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April 25, 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: Departure Review **B** Section 401(m), PROTECT Act

Dear Judge Murphy and Commissioners:

Congress built departures into the guideline system as a mechanism for preserving fairness and individualized sentences in a system that was intended to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct ... 28 U.S.C. § 991(b)(1)(B). To this end, Congress directed district courts when imposing sentence to take into account those factors not adequately considered in setting the guidelines. 18 U.S.C. § 3553(b); *Koon v. United States*, 518 U.S. 81, 113 (1996). The guidelines were structured in this fashion not because Congress believed that Sentencing Commissions would fail in their assigned task to develop appropriate guidelines. After years of study and consideration, departures were designed into the structure of the guidelines because Congress understood that no Commission, indeed not even Congress itself, could adequately take every appropriate factor into consideration in setting guidelines. In our experience, downward departures are working as intended by Congress **B** preserving some fairness and individualized sentencing within the guidelines system.

In its review of departures, the Commission should dispel with hard data and impeccable analysis the false impression that has been created that federal judges are granting too many downward departures. As Commission statistics reflect, a large number of downward departures result from plea agreements, including the case-load management procedures utilized by the government to deal with the explosion of immigration cases in border districts, quid-pro-quo waiver of rights agreements, and other accommodations largely within the control of the government. A majority of districts have downward departure rates in the single digits, a number well below the 20% contemplated in the Senate Report issued when the Sentencing Reform Act was passed. S.Rep. No. 225, 98th Cong., 1st Sess. 52 n.71 (1983). Our experience in court rooms across America is that district judges grant too few downward departures in cases where departures are warranted.

We recommend that the Commission include the following in its review of downward departures: |

(1) a Report to Congress that:

- \$ promotes a better understanding by Congress and the public of the true state of departure jurisprudence,
- \$ that identifies how such factors as aberrant behavior, family circumstances and the other 5H factors, diminished capacity, post-offense rehabilitation and other unmentioned factors came to be included as permissible grounds for departures,
- \$ that explains the need for discretionary departures in a guideline system, and
- \$ that provides reference materials to guide district judges considering departures.

(2) a review of departures to identify those guidelines where factors not adequately addressed are resulting in above-average rates of downward departures so that those guidelines may be amended to reduce the incidence of departures and thus preserve and encourage the exercise of discretion to grant departures where warranted; and

(3) an explanation of the factors that resulted in higher than average departure rates in the child-related offenses for which Congress has limited departures in the PROTECT Act.

We write also to provide the Commission with comments based on our experience in representing a substantial number of persons sentenced under the federal sentencing guidelines and recommendations about factors that the Commission should consider in designing the study.

I. DEPARTURES REFLECT A RATIONAL COMPLIANCE WITH THE STRUCTURE OF THE GUIDELINES NOT A REJECTION OF CONGRESSIONAL POLICY OR AN EPIDEMIC OF JUDICIAL LENIENCY

A downward departure does not mean a sentence of probation or that a defendant is released outright. The Commission's statistics show that 91% of defendants were sentenced to prison in 2001. Of those defendants eligible for straight probation, 32.3% were sentenced to prison. This data underscore our experience with the guidelines **B** there is no epidemic of leniency in the sentencing of defendants in federal criminal cases.

District court judges are not lawless. Judges comply with guideline and statutory provisions even where they personally believe that it would be more just to depart down or that the better policy is to be lenient. In any case where a judge wilfully disregarded a statutory or guideline mandate, the government would presumably appeal and win the case.

When a federal judge grants a downward departure, the judge does so to impose just punishment by taking into account the offense and the offender in accordance with the statutory mandate in 18 U.S.C. ' 3553(a) and (b). The departure is not an exercise of judicial policy making or a rejection of the will of Congress expressed in the statutory penalties. Indeed, federal judges occasionally express frustration with being required to impose sentences that they believe are more severe than necessary to satisfy the purposes of sentencing. In our view, too often the district judge did have discretion to be more lenient but denied the request in the exercise of discretion because the judge disagreed with our assessment of the extent of discretion or simply believed that the statutory mandate required otherwise.

II. ABOVE-AVERAGE RATES OF DOWNWARD DEPARTURES RESULT FROM DEPARTURES THAT ARE WARRANTED TO ASSURE JUST PUNISHMENT AS REQUIRED BY 18 U.S.C. ' 3553

Each departure reflects exactly the structure that Congress enacted in the Sentencing Reform Act. Every departure and every above-average departure statistic reflects inadequately considered factors that warrant a departure to assure just punishment.

The large number of downward departures in immigration cases is not an indication that federal judges in border districts condone immigration violations or disagree with the Congressional determination to crack down on illegal immigration. Those high downward departure statistics in immigration cases reflect a policy decision by the Department of Justice to manage the large case load by rewarding fast track guilty pleas. Other downward departures in immigration cases are warranted because of the guideline enhancement for aggravated felonies that does not adequately consider the range in the severity of the prior record or culpability of the defendants in these cases. The Commission has not simply ignored these statistics. After studying the above-average departure rates in immigration cases, the Commission addressed the problem with an amended adjustment that provides a more graduated enhancement and continues to refine that guideline.

With respect to the child-related offenses for which Congress has now limited departure authority, the same is true. Higher than average statistical departure rates in these cases is not a reflection that federal judges condone abusive conduct toward children or that the Department of Justice has failed to appeal such departures because it is soft on crime. Rather, they reflect inadequately considered factors in the guidelines for these offenses. Several factors account for the number of departures in these cases. These guidelines cover a wide range of conduct, from pedophiliacs who sexually exploit minors to defendants with no

predatory tendencies, who access pornographic pictures in the privacy of their own homes. Downward departures have been granted to first-time offenders convicted of downloading child pornography on their home computers, who have had stable employment their entire life, no prior contact of any kind with the criminal justice system, after a distinguished military career, where evidence from medical experts showed that the persons have no predatory tendencies. The use of cross-references in these guidelines overrepresent the severity of the actual offense in some cases. Another factor is the intersection of technology with this guideline. The technology lull some offenders into misapprehending the criminality of accessing computer sites with images that include First Amendment protected materials as well as illegal child pornography. These sites are freely available for public access. Technology also plays a part in overrepresentation of this offense conduct because the guideline provides enhancements based on the number of pornographic images possessed by a person regardless of whether the images were intentionally downloaded by the person and saved for future reference or were merely automatically downloaded onto temporary cache drives in computers unbeknownst to the person who accessed the site.

Offenses prosecuted on Indian Reservations such as homicide also present unique circumstances not adequately considered and reflected in the above-average departure rates for these offenses. Jon M. Sands, *Departure Reform and Indian Crimes: Reading the Commission's Staff Paper with "Reservations"*, 9 Fed. Sent. Rep. 114 (1996). Indeed, the Commission created an Ad Hoc Advisory Group to deal with the unique circumstances in these cases. Then- Commissioner, and now Justice, Breyer recognized the unusual and atypical nature of these cases. His solution was to urge courts to exercise their discretion to depart in the Indian cases. @ *Id.* at 115.

With respect to the above-average incidence of downward departures in white collar offenses it is a reflection of the relatively low severity that Congress had previously applied to mail and wire fraud cases (5-year statutory maximum). Congress has also expressly stated that it is appropriate to impose a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, @ 28 U.S.C. ' 994(j). As well, a large percentage of the white collar offenses prosecuted in federal courts involve low-level loss amounts.

III. THE COMMISSION SHOULD REFINE THE GUIDELINES WHERE NECESSARY BUT RETAIN THE DISCRETION TO DEPART WHERE WARRANTED

In a seeming inconsistency, Section 441(m) of the PROTECT Act directs the Commission to review the grounds for departures and substantially reduce the incidence of downward departures while at the same time also directs the Commission to create a new ground for departure for nearly disposition cases. Most, if not all, fast track departures currently granted in immigration cases will fit within this new departure ground. These are the very departures that have driven up the above-average departure rate.

The Commission is required to cap this new *early disposition* departure at *not more than 4 levels*. As such, it is more akin to an adjustment that provides for a reduction of a specified number of levels than a departure, which by definition as well as tradition is a discretionary decision based on individualized factors not otherwise considered. This factor could more readily be taken into account as a separate adjustment, also in Chapter 3. It could be fashioned after the mitigating role adjustment that provides for a 2- 3- or 4-level downward adjustment. Doing so would reduce the number of departures significantly.

IV. RECOMMENDATIONS

- \$ The study should identify not merely the incidence of downward departures but also the extent of the departure and whether the sentence resulted in a prison term, some intermediate condition of confinement, or release with conditions for treatment.
- \$ The study should identify whether the departure was granted with the agreement of the government or with its acquiescence, and whether an appeal was taken by the government.
- \$ Where the incidence of departures exceed the norm, either in a class of cases nationwide, or in a given district when compared to other districts nationwide, the study should attempt to ascertain the common factors that would explain the higher than average incidence of departures, *e.g.* immigration cases in border states with above-average immigration case loads; point of entry districts with above-average incidence of drug offenses involving couriers; guidelines with broad range of offense conduct where the severity range is not adequately considered.
- \$ The Commission should recommend to Congress that *early disposition* departures would better fit into the guideline scheme as an adjustment in Chapter 3 than a departure.

V. CONCLUSION

Departures do what Congress intended them to do. They bring sentencing decisions into the open, where district courts must explain their reasons subject to appeal and judicial review. Departures also allow the Commission to comply with its own statutory obligation to monitor how the guidelines are working and modify guidelines as required. As intended by Congress, departures provide for a more honest sentencing system where decisions that impact the sentence are made in the open, rather than behind closed doors in the prosecutor's office. The authority to depart also retains, within a guideline system, the individualized

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sentencing that Congress wanted as well preserves the long tradition of judicial discretion that the Supreme Court unanimously upheld in *Koon*.

For these reasons, as set out above, we recommend that the Commission study departure decisions thoroughly, with a view to explaining departure trends and disparities among classes of cases and circuits; that it publish a Report with descriptive data and conclusions, that may serve as a resource for Congress in its legislative function as well as the judiciary in determining whether a departure is warranted; that it refine those guidelines that involve above-average departure rates, thereby reducing the incidence of departures without unduly interfering with the discretion that Congress reposed in district courts to depart down where warranted by individual factors not adequately considered in the guidelines.

We also ask the Commission to publish its departure data to the public as soon practicable so that public comments to proposals that the Commission may publish pursuant to 28 U.S.C. ' 944 may be informed by that data.

Thank you very much for your consideration.

Very truly yours,

Jon M. Sands
Chair, Federal Defenders=
Sentencing Guidelines Subcommittee

cc US Sentencing Commissioners
Carmen Hernandez
Tom Hillier
Tim McGrath
Charles Tetzlaff