

No. 02-

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**UNITED STATES OF AMERICA,**

Appellee,

v.

,

Appellant.

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On Appeal from the Judgment of Sentence  
In the United States District Court for the District of New Jersey

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**REPLY BRIEF FOR APPELLANT**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

ARGUMENT ..... 1

III. THIS COURT SHOULD GRANT A GENERAL REMAND FOR RESENTENCING BY A DIFFERENT JUDGE, IRRESPECTIVE OF THE PROVISIONS OF 18 U.S.C. § 3742 AS ALTERED BY THE FEENEY AMENDMENTS ..... 26

    A. 18 U.S.C. § 3742(f), as Changed by the Feeney Amendments ..... 27

    B. 18 U.S.C. § 3742(g), as Added by the Feeney Amendments ..... 29

    C. 28 U.S.C. § 1291, Not 18 U.S.C. § 3742, Governs the Remand of Plea Related Issues in This Case ..... 32

    D. 18 U.S.C. § 3742(g)(2) Should Be Interpreted to be Inapplicable to Remands Pursuant to 18 U.S.C. § 3742(f)(1). .... 33

    E. Congress Intended the Amended § 3742 to Apply Only to Appeals From Sentencings Originally Conducted Pursuant to the Feeney Amendments ..... 41

    F. Applying 18 U.S.C. § 3742(g)(2) to a Remand Pursuant to 18 U.S.C. § 3742(f)(1) is Unconstitutional ..... 42

CONCLUSION ..... 48

CERTIFICATE OF COMPLIANCE

STATUTORY APPENDIX TO THE REPLY BRIEF

I. THIS COURT SHOULD GRANT A GENERAL REMAND FOR RESENTENCING BY A DIFFERENT JUDGE, IRRESPECTIVE OF THE PROVISIONS OF 18 U.S.C. § 3742 AS ALTERED BY THE FEENEY AMENDMENTS

In Section 402 of the PROTECT Act, Pub.L.108-21§ 402 (April 30, 2003), the so-called Feeney Amendments, Congress enacted a number of ill-conceived provisions affecting the authority of courts relating to sentencing and sentencing appeals. Several of the changes made by Feeney Amendments to 18 U.S.C. § 3742 are arguably pertinent to the scope the remand Mr. [Client] requested before the amendments were passed.<sup>1</sup> The arguably relevant provisions of § 3742, as amended, are subsections (f) and (g). Although subsection 402(j) made certain provisions of the Feeney Amendments effective upon enactment, Pub.L. 108-21 § 402(j)(1); *id.*, § 402(j)(5), the retroactive effects of the amendments altering § 3742(f) and adding § 3742(g) were nowhere expressly addressed in the Feeney Amendments. For the reasons that follow, this court should remand for resentencing in accordance with the principles that have long governed remands in cases in which the government has breached the plea agreement. *See* Br. for Applnt at 38-40.

A. 18 U.S.C. § 3742(f), as Changed by the Feeney Amendments

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<sup>1</sup>The entire text of the amended version of 18 U.S.C. § 3742 is set forth in the statutory appendix to this Reply Brief.

Paragraph (f)(1) governs a broad category of remands—remands where the original sentence was imposed “in violation of law” or “as a result of an incorrect application of the guidelines.” 18 U.S.C. § 3742(f)(1). Even after the Feeney amendments, paragraph (f)(1) continues to mandate that the court of appeals exercise its own discretion in formulating the mandate. Paragraph (f)(1) provides that the appellate court “shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.” Id.

In contrast, Paragraph (f)(2) governs remands where the appellate court finds that “the sentence is outside the applicable guideline range” and one or more specified errors is also present. 18 U.S.C. § 3742(f)(2). Those errors consist of the district court failing to “provide the required statement of reasons” for the departure and the district court departing “based upon an impermissible factor or departing to an unreasonable degree.” Id. Paragraph (f)(2) also governs remands of cases involving the increasingly rare and atavistic non-guideline sentence. Thus, in a phrase that is grammatically parallel to the entire phrase addressing improper departures, paragraph (f)(2) provides that if the appellate court finds that “the sentence was imposed for an offense for which there is no applicable guideline and is plainly unreasonable,” it must remand. The amended paragraph (f)(2) now requires the appellate court, in all cases governed by it, to “state specific reasons for its conclusions.” Id. With respect to all appealed sentences

falling within the scope of (f)(2)—irrespective of whether the sentence was subject to the guidelines or not and whether a sentence subject to the guidelines resulted from an upward or downward departure—the appellate court must “remand the case for further sentencing proceedings with such instructions as the court considers appropriate, *subject to subsection (g)*.” *Id.* §§ 3742(f)(2)(A) & (B) (emphasis added).

B. 18 U.S.C. § 3742(g), as Added by the Feeney Amendments

The applicability of the Feeney limitations on remand, however, cannot be finally resolved based simply upon the fact the court of appeals’ discretion in formulating a remand is “subject to subsection (g)” under paragraph (f)(2), but not under paragraph (f)(1). On its face, subsection (g) directs that district courts ignore, in certain regards, appellate mandates issued under *both* paragraphs (f)(1) and (f)(2). 18 U.S.C. § 3742(g) (preamble). The limitations of subsection (g) on resentencing on remand are two-fold. *Id.*, § 3742(g)(1); *id.* § 3742(g)(2)(A)-(B).

Paragraph (g)(1) sets forth the following exception to the district court’s duty to follow the appellate mandate:

(1) In determining the [guideline] range . . . , the court shall apply the guidelines issued by the Sentencing Commission . . . , and that were in effect on *the date of the previous sentencing of the defendant prior to appeal*, together with any amendments thereto by any act of Congress that was in effect *on such date*;

Id., § 3742(g)(1) (emphasis added). Paragraph (g)(1) appears to be intended to establish that guideline amendments—whether favorable or unfavorable to a defendant and whether adopted by the Sentencing Commission or directly enacted by Congress—that become effective after the date of the defendant’s original sentencing do not apply on resentencing. Yet, because the provision is drafted as an exception to the mandate rule, rather than a rule of decision applicable in appellate courts as well as the district court, the provision admits a number of additional troubling interpretations.

The Feeney Amendments provide that the amendments to the sentencing guidelines Congress directly enacted were effective upon enactment. Id. § 3742(j)(1); id. § 3742(j)(5). All of Congress’ direct amendments to the guidelines were to the substantive disadvantage of defendants. *See* Pub.L. 108-21, §§ 402(b), (g), & (i). In both the district court and the appellate courts, the application of the amended guidelines to offenses committed before April 30, 2003 is constrained *ex post facto* considerations. *See Miller v. Florida*, 482 U.S. 423 (1987); *Carmell v. Texas*, 529 U.S. 513 (2000); *cf. United States v. Yeaman*, 248 F.3d 223, 227-28 (3d Cir. 2001). Consistent with the *Ex Post Facto* Clause and the foregoing authorities, an appellate court must hold that application of the purportedly immediately effective adverse changes Feeney wrought in particular guidelines cannot be applied to an offense committed before the Feeney Amendments became

effective. Yet, by its plain language, subsection (g)(1) dictates that the district court ignore any such holding by an appellate court. In such circumstances, paragraph (g)(1) simply dictates that the resentencing be according to the Feeney amendments without regard to prior proceedings.<sup>2</sup>

Paragraph (g)(2) sets forth the following exception to the district court's duty to follow the appellate mandate:

(2) the court shall not impose a sentence outside the applicable guideline range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

18 U.S.C. § 3742(g)(2). Subsection (f) of the Feeney Amendments, Pub.L. 108-21, § 402(f), defined the term “permissible ground for departure.” It is a ground that “advances the objectives” of 18 U.S.C. § 3553(a)(2), is authorized under 3553(b) and “is justified by the facts of the case.” 18 U.S.C. § 3742(i); *see also id.* § 3742(e)(3)(B)(i)-(iii) (mandating that a court of appeals address these aspects of a departure factor during consideration of departure appeals). Bearing these

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<sup>2</sup>For any case that is remanded, paragraph (g)(1) may eliminate the need for the government to have filed appeal a district court's *ex post facto* ruling adverse to the government in the initial sentencing. This is so because the component of the law-of-the-case doctrine that makes district court rulings that have not been appealed controlling on remand operates only by way of the appellate mandate, which the district court is to ignore.

features of the amended § 3742 in mind, the analysis turns to why the court should remand in accordance with its longstanding practices.

C. 28 U.S.C. § 1291, Not 18 U.S.C. § 3742, Governs the Remand of Plea Related Issues in This Case

Subsections (f) and (g) should have no application to this Court's remand because § 3742 does not govern the appeal of the plea related issues in this case. The general remand for resentencing in this case is requested in relation to the government's breach of the plea agreement regarding the government's failure to consider all of Mr. [Client]'s cooperation and the district court's error in misconstruing the stipulated applicable total offense level provision of the plea agreement, one of the consequences of which was the government's breach of that provision.<sup>3</sup> As already discussed in detail above, a breach of the plea agreement results in an error in the judgment of conviction, not the judgment of sentence. Santobello, 404 U.S. at 260-63; Dunn, 247 F.3d at 461-62; *supra* Part I.B.

Consequently, the appeal and the remand relating to such issues are governed by 28 U.S.C. § 1291, not 18 U.S.C. § 3742, and none of the § 3742 restrictions on the

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<sup>3</sup>The other consequence fo the district court's interpretation error was its failing to give the stipulation independent weight. Standing alone the failure to give the stipulation independent weight would constitute an incorrect application of the guidelines. That error, however, was merely a consequence of the district court's misinterpretation of the plea agreement, which directly affected the validity of the conviction and authorized the government's breach.

proceedings that may occur apply in this case to this Court's mandate or the district court's resentencing.

Even if § 3742 is generally applicable to the plea-related issues, only if the act is construed to constrain this Court's remand or the district court's execution of this Court's mandate in a case such as this and, additionally, construed to have retroactive application will proceedings on remand be facially governed by the Feeney Amendments. If so, the constitutional invalidity of the relevant Feeney Amendments will be squarely presented.

D. 18 U.S.C. § 3742(g)(2) Should Be Interpreted to be Inapplicable to Remands Pursuant to 18 U.S.C. § 3742(f)(1).

To give a reasonable meaning to all the admittedly inconsistent language of the amended § 3742, to avoid absurd results and to maintain a rational system of appellate review, paragraph (g)(1) should be interpreted to apply to all remands under both paragraphs (f)(1) and (f)(2), but paragraph (g)(2) should be held to apply only to remands pursuant to (f)(2) and to be inapplicable to remands under (f)(1). So interpreted, the changes in § 3742 will have no effect on this appeal or on remand.

If §§ 3742(a) and (f) (rather than 28 U.S.C. 1291) were to apply at all to claims that the government breached the plea agreement, §§ 3741(a)(1), (a)(2) and (f)(1) would necessarily be the governing provisions. This is so because §

3742(f)(2) applies solely to granted departures that suffer from specific enumerated defects. 18 U.S.C. § 3742(f)(2).

With respect to remands under paragraph (f)(1), subsection (g) places its restrictions upon the district court's complying with the appellate court's mandate, not on the appellate court in formulating its mandate. 18 U.S.C. § 3742(g).

Paragraph (f)(1) preserved the full measure of this court's discretion in formulating a mandate for resentencing. 18 U.S.C. § 3742(f)(1) (court "shall remand . . . with such instructions as the court considers appropriate"). In fact, paragraph (f)(1) *mandates* "such instructions as the court considers appropriate." Id. In § 3742(f)(2)(A) & (B), however, the act provides that the appellate court's mandate itself is "subject to subsection (g)." 18 U.S.C. § 3742(f)(2)(A) & (B). As Congress amended both § 3742(f)(1) and (2) in the Feeney amendments, but did not include the language "subject to subsection (g)" in paragraph (f)(1), Pub.L. 108-21, § 402(d)(3)(A), (B) & (C), the court must give some meaning to this distinction. At the same time, the Court must give some meaning to the preamble of subsection (g), which makes its restriction applicable in the district court to remands under paragraph (f)(1).<sup>4</sup>

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<sup>4</sup>The Feeney Amendments were obviously not thoroughly considered. One patently absurd result not implicated in this case is that non-guideline sentences "imposed in violation of law" within the meaning of paragraph (f)(1) or "plainly unreasonable" within the meaning of paragraph (f)(2) would literally be subject on  
(continued...)

Meaning can rationally be given to the preamble of subsection (g) by holding that paragraph (g)(1) restricts the district in resentencing pursuant to mandates issued under paragraph (f)(1) (and paragraph (f)(2)). Whatever paragraph (g)(1) ultimately means, it logically applies to remands pursuant to both paragraph (f)(1) and paragraph (f)(2). That is, the issue of what version of the guidelines can be lawfully applied on remand arises in cases remanded generally under (f)(1) or remanded for due to errors that include specific defects in a departure under (f)(2).

Meaning can rationally be given to Congress' preservation of this Court's full measure of discretion in formulating mandates under paragraph (f)(1) by excepting such mandates from the operation of paragraph (g)(2). Such an interpretation is supported by the close interrelationship of paragraphs (f)(2) and (g)(2) with each other—an interrelationship that does not exist between paragraphs (f)(1) and (g)(2). Moreover, if preservation of this Court's discretion

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<sup>4</sup>(...continued)  
remand to the restrictions of paragraphs (g)(1) and (g)(2), which are *rational* only in the context of guideline sentencing.

Another absurd result is that a district judge could intentionally or inadvertently defeat a departure dictated by a *de novo* review precedent by failing to include its grounds in a written statement. The judgment would be reversed under paragraph (f)(2), but the departure would be barred on remand by paragraph (g)(2).

to formulate general remands under paragraph (f)(1) is not given precedence over the provisions of (g)(2), absurd results will often occur, as they do in this case.

The texts of paragraphs (f)(2) and (g)(2) are interrelated in ways that the texts of paragraphs (f)(1) and (g)(2) are not. Both expressly address the subject matter of departures and the specific requirements the Feeney Amendments now place on them. For instance, Paragraph (f)(2) makes it a ground for a remand a district court's failure to provide the "required statement of reasons" under 18 U.S.C. § 3553(c), the written version of which is newly required by the Feeney Amendments. Pub.L. 108-21, § 402(c). In turn, paragraph (g)(2) defines its departure exception to the mandate rule in part by reference to whether ground for departure "was specifically and affirmatively included in the written statement of reasons" from the previous sentencing. 18 U.S.C. § 3742(g)(2)(A).

The interrelationship between paragraphs (f)(2) and (g)(2) is further shown by the fact that the requirement that the appellate court "shall state specific reasons for its conclusions" appears to be related to the requirement that a departure ground is only available on remand only if it "was held by the court of appeals . . . to be a permissible ground for departure." *Id.* § 3742(g)(2)(B). For this system to work at all, the court of appeals' "specific reasons" must include all the findings necessary to determine whether it "held" a departure to be a "permissible departure." Thus, the "specific reasons" must include at least the finding

regarding whether the departure “is justified by the facts of the case” within the meaning of the definition of “permissible ground for departure.” *Id.*, § 3742(i); *see also id.* § 3742(e)(3)(B)(i)-(iii) (court must consider the same criteria found in the definition of “permissible ground for departure”).

Finally, and perhaps most importantly, all remands under (f)(2) will be based upon its enumerated errors relating to departures. Grounds for departure are precisely the subject matter of exception to the mandate rule found in paragraph (g)(2). In this context, limiting the court of appeal’s discretion to formulate a mandate under paragraph (f)(2) by making the discretion “subject to subsection (g)” most appropriately refers to paragraph (g)(2), and its limitation on departures.

In contrast, the category of errors subject to correction under paragraph (f)(1) is much broader than improper departures. It includes all sentences imposed “in violation of law” or “as a result an incorrect application of the guidelines.” *Id.* § 3742(f)(1). Among the innumerable errors correctable under paragraph (f)(1) are errors antecedent to departure decisions (in the sense that the errors result in no departure decision being made) and errors consisting of denials of departure motions. Making paragraph (f)(1) mandates subject to the exception to the mandate rule found in paragraph (g)(2) would itself have absurd, illogical results with respect to such errors correctable under paragraph (f)(1).

Take, for instance, a district court's *erroneous failure* to award a downward (or upward) departure based upon his or her misapprehension of his or her authority to grant it. That is an incorrect application of the guidelines relating to a departure that is not expressly enumerated in paragraph (f)(2). Consequently, the decision and disposition it governed by paragraph (f)(1). As the appellate court's discretion in formulating the mandate in the first instance is not "subject to subsection (g)," the appellate court can, indeed must, order the appropriate relief—the district court should adjudicate the motion for departure on remand and resentence accordingly.

Yet, if paragraph (g)(2) governs the district court on remand, the district court must violate the mandate because, *necessarily*, paragraph (g)(2) cannot be satisfied. Subparagraph (g)(2)(A) cannot be satisfied because the district court did not specifically and affirmatively include the ground for departure in its written statement of reasons because it denied, rather than granted the departure, and unless it was required by some other aspect of the judgment of sentence, would not have issued any written statement. Similarly, subparagraph (g)(2)(B) cannot be satisfied because the motion was not adjudicated on the merits, and there was no record from which this court could definitively find that ground for departure satisfied the requirement for permissibility that the ground "is justified by the facts of the case." As can be seen from this commonplace example, applying paragraph

(g)(2) to a remand under paragraph (f)(1) not only contradicts Congress' preservation of general remands under paragraph (f)(1), but is also tantamount to a silent repeal of 18 U.S.C. § 3742(a) with respect to any of the innumerable violations of law or misapplications of the guidelines that are antecedent to the ultimate decision to grant or deny a motion for departure.

In Mr. [Client]'s case—if the government's breach of the plea agreement is deemed to be an error subject to review under § 3742(a), as changed by the Feeney Amendments—an analogous problem is presented. For example, one of Mr. [Client]'s complaints is that the government did not consider his cooperation in an unrelated matter through a different Assistant United States Attorney before declining to file a motion for downward departure. Consequently, the error is antecedent to any district court departure decision, but even more removed from it than the error of a district court misapprehending its authority to depart. Even though the antecedent error resulted in no departure and no written statement of reasons, if paragraph (g)(2) applies on remand, no departure can be forthcoming in the district court, no matter what the mandate of this court states.

There is another absurd result of making remands under paragraph (f)(1) subject to the restrictions of (g)(2) in a case like Mr. [Client]'s, where there is a *plea agreement* implicating downward departures. The application of paragraph (g)(2) to a remand under paragraph (f)(1) operates to preclude the defendant from

receiving what is “reasonably due under the circumstances.” Santobello, 404 U.S. at 262. Where, as here, the government breaches the agreement relating to a 5K1.1 departure, the agreement must either be specifically enforced, thereby again rendering the plea constitutionally valid, or the defendant must be permitted to withdraw his plea. Paragraph (g)(2) ensures that in circumstances such as these the plea agreement cannot be enforced. Perversely, given that one of the reasons for the amendments to § 3742 appears to be to preclude serial litigation of issues, paragraph (g)(2) ensures that the breach of a plea agreement relating to a departure results in the placing of the case back into a pretrial/pre-plea status, even when such a result is contrary to the wishes of the court, the prosecution and the defendant.

To avoid the unjust and absurd results that would flow from interpreting paragraph (g)(2) as constraining remands pursuant to paragraph (f)(1), this court should interpret the admittedly inconsistent language of the amended subsections (f) and (g), such that the exception to the mandate rule found in (g)(2) has no effect on remands pursuant to paragraph (f)(1). Under such a construction, even if § 3742 were the correct jurisdictional statute and otherwise controlling in this appeal, § 3742(g) would be irrelevant to this case. Paragraph (g)(1), although applicable to a remand under paragraph (f)(1), would have no impact because neither Mr. [Client] nor the government has invoked any post-sentencing guideline

amendments. Paragraph (g)(2) would control neither this Court’s formulation of a mandate nor the district court’s compliance with the mandate.

E. Congress Intended the Amended § 3742 to Apply Only to Appeals From Sentencings Originally Conducted Pursuant to the Feeney Amendments

Section 3742, as changed by the Feeney Amendments, does not apply because Congress did not intend the changes to be retroactively applicable to appeals from sentences imposed under the pre-Feeney regime. Many of the provisions of the amended versions of paragraph (f)(2) and (g)(2) contemplate that the original sentencing took place after and pursuant to Feeney Amendments. For instance, the requirement that the district court must have included a written statement of reasons did not apply before the Feeney Amendments. *See* Pub.L. 108-21 § 402(c) (adding the requirement of a written statement of reasons). Thus, the ground for remand in paragraph (f)(2) based on the failure to make the “required statement,” which necessarily means “written statement” after Feeney, and the requirement under paragraph (g)(2) for a departure ground to be available on remand that the district court *in the original sentencing* must have included the ground in the written statement of reasons are clear indications that the interrelated amended (f)(2) and the new paragraph (g)(2) were not intended to apply where the original sentencing occurred prior to the enactment of the Feeney Amendments.

This prospective intent of Congress is also supported by the language of paragraph (g)(1). That provision requires resentencing to conform to the guidelines *and* “any amendments thereto by any act of Congress that was in effect on such date,” referring to “the date of the previous sentencing.” 18 U.S.C. § 3742(g)(1). Since it was in the Feeney Amendments that Congress for the first time ever directly amended the guidelines, such a limitation likely indicates an intent that the limitations on the scope of the remand would apply only to cases both originally sentenced and remanded under the Feeney Amendments.

F. Applying 18 U.S.C. § 3742(g)(2) to a Remand Pursuant to 18 U.S.C. § 3742(f)(1) is Unconstitutional

If paragraph (g)(2) applies in this case as a matter of statutory construction, nettlesome constitutional questions are, or may be, presented. To review, unquestionably Congress mandated that this Court’s remand under paragraph (f)(1) grant the full measure of relief appropriate under the law, including the consideration or reconsideration of matters, other than those specified in paragraph (f)(2), that may result in departures. 18 U.S.C. § 3742(f)(1). Yet, Congress forbids the district court from following this Court’s mandate unless conditions *in addition to those warranting appellate relief* are met.

The statute, so construed, violates the separation of powers. By hypothesis, the paragraph (g)(2) exception to the mandate rule changes the outcome of cases

remanded pursuant to paragraph (f)(1) for errors resulting in the denial of a departure.<sup>5</sup> Admittedly, consistent with Article III, Congress may change the outcome of a remand by altering the substantive law after the mandate issues (subject to certain restrictions in criminal cases) or by withdrawing jurisdiction over the subject matter from the district court. Section 3742 does neither of these things. Rather, despite a judgment from the appellate court that a party is, or upon certain proofs may be, entitled to a departure under existing law, Congress has mandated that the district court not apply controlling law in the case. That exceeds the legitimate scope of legislative influence over pending cases and crosses over into the exercise of judicial powers assigned exclusively to Article III courts.

With respect to offenses committed before the Feeney Amendments, like Mr. [Client]'s offenses, paragraph (g)(2) violates the *Ex Post Facto* Clause.

Paragraph (g) operates to make punishment more burdensome in violation of the

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<sup>5</sup>The constitutional validity of paragraph (g)(2) as applied to mandates issued under paragraph (f)(1) is not implicated unless several preconditions are met. First, the court of appeals has to remand a case under paragraph (f)(1) having found reversible error in the sentence implicating a potential departure. The error must, at least in part, not be governed by paragraph (f)(2). Theoretically, paragraph (g)(2) would not be implicated unless and until proceedings on remand established that but for paragraph (g)(2) the defendant is entitled to a departure. (Paragraph (g)(2) does not forbid the following of the mandate to determine whether a defendant is entitled to relief, it only bars relief itself). As a practical matter, it is likely that district courts will overlook this last precondition and invoke (g)(2) to avoid holding proceedings that cannot result in relief.

*Ex Post Facto* Clause. See Lynce v. Mathis, 519 U.S. 433 (1997) (applying the third category of Calder v. Bull, 3 U.S. 386 (1798)); see also Miller v. Florida, 482 U.S. 423 (1987) (changes in sentencing guidelines make punishment more burdensome). The availability of departures lessens the prospective punishment for crimes sentenced under the guidelines. With respect to reversible errors, correctable under paragraph (f)(1), that resulted in erroneous denials of departures, paragraph (g)(2) changes what must be proved on remand to receive the benefit of the departure. Cf. Carmell v. Texas, 529 U.S. 513 (2000) (applying the fourth Calder category). In the context of errors, correctable under paragraph (f)(1), that precluded the granting of meritorious departures the effect is not remote or speculative. The change is outcome determinative because, with respect to remands under (f)(1), the new standards are impossible to meet.

Paragraph (g)(2) violates the due process and equal protection components of the Fifth Amendment. As a result of the application of paragraph (g)(2) to remands under paragraph (f)(1), defendants who receive downward departures and person who are denied downward departures due to *reversible error* are treated differently. The presence of reversible error to distinguish between these classes is not a rational distinction. Indeed, it is so arbitrary and capricious that it offends Due Process as well.

For any and all of these reasons, the Court should issue the appropriate general remand for resentencing before a different judge and also direct the district court to consider grounds for departure available without regard for subsection (g) of 18 U.S.C. § 3742.

### **CONCLUSION**

WHEREFORE, Appellant [CLIENT] respectfully requests that the Court reverse the judgment and remand for a full resentencing before a different judge within a statutory maximum term of imprisonment of twenty years determined to under 21 U.S.C. § 841(b)(1)(C) and without regard to U.S.S.G. § 3B1.1.

Respectfully submitted,

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