendix C explains the data methodology used in preparation of this report.