

SIXTH CIRCUIT JUDICIAL CONFERENCE

Sentencing Session Materials

Table of Contents

- Pp. 1-2 1. Protect Act – July 28, 2003 letter from the Attorney General to Senator Orin Hatch
- Pp. 3-6 2. Protect Act – July 28, 2003 letter from the Attorney General to all Federal Prosecutors
- Pp. 7-8 3. Protect Act – July 28, 2003 Amendment to U.S. Attorneys Manual
- Pp. 9-15 4. Protect Act – September 22, 2003 letter from the Attorney General to all Federal Prosecutors re “Department Policy Concerning Charging Offenses, Disposition of Charges, and Sentencing
- P. 16 5. Protect Act – 29 U.S.C.A. § 994(h)(2)
- P. 17-17a 6. Selected Sixth Circuit Sentencing Decisions
- Pp. 18-27 7. *U.S. v. VanLeer*, 270 F.Supp. 2d 1318 (D. Utah). Judge Cassell



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 28, 2003

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Attorney General today signed the enclosed Memorandum establishing certain policies and procedures in the Department of Justice concerning sentencing recommendations and sentencing appeals. As explained in detail in the Memorandum, these measures are intended to ensure that the Department's actions will fully support the sentencing reform provisions of the PROTECT Act, in which Congress reaffirmed its commitment to the consistency and predictability that Congress sought in the Sentencing Reform Act of 1984. On behalf of, and at the direction of the Attorney General, I am forwarding a copy of this Memorandum to the Committee. An identical letter is likewise being sent to the House Committee on the Judiciary.

We note that, among other things, the Memorandum describes in detail the policies and procedures adopted by the Department, subsequent to the enactment of that Act, with respect to each of the five enumerated subject areas set forth in section 401(D)(1). Specifically, the Memorandum describes the policies and procedures the Department has adopted, *inter alia*:

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

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

“(C) to 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;

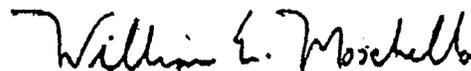
“(D) to ensure that Department of Justice attorneys promptly notify the designated Department of Justice component in Washington concerning such adverse sentencing decisions; and

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

PROTECT Act, § 401(l)(1)(A)-(E), 117 Stat. 650, 674 (2003). Accordingly, this letter, together with the attached Memorandum, satisfies the definition of the “report described in paragraph (3)”, as that term is defined in section 401(l)(1). Under section 401(l)(3) of the PROTECT Act, because this report is being submitted to the Judiciary Committees not more than 90 days after the date of enactment, the provisions of paragraph (2) of section 401(l) “shall not take effect.” See PROTECT Act, § 401(l)(3), 117 Stat. at 675. We are therefore notifying Department attorneys that section 401(l)(2) of the PROTECT Act will not take effect.

If we may be of further assistance on this, or any other matter, please do not hesitate to contact this office.

Sincerely,



William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member



Office of the Attorney General
Washington, D. C. 20530

July 28, 2003

TO: All Federal Prosecutors

FROM: John Ashcroft
Attorney General

A handwritten signature in black ink, appearing to read "John Ashcroft", written over a horizontal line.

SUBJECT: Department Policies and Procedures Concerning Sentencing Recommendations
and Sentencing Appeals

I. INTRODUCTION

Earlier this year, the President signed into law the PROTECT Act, a landmark piece of legislation that comprehensively strengthens the Government's ability to prevent, investigate, prosecute, and punish violent crimes committed against children. Pub. L. No. 108-21, 117 Stat. 650 (2003). The PROTECT Act also contains an important amendment, sponsored by Representative Feeney and supported by the Department of Justice, that enacts several key reforms designed to ensure that the Sentencing Guidelines would be more faithfully and consistently enforced, thereby achieving the consistency and predictability that Congress sought in the Sentencing Reform Act (which established the Guidelines System). *See id.*, § 401. Specifically, the legislation includes a number of reforms designed to reduce the number of "downward departures" from the Sentencing Guidelines, and it further instructs the Sentencing Commission to adopt additional measures "to ensure that the incidence of downward departures [is] substantially reduced." *Id.*, § 401(m)(2)(A). In our constitutional democracy, these fundamental policy choices as to the range of permissible sentences are ultimately for the Congress to make. As Chief Justice Rehnquist recently remarked:

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

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

Because it is a party to every federal sentencing proceeding, the Justice Department has a duty to ensure that its future actions fully support the important reforms enacted by the PROTECT Act. Few things that the Department does are more important than the hard work tirelessly performed by its prosecutors, and the Department is presently undertaking a careful review of its overall policies in this vital area. However, in light of the recent passage of the PROTECT Act and its focus on sentencing practices, it is appropriate at this time to provide clear guidance that specifically addresses the Department's policies with respect to sentencing recommendations and sentencing appeals.

II. DEPARTMENT POLICIES AND PROCEDURES CONCERNING SENTENCING RECOMMENDATIONS AND APPEALS

The Sentencing Reform Act's key purposes were to "provide certainty and fairness in meeting the purposes of sentencing," and to "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). The recent passage of the PROTECT Act strongly reaffirms Congress' commitment to these goals. In order to fulfill these purposes, all Department attorneys must adhere to the following policies and procedures with respect to sentencing recommendations, sentencing hearings, and sentencing appeals.

A. *The Department's actions with respect to sentencings must in all respects be supported by the facts and the law.*

Department of Justice policy requires honesty in sentencing, both with respect to the facts and the law. Accordingly, prosecutors' actions and recommendations with respect to sentencings must in all respects be consistent with the relevant facts and the applicable law. Several requirements follow from this general principle.

1. *The sentencing recommendations of the Department must be supported by the facts and the law.*

Department attorneys must ensure that the Sentencing Guidelines are applied as Congress and the Sentencing Commission intended them to be applied, regardless of whether an individual prosecutor agrees with that policy decision. Any sentencing recommendation made by the United States in a particular case must honestly reflect the totality and seriousness of the defendant's conduct and must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant's history and conduct.

Accordingly, if readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office. Thus, for example, a prosecutor may not fail to bring readily provable facts about relevant conduct to the court's attention (e.g., additional drug amounts or fraud losses). Concealment of such facts from the court imperils a cardinal principle of the Guidelines: that sentences are in large measure based upon the "real offense" instead of the "charge offense." See U.S.S.G. Ch. 1, Pt. A, ¶ 4(a).

Similarly, in negotiating plea agreements that address sentencing issues, federal prosecutors may not “fact bargain,” or be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing. Nor may prosecutors reach agreements about Sentencing Guidelines factors that are not fully consistent with the readily provable facts. For example, a prosecutor may not agree to a reduction for role in the offense that is not consistent with the readily provable facts about a defendant’s actual role. Likewise, if the United States agrees to make a non-binding recommendation for a particular sentence under Rule 11(c)(1)(B), or if the agreement is for a specific sentence under Rule 11(c)(1)(C), the agreement must not vitiate relevant provisions of the Sentencing Guidelines.

Prosecutors should be thoroughly familiar with how the relevant statutes and Guidelines apply to their cases. In particular, prosecutors must not recommend downward departures unless they are fully consistent with the Sentencing Reform Act, the PROTECT Act, and the applicable provisions of the Guidelines Manual. Section 5K1.1 of the Sentencing Guidelines specifically provides that, upon motion by the Government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person, a court may depart from the guideline range, and § 401(m)(2)(B) of the PROTECT Act specifically recognizes the importance of downward departures pursuant to authorized “early disposition” or “fast-track” programs. Other than these two situations, however, Government acquiescence in a downward departure should be, as the Guidelines Manual itself suggests, a “rare occurrence.” See U.S.S.G., Ch. 1, Pt. A, ¶ (4)(b).

2. *Department attorneys must oppose sentencing adjustments that are not supported by the facts and the law.*

Department attorneys also have an affirmative obligation to *oppose* any sentencing adjustments, including downward departures, that are not supported by the facts and the law. This obligation extends to all such improper adjustments, whether requested by the defendant or made *sua sponte* by the court. In particular, downward departures or other adjustments that would violate the specific restrictions of the PROTECT Act should be vigorously opposed.

In any case in which a sentencing adjustment, including a downward departure, is 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. Moreover, prosecutors must not enter into plea agreements that waive the Government’s right to object to adjustments that are not supported by the facts and the law. For example, a prosecutor may not enter into a plea agreement that binds the Government to “stand silent” with respect to a defendant’s request for a particular adjustment, unless the prosecutor determines in good faith that the adjustment is supported by the facts and the law.

B. *Reporting and appeal of adverse sentencing decisions.*

In the sentencing reform provisions of the PROTECT Act, Congress reaffirmed its commitment to the principles underlying the Sentencing Reform Act of 1984, including the goal of reducing unwarranted disparities in sentencing among similarly situated defendants. To promote uniformity in sentencing across various districts, Congress provided for *de novo* appellate review of decisions to depart from the Sentencing Guidelines, and restricted departure authority in several additional respects. 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.

Accordingly, Department attorneys must adhere to the following policies and procedures with respect to adverse sentencing decisions:

First, Department attorneys must promptly notify the appropriate division at the Department of Justice in Washington ("Main Justice"), as specified in the United States Attorneys' Manual ("USAM"), concerning any adverse sentencing decision that meets the objective criteria set forth in § 9-2.170(B) of the USAM. In order to delineate such objective criteria, I am directing that, effective immediately, § 9-2.170(B) is amended as described in the attached Appendix to this memorandum. Such criteria may be amended only in accordance with § 1-1.600 of the USAM.

Second, Department attorneys must diligently comply with the procedures set forth in the USAM with respect to the pursuit and conduct of appeals. *See, e.g.*, USAM Title 2; USAM § 9-2.170. In particular, when a Government appeal is under consideration, the Government's right to appeal should be protected by the filing of a timely notice of appeal.

Third, upon notification of an adverse decision described in § 9-2.170(B), the appropriate division at Main Justice should carefully review the decision to determine whether an appeal would be appropriate and meritorious. If the appropriate division or the United States attorney recommends an appeal, the Solicitor General's Office should carefully review the decision and determine whether an appeal would be appropriate and meritorious.

Fourth, if an appeal is authorized by the Solicitor General of an adverse decision described in § 9-2.170(B), Department attorneys should vigorously and professionally pursue the appeal.

III. CONCLUSION

The Department of Justice has a solemn obligation to ensure that the laws concerning criminal sentencing are faithfully, fairly, and consistently enforced. The public in general and crime victims in particular rightly expect that the penalties established by law for specific crimes will be sought and imposed by those who serve in the criminal justice system.

APPENDIX**AMENDMENT TO § 9-2.170(B) OF THE U.S. ATTORNEYS' MANUAL
(Effective July 28, 2003)**

Effective July 28, 2003, section 9-2.170(B) of the United States Attorneys' Manual is amended by striking the last two sentences of the first paragraph ("USAOs need only report adverse district court Sentencing Guidelines decisions if they wish to obtain authorization to appeal that decision. Other adverse sentencing decisions should be reported.") and inserting the following:

USAOs must report the following categories of adverse sentencing decisions to the Appellate Section of the Criminal Division or other appropriate division as soon as possible, but in no event later than 14 days of judgment. This requirement only applies to *adverse* decisions, *i.e.*, decisions made over the objection of the Government. The categories of adverse decisions required to be reported are as follows:

- (1) *Departures that change the "Zone" in the Sentencing Table:* An adverse decision must be reported if the following three criteria are met:
 - (a) the court departed downward on any ground;
 - (b) the departure reduces the sentencing range from Zone C or D to a lower zone; and
 - (c) no term of imprisonment was imposed.
- (2) *Departures based on criminal history:* An adverse decision must be reported if the following three criteria are met:
 - (a) the court departed downward on the ground that the defendant's criminal history category over-represents the seriousness of the defendant's criminal history, *see* U.S.S.G. § 4A1.3;
 - (b) the Government asserted that no such departure was justified on the facts of the case at all, *cf.* 18 U.S.C. § 3742(e)(3)(B)(iii) (thus triggering the *de novo* appellate review provisions of the PROTECT Act); and
 - (c) the extent of the departure was two or more criminal history categories or the equivalent.
- (3) *Departures based on "discouraged" or "unmentioned" factors:* An adverse decision must be reported if the following four criteria are met:
 - (a) the court departed downward based on a discouraged factor, *see, e.g.*, U.S.S.G. Ch. 5, Pt. H, a factor not mentioned in the Guidelines, or a combination of factors where no single factor justifies departure;
 - (b) the basis for departure constitutes an "impermissible" ground as defined in 18 U.S.C. § 3742(j)(2) (and is therefore subject to *de novo* review under the PROTECT Act);
 - (c) the offense level prior to departure was 16 levels or more; and
 - (d) the extent of the departure was three or more offense levels.

- (4) *Departures in child victim and sexual abuse cases:* An adverse decision must be reported if the following two criteria are met:
- (a) the court departed downward on any ground; and
 - (b) the case is one in which the sentencing of the offense of conviction is 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 chapter 71, 109A, 110, or 117").
- (5) *Illegal adjustments for "acceptance of responsibility":* An adverse decision must be reported if the following two criteria are met:
- (a) the court granted a three-level downward adjustment for acceptance of responsibility; and
 - (b) the Government did not move for the third level of the adjustment. *See* U.S.S.G. § 3E1.1(b), as amended by the PROTECT Act.
- (6) *Departures on remand:* An adverse decision must be reported if the following two criteria are met:
- (a) the court imposed the sentence on remand from the court of appeals; and
 - (b) the sentence does not comply with the PROTECT Act's requirements for sentencing after remand. *See* 18 U.S.C. § 3742(g).
- (7) *Recurring illegal departures:* An adverse decision must be reported if the following two criteria are met:
- (a) the court improperly departed downward in a manner that is not otherwise required to be reported; and
 - (b) the basis for departure has become prevalent in the district or with a particular judge.
- (8) *Sentences below statutory minimum:* Any decision in which the court imposed a sentence that is illegally below the statutory minimum must be reported.
- (9) *Any other case for which authority to appeal is sought:* The USAO must report any other adverse sentencing decision that is not supported by the law and the facts and that the United States Attorney wishes to appeal.



Office of the Attorney General
Washington, D. C. 20530

September 22, 2003

TO: All Federal Prosecutors

FROM: John Ashcroft
Attorney General

SUBJECT: Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing

INTRODUCTION

The passage of the Sentencing Reform Act of 1984 was a watershed event in the pursuit of fairness and consistency in the federal criminal justice system. With the Sentencing Reform Act's creation of the United States Sentencing Commission and the subsequent promulgation of the Sentencing Guidelines, Congress sought to "provide certainty and fairness in meeting the purposes of sentencing." 28 U.S.C. § 991(b)(1)(B). In contrast to the prior sentencing system – which was characterized by largely unfettered discretion, and by seemingly severe sentences that were often sharply reduced by parole – the Sentencing Reform Act and the Sentencing Guidelines sought to accomplish several important objectives: (1) to ensure honesty and transparency in federal sentencing; (2) to guide sentencing discretion, so as to narrow the disparity between sentences for similar offenses committed by similar offenders; and (3) to provide for the imposition of appropriately different punishments for offenses of differing severity.

With the passage of the PROTECT Act earlier this year, Congress has reaffirmed its commitment to the principles of consistency and effective deterrence that are embodied in the Sentencing Guidelines. The important sentencing reforms made by this legislation will help to ensure greater fairness and to eliminate unwarranted disparities. These vital goals, however, cannot be fully achieved without consistency on the part of federal prosecutors in the Department of Justice. Accordingly, it is essential to set forth clear policies designed to ensure that all federal prosecutors adhere to the principles and objectives of the Sentencing Reform Act, the PROTECT Act, and the Sentencing Guidelines in their charging, case disposition, and sentencing practices.

The Department has previously issued various memoranda addressing Department policies with respect to charging, case disposition, and sentencing. Shortly after the constitutionality of the Sentencing Reform Act was sustained by the Supreme Court in 1989, Attorney General Thornburgh issued a directive to federal prosecutors to ensure that their practices were consistent with the principles of equity, fairness, and uniformity. Several years

later, Attorney General Reno issued additional guidance to address the extent to which a prosecutor's individualized assessment of the proportionality of particular sentences could be considered.

The recent passage of the PROTECT Act emphatically reaffirms Congress' intention that the Sentencing Reform Act and the Sentencing Guidelines be faithfully and consistently enforced. It is therefore appropriate at this time to re-examine the subject thoroughly and to state with greater clarity Department policy with respect to charging, disposition of charges, and sentencing. One part of this comprehensive review of Department policy has already been completed: on July 28, 2003, in accordance with section 401(D)(1) of the PROTECT Act, I issued a Memorandum that specifically and clearly sets forth the Department's policies with respect to sentencing recommendations and sentencing appeals. The determination of an appropriate sentence for a convicted defendant is, however, only half of the equation. 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.

Accordingly, the purpose of this Memorandum is to set forth basic policies that all federal prosecutors must follow in order to ensure that the Department fulfills its legal obligation to enforce faithfully and honestly the Sentencing Reform Act, the PROTECT Act, and the Sentencing Guidelines. This memorandum supersedes all previous guidance on this subject.

I. Department Policy Concerning Charging and Prosecution of Criminal Offenses

A. General Duty to Charge and to Pursue the Most Serious, Readily Provable Offense in All Federal Prosecutions

It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case, except as authorized by an Assistant Attorney General, United States Attorney, or designated supervisory attorney in the limited circumstances described below. The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence. A charge is not "readily provable" if the prosecutor has a good faith doubt, for legal or evidentiary reasons, as to the Government's ability readily to prove a charge at trial. Thus, charges should not be filed simply to exert leverage to induce a plea. Once filed, the most serious readily provable charges may not be dismissed except to the extent permitted in Section B.

B. Limited Exceptions

The basic policy set forth above requires federal prosecutors to charge and to pursue all charges that are determined to be readily provable and that, under the applicable statutes and Sentencing Guidelines, would yield the most substantial sentence. There are, however, certain limited exceptions to this requirement:

1. ***Sentence would not be affected.*** First, if the applicable guideline range from which a sentence may be imposed would be unaffected, prosecutors may decline to charge or to pursue readily provable charges. However, if the most serious readily provable charge involves a mandatory minimum sentence that exceeds the applicable guideline range, counts essential to establish a mandatory minimum sentence must be charged and may not be dismissed, except to the extent provided elsewhere below.

2. ***"Fast-track" programs.*** With the passage of the PROTECT Act, Congress recognized the importance of early disposition or "fast-track" programs. Section 401(m)(2)(B) of the Act instructs the Sentencing Commission to promulgate, by October 27, 2003, a policy statement authorizing a downward departure of not more than 4 levels "pursuant to an early disposition program *authorized by the Attorney General and the United States Attorney.*" Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003) (emphasis added). Although the PROTECT Act requirement of Attorney General authorization only applies by its terms to fast-track programs that rely on downward departures, the same requirement will also apply, as a matter of Department policy, to any fast-track program that relies on "charge bargaining" — *i.e.*, an expedited disposition program whereby the Government agrees to charge less than the most serious, readily provable offense. Such programs are intended to be exceptional and will be authorized only when clearly warranted by local conditions within a district. The specific requirements for establishing and implementing a fast-track program are set forth at length in the Department's "Principles for Implementing An Expedited or Fast-Track Prosecution Program." In those districts where an approved "fast-track" program has been established, charging decisions and disposition of charges must comply with those Principles and with the other requirements of the approved fast-track program.

3. ***Post-indictment reassessment.*** In cases where post-indictment circumstances cause a prosecutor to determine in good faith that the most serious offense is not readily provable, because of a change in the evidence or some other justifiable reason (*e.g.*, the unavailability of a witness or the need to protect the identity of a witness until he testifies against a more significant defendant), the prosecutor may dismiss the charge(s) with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney.

4. ***Substantial assistance.*** The preferred means to recognize a defendant's substantial assistance in the investigation or prosecution of another person is to charge the most serious readily provable offense and then to file an appropriate motion or motions under U.S.S.G. § 5K1.1, 18 U.S.C. § 3553(e), or Federal Rule of Criminal Rule of Procedure 35(b).

However, in rare circumstances, where necessary to obtain substantial assistance in an important investigation or prosecution, and with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney, a federal prosecutor may decline to charge or to pursue a readily provable charge as part of plea agreement that properly reflects the substantial assistance provided by the defendant in the investigation or prosecution of another person.

5. **Statutory enhancements.** The use of statutory enhancements is strongly encouraged, and federal prosecutors must therefore take affirmative steps to ensure that the increased penalties resulting from specific statutory enhancements, such as the filing of an information pursuant to 21 U.S.C. § 851 or the filing of a charge under 18 U.S.C. § 924(c), are sought in all appropriate cases. As soon as reasonably practicable, prosecutors should ascertain whether the defendant is eligible for any such statutory enhancement. In many cases, however, the filing of such enhancements will mean that the statutory sentence exceeds the applicable Sentencing Guidelines range, thereby ensuring that the defendant will not receive any credit for acceptance of responsibility and will have no incentive to plead guilty. Requiring the pursuit of such enhancements to trial in every case could therefore have a significant effect on the allocation of prosecutorial resources within a given district. Accordingly, an Assistant Attorney General, United States Attorney, or designated supervisory attorney may authorize a prosecutor to forego the filing of a statutory enhancement, but *only* in the context of a negotiated plea agreement, and subject to the following additional requirements:

- a. Such authorization must be written or otherwise documented and may be granted only after careful consideration of the factors set forth in Section 9-27.420 of the United States Attorneys' Manual. In the context of a statutory enhancement that is based on prior criminal convictions, such as an enhancement under 21 U.S.C. § 851, such authorization may be granted only after giving particular consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity.
- b. A prosecutor may forego or dismiss a charge of a violation of 18 U.S.C. § 924(c) only with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney, and subject to the following limitations:
 - (i) In all but exceptional cases or where the total sentence would not be affected, the first readily provable violation of 18 U.S.C. § 924(c) shall be charged and pursued.
 - (ii) In cases involving three or more readily provable violations of 18 U.S.C. § 924(c) in which the predicate offenses are crimes of violence, federal prosecutors shall, in all but exceptional cases, charge and pursue the first two such violations.

6. ***Other Exceptional Circumstances.*** Prosecutors may decline to pursue or may dismiss readily provable charges in other exceptional circumstances with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney. This exception recognizes that the aims of the Sentencing Reform Act must be sought without ignoring the practical limitations of the federal criminal justice system. For example, a case-specific approval to dismiss charges in a particular case might be given because the United States Attorney's Office is particularly over-burdened, the duration of the trial would be exceptionally long, and proceeding to trial would significantly reduce the total number of cases disposed of by the office. However, such case-by-case exceptions should be rare; otherwise the goals of fairness and equity will be jeopardized.

II. Department Policy Concerning Plea Agreements

A. Written Plea Agreements

In felony cases, plea agreements should be in writing. If the plea agreement is not in writing, the agreement should be formally stated on the record. Written plea agreements will facilitate efforts by the Department of Justice and the Sentencing Commission to monitor compliance by federal prosecutors with Department policies and the Sentencing Guidelines. The PROTECT Act specifically requires the court, after sentencing, to provide a copy of the plea agreement to the Sentencing Commission. 28 U.S.C. § 994(w). Written plea agreements also avoid misunderstandings with regard to the terms that the parties have accepted.

B. Honesty in Sentencing

As set forth in my July 28, 2003 Memorandum on "Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals," Department of Justice policy requires honesty in sentencing, both with respect to the facts and the law:

Any sentencing recommendation made by the United States in a particular case must honestly reflect the totality and seriousness of the defendant's conduct and must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant's history and conduct.

This policy applies fully to sentencing recommendations that are contained in plea agreements. The July 28 Memorandum further explains that this basic policy has several important implications. In particular, if readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office. Likewise, federal prosecutors may not "fact bargain," or be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing.

The current provision of the United States Attorneys' Manual that addresses charging policy and that describes the circumstances in which a less serious charge may be appropriate includes the admonition that "[a] negotiated plea which uses any of the options described in this section must be made known to the sentencing court." See U.S.A.M. § 9-27.300(B); see also U.S.A.M. § 9-27.400(B) ("it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure"). Although this Memorandum by its terms supersedes prior Department guidance on this subject, it remains Department policy that the sentencing court should be informed if a plea agreement involves a "charge bargain." Accordingly, a negotiated plea that uses any of the options described in Section I(B)(2), (4), (5), or (6) must be made known to the court at the time of the plea hearing and at the time of sentencing, *i.e.*, the court must be informed that a more serious, readily provable offense was not charged or that an applicable statutory enhancement was not filed.

C. Charge Bargaining

Charges may be declined or dismissed pursuant to a plea agreement only to the extent consistent with the principles set forth in Section I of this Memorandum.

D. Sentence Bargaining

There are only two types of permissible sentence bargains.

1. ***Sentences within the Sentencing Guidelines range.*** Federal prosecutors may enter into a plea agreement for a sentence that is within the specified guideline range. For example, when the Sentencing Guidelines range is 18-24 months, a prosecutor may agree to recommend a sentence of 18 or 20 months rather than to argue for a sentence at the top of the range. Similarly, a prosecutor may agree to recommend a downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1 if the prosecutor concludes in good faith that the defendant is entitled to the adjustment.

2. ***Departures.*** In passing the PROTECT Act, Congress has made clear its view that there have been too many downward departures from the Sentencing Guidelines, and it has instructed the Commission to take measures "to ensure that the incidence of downward departures [is] substantially reduced." Pub. L. No. 108-21, § 401(m)(2)(A), 117 Stat. 650, 675 (2003). The Department has a duty to ensure that the circumstances in which it will request or accede to downward departures in the future are properly circumscribed.

Accordingly, federal prosecutors must not request or accede to a downward departure except in the limited circumstances specified in this memorandum and with authorization from an Assistant Attorney General, United States Attorney, or designated supervisory attorney. Likewise, except in such circumstances and with such authorization, prosecutors may not simply stand silent when a downward departure motion is made by the defendant.

An Assistant Attorney General, United States Attorney, or designated supervisory attorney may authorize a prosecutor to request or accede to a downward departure at sentencing only in the following circumstances:

a. ***Substantial assistance.*** Section 5K1.1 of the Sentencing Guidelines provides that, upon motion by the Government, a court may depart from the guideline range. A substantial assistance motion must be based on assistance that is *substantial* to the Government's case. It is not appropriate to utilize substantial assistance motions as a case management tool to secure plea agreements and avoid trials.

b. ***"Fast-track" programs.*** Federal prosecutors may support a downward departure to the extent consistent with the Sentencing Guidelines and the Attorney General's "Principles for Implementing An Expedited or Fast-Track Prosecution Program." The PROTECT Act specifically recognizes the importance of such programs by requiring the Sentencing Commission to promulgate a policy statement specifically authorizing such departures.

c. ***Other downward departures.*** As set forth in my July 28 Memorandum, "[o]ther than these two situations, however, Government acquiescence in a downward departure should be, as the Sentencing Guidelines Manual itself suggests, a "rare occurenc[e]." See U.S.S.G., Ch. 1, Pt. A, ¶ (4)(b). Prosecutors must affirmatively oppose downward departures that are not supported by the facts and the law, and must not agree to "stand silent" with respect to such departures. In particular, downward departures that would violate the specific restrictions of the PROTECT Act should be vigorously opposed.

Moreover, as stated above, Department of Justice policy requires honesty in sentencing. In 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.

In sum, plea bargaining must honestly reflect the totality and seriousness of the defendant's conduct, and any departure must be accomplished through the application of appropriate Sentencing Guideline provisions.

CONCLUSION

Federal criminal law and procedure apply equally throughout the United States. As the sole federal prosecuting entity, the Department of Justice has a unique obligation to ensure that all federal criminal cases are prosecuted according to the same standards. Fundamental fairness requires that all defendants prosecuted in the federal criminal justice system be subject to the same standards and treated in a consistent manner.

15

108-21, 2003 S 151
 L 108-21, April 30, 2003, 117 Stat 650
 (Cite as: 117 Stat 650)

PROTECT ACT

Page 31

(g) REFORM OF GUIDELINES GOVERNING ACCEPTANCE OF RESPONSIBILITY.--Subject to subsection (j), the Guidelines Manual promulgated by the Sentencing Commission pursuant to section 994(a) of title 28, United States Code, is amended--

(1) in section 3E1.1(b)--

(A) by inserting "upon motion of the government stating that" immediately before "the defendant has assisted authorities"; and

(B) by striking "taking one or more" and all that follows through and including "additional level" and insert "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level";

(2) in the Application Notes to the Commentary to section 3E1.1, by amending Application Note 6--

(A) by striking "one or both of"; and

*672 (B) by adding the following new sentence at the end: "Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing."; and

(3) in the Background to section 3E1.1, by striking "one or more of".

<< 28 USCA § 994 >>

(h) IMPROVED DATA COLLECTION.--Section 994(w) of title 28, United States Code, is amended to read as follows:

"(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include--

"(A) the judgment and commitment order;

"(B) the statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range);

"(C) any plea agreement;

"(D) the indictment or other charging document;

"(E) the presentence report; and

"(F) any other information as the Commission finds appropriate.

→ "(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

16

SIXTH CIRCUIT CONFERENCE: Louisville, KY May 7, 2004
Selected Sentencing Session Materials Sixth Circuit Sentencing Opinions

1. Probation Officer's position in the PSR is not evidence:

The mere conclusion of the probation report is an insufficient basis for a finding that the evidence before the sentencing judge supports the proposition of fact asserted therein. Basic fairness requires that the evidence be identified and its reliability demonstrated. In a contested case, the position of the probation officer on a material matter should not be treated as evidence admitted in the case unless the probation officer takes the stand and offers testimony which may be cross-examined.

U.S. v. McMeen, 49 F.3d 225 (6th Cir. 1995).

2. Judge is required to make factual determinations when PSR factual findings are disputed. The case cites to F.R.Crim.P. 32(i)(3)(B):

At sentencing the court . . . (B) must – for any disputed portion of the presentence report or other controverted matter – rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing.

U.S. v. Monus, 128 F.3d 376 (6th Cir. 1998).

This requirement also requires the sentencing judge to make factual findings with regard to the amount of restitution or loss; the judge cannot delegate this duty to the probation officer or the parties. *U.S. v. James Smith*, 344 F.3d 179 (6th Cir. 2003).

3. In a conspiracy case sentencing, the judge must

make particularized findings with respect to both the scope of the defendant's agreement and the foreseeability of his co-conspirators' conduct before holding the defendant accountable for the scope of the entire conspiracy.

U.S. v. Campbell, 279 F.3d 392, 400 (6th Cir. 2002). The Sixth Circuit further stated:

In applying the sentencing guidelines to particular defendants who have been convicted for their role in a conspiracy, a district court must differentiate between the co-conspirators and make individualized findings of fact for each defendant.

U.S. v. Orlando, 281 F.3d 586, 600 (6th Cir. 2002).

4. Determining a particular defendant's Drug quantity for sentencing purposes. *U.S. v. Gill*, 348

F.3d 147, 151 (6th Cir. 2003):

When the amount of drugs is uncertain the district court must "err on the side of caution" and hold the defendant accountable only for that amount that is more likely than not attributable to the defendant.

In calculating the amount of drugs attributable to a defendant convicted of possession with intent

to distribute:

Amounts possessed for personal consumption should not be included when calculating the amount of drugs to enter into the drug quantity table in U.S. S.G. § 2D1.1(c).

Id. at 153.

17a

Westlaw

270 F.Supp.2d 1318
(Cite as: 270 F.Supp.2d 1318)

Page 1

C

United States District Court,
D. Utah,
Central Division.

UNITED STATES of America, Plaintiff,
v.
Paul Bradley VANLEER, Defendant.

No. 2:03-CR-00137 PGC.

July 3, 2003.
As Amended July 17, 2003.

Defendant pled guilty to possession of firearm by convicted felon and moved for downward departure. The District Court, Cassell, J., held that: (1) Feeney Amendment did not substantively change ability of district courts to depart in most cases; (2) downward departure was appropriate for defendant convicted of being felon in possession based on his conduct of pawning firearm; and (3) four-level downward departure was appropriate.

Motion granted.

West Headnotes

[1] Sentencing and Punishment ⚡850
350Hk855 Most Cited Cases

Feeney Amendment, or Hatch-Sensenbrenner-Graham compromise amendment, did not substantively limit ability of sentencing court under Guidelines to grant downward departures for crimes not involving child abduction and sex offenses when case is outside of Guidelines' heartland. 18 U.S.C.A. § 3553(b).

[2] Sentencing and Punishment ⚡855
350Hk855 Most Cited Cases

Downward departure was appropriate from Guidelines sentence for being felon in possession of firearm where defendant's possession of firearm was brief and was for purpose of pawning firearm, and

defendant did in fact pawn firearm; conduct fell within Guideline authorizing departure when defendant's conduct did not involve harms or evils envisioned when statute was enacted. 18 U.S.C.A. § 3553; U.S.S.G. § 2K2.1(b), 18 U.S.C.A.

[3] Sentencing and Punishment ⚡855
350Hk855 Most Cited Cases

Four-level downward departure was appropriate from Guidelines sentence for defendant convicted of being felon in possession of firearm based on his possession of weapon for purpose of pawning it; departure was sufficient to differentiate defendant's conduct from that of more culpable felons. 18 U.S.C.A. § 3553; U.S.S.G. § 2K2.1(b), 18 U.S.C.A. *1319 Eric D. Petersen, Salt Lake City, UT, for Plaintiff.

Henri R. Sisneros, Salt Lake City, UT, for Defendant.

OPINION AND ORDER GRANTING MOTION FOR DOWNWARD DEPARTURE

CASSELL, District Judge.

This criminal case is before the court on defendant Paul Bradley VanLeer's motion for a downward departure. VanLeer has pled guilty to possession of a firearm by a convicted felon. He agrees with the government that the applicable sentencing guidelines produce a sentencing range of 30 to 37 months. VanLeer argues, however, that the court should depart downward from this range under U.S.S.G. 5K2.11, which allows a departure where the crime did not "threaten the harm or evil" ordinarily covered by the statute at issue. VanLeer observes that his crime involved merely taking a firearm to a pawn shop to sell it.

The court agrees with VanLeer that a downward departure is appropriate on this basis. In reaching that conclusion; however, the court has found it necessary to review the effects of a newly passed federal statute involving downward departures--the so-called "Feeney Amendment." In some quarters,

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

18

270 F.Supp.2d 1318
 (Cite as: 270 F.Supp.2d 1318)

Page 2

the view has been expressed that the Feeney Amendment "essentially eliminates judges' discretion to depart below the Guidelines in all cases." [FN1] This opinion explains the court's conclusion that the Feeney Amendment does not have such far-reaching effects and why a downward departure is appropriate here.

FN1. Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary? Why Congress' Fear of Judicial Sentencing Discretion may Undermine a Generation of Reform*, 27 JUN CHAMPION 6, 9 (2003).

FACTUAL BACKGROUND

This case involves a somewhat unusual fact pattern that resulted in a felon- in-possession charge when a felon was dispossessing himself of a firearm. The court finds the facts to be as follows. VanLeer has a history of non-violent criminal offenses, all apparently stemming from his use of illegal drugs. On September 10, 2002, VanLeer was released from prison after serving time connected with a forgery charge. Several weeks after his release, he met a friend who was in possession of a shotgun that VanLeer had purchased and owned before acquiring a felony conviction. As VanLeer was destitute and needed money for rent, he took the firearm--a Ted Williams 12 gauge shotgun--to a local pawn shop and sold it. During this transaction on October 1, 2002, VanLeer gave his correct name, address, and an inked fingerprint to verify his identity as owner of the firearm to the pawn shop clerk.

On November 5, 2002, an investigator from the Salt Lake City Police Department conducted a record check and determined that VanLeer was a previously convicted felon. This led to the filing of a one-count indictment, charging felon in possession of a firearm in violation of 18 U.S.C. 922(g)(1). The defendant pled guilty, leading to this sentencing.

Both sides agree that the proper offense level starts at a level 14 under the guidelines applicable to felons in possession of a firearm. [FN2] Both sides further agree that a two-level reduction for accepting responsibility is appropriate, producing a final offense level of 12. VanLeer's criminal history

(involving driving under the influence of alcohol, forgery, reckless driving, theft, attempted forgery, shoplifting) is a level *1320 VI, establishing a sentencing range of 30-37 months. VanLeer seeks a downward departure from this range.

FN2. See U.S.S.G. 2K2.1(a)(6).

DISCUSSION

I. Standards for a Downward Departure Before the Feeney Amendment

The Supreme Court and the Tenth Circuit have announced the general standards for a downward departure under the sentencing guidelines. In 1996, the Supreme Court explained that when a sentencing court is considering departing from the Guidelines, it should ask four questions:

- 1) What features of this case, potentially, take it outside the Guidelines' "heartland" and make it a special, or unusual case?
- 2) Has the Commission forbidden departures based on those features?
- 3) If not, has the Commission encouraged departures based on those features?
- 4) If not, has the Commission discouraged departures based on those features? [FN3]

FN3. *Koon v. United States*, 518 U.S. 81, 95, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996); citing *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir.1993).

If a factor is not mentioned in the Guidelines, as in this case, then "the court must, after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,' decide whether it is sufficient to take the case out of the Guideline's heartland." [FN4] The Tenth Circuit has instructed that a sentencing court, when considering a downward departure on grounds that the case is "outside the heartland" must determine whether the departure is consistent with the Guidelines' goals. [FN5] These goals are to "(1) reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the crime; (2) deter criminal conduct; (3) protect the public from the defendant's further crimes; and (4) provide the defendant with needed correctional

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

19

270 F.Supp.2d 1318
(Cite as: 270 F.Supp.2d 1318)

Page 3

care or treatment." [FN6]

FN4. *Koon*, 518 U.S. at 95, 116 S.Ct. 2035 (citing *Rivera*, 994 F.2d at 949).

FN5. See *United States v. Miranda-Ramirez*, 309 F.3d 1255, 1260 (10th Cir.2002), cert. denied, --- U.S. ---, 123 S.Ct. 1380, 155 L.Ed.2d 217 (2003).

FN6. *Id.* (citing 18 U.S.C. § 3553(a)(2)).

Departures--both downward and upward--are a critical component of the sentencing guideline scheme. Departures provide flexibility to what would otherwise be an unduly rigid system. Indeed, without departures to avoid unduly lenient or unduly excessive punishment, it seems likely that popular support for sentencing guidelines would quickly erode. Presumably for this very reason Congress directed that the sentencing guidelines should be crafted (and presumably interpreted) so as to "avoid[] 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 practices...." [FN7]

FN7. 28 U.S.C. § 991(b)(1)(B).

These pronouncements on downward departures, however, all predate the passage of the Feeney Amendment, adopted by Congress on April 10, 2003 with an effective date of April 30, 2003. Both Sides have apparently agreed that the Feeney Amendment governs the sentencing at issue here. There is a substantial question concerning the constitutionality of retroactively applying the Feeney Amendment to VanLeer, who committed his crime before *1321 effective date of the Act. In view of the parties' agreement, however, the court will assume the Amendment applies retroactively. The question thus arises: what effect does the Feeney Amendment have on these general standards

for downward departures?

II. The Effect of the Feeney Amendment on Downward Departures

A. Legislative History of the Feeney Amendment.

[1] On February 24, 2003, the Senate considered and unanimously passed what was formally called the Prosecutorial Remedies and Tools Against the Exploitation of Children Today ("PROTECT") Act of 2003. [FN8] This legislation focused on enhancing the prosecution of child pornography. When the House took up the measure on March 26, 2003, its focus was on legislation to prevent child abduction, including a national notification system to find abducted children known as the Amber Alert. [FN9] On March 27, 2003, Representative Tom Feeney proposed amending this legislation to "address [] long-standing and increasing problems of downward departures from the Federal sentencing guidelines." [FN10] His amendment would have restricted downward departures in all cases. Departures would be limited to grounds that had been "affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements." [FN11] The justification for this restriction was to prevent judges from "mak[ing] up exceptions [to the guidelines] as they go along." [FN12] The Feeney Amendment was approved by a vote of 357 to 58, [FN13] and the child abduction prevention legislation to which it was attached passed overwhelmingly as well. [FN14]

FN8. See 149 CONG. REC. S2573-90 (daily ed. Feb. 24, 2003).

FN9. See 149 CONG. REC. H2320-H2325 (daily ed. Mar. 26, 2003).

FN10. 149 Cong. Rec. H2422 (daily ed. Mar. 27, 2003) (statement of Rep. Feeney).

FN11. *Id.* at H2420.

FN12. *Id.* at H2435 (statement of Rep. Feeney).

270 F.Supp.2d 1318
(Cite as: 270 F.Supp.2d 1318)

Page 4

FN13. *See Id.* at H2436.

FN14. *See Id.* at H2438.

After the House's approval of legislation differing from the Senate's, the matter went to a Conference Committee. While pending there, a variety of diverse commentators expressed their concern about various aspects of the Feeney Amendment. For example, the Judicial Conference of the United States, through the Chief Justice, expressed its view that "this legislation, if enacted, would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and responsible sentences." [FN15] Similarly, Business Civil Liberties, Inc., offered its view that the Amendment would interfere with the proper sentencing of those in the business community who had committed criminal offenses involving essentially regulatory infractions. [FN16] The National Association of Criminal Defense Lawyers argued that "[w]ithout the discretionary authority to depart, all crimes regardless of the circumstances would have to be sentenced exactly the same; one size must fit all..." [FN17]

FN15. Letter from the Chief Justice to Sen. Patrick Leahy (Apr. 2, 2003).

FN16. *See Business Civil Liberties, Inc., Business Civil Liberties, Inc. Opposed Limiting Downward Departures in Federal Sentencing* (Apr. 7, 2003).

FN17. Letter from NACDL to congressional representatives (Apr. 9, 2003).

Apparently as a result of concerns such as these, the Conference Committee *1322 reached a bipartisan compromise, which substantially narrowed the breadth of the Feeney Amendment. [FN18] The compromise version has been called the Hatch-Sensenbrenner-Graham compromise amendment, [FN19] but for clarity here will be identified as the "Feeney Amendment." This

Amendment made the most restrictive limitations on downward departures applicable only to certain child crimes and sex offenses. [FN20] With this change, the House and the Senate agreed to the conference report on April 10, 2003, the President approved it, and the Act became effective on April 30, 2003. [FN21]

FN18. *See H.R. CONF. REP. NO. 108-66, Title IV* (2003).

FN19. *See, e.g., 149 CONG. REC. S5137-01* (daily ed. Apr. 10, 2003) (statement of Sen. Hatch).

FN20. *See PROTECT Act, Pub.L. No. 108-21 § 401, 117 Stat. 650, 667* (to be codified as 18 U.S.C. § 3553(b)).

FN21. *See 149 CONG. REC. H3075-76* (daily ed. Apr. 10, 2003); *id.* at S5156 (daily ed. Apr. 10, 2003). *See generally* PROTECT Act, Pub.L. No. 108-21, 117 Stat. 650 (to be codified as 18 U.S.C. § 3553), Legislative History.

B. Changes in the Standards for Departures.

As finally approved by Congress, the Feeney Amendment makes a variety of changes related to sentencing procedures. The Amendment expands appellate review of sentencing departures [FN22] and alters the procedures to be used following remands in such cases. [FN23] The Amendment further requires a formal government motion before awarding a defendant a three-level reduction for accepting responsibility (instead of the normal two-level reduction). [FN24] In an effort to gain additional data about the sentencing guidelines, the Amendment directs the Chief Judge of each district to submit information about sentencing judgments to the Sentencing Commission, which in turn makes it available to Congress if so requested. The Amendment also directs the Sentencing Commission to promulgate, within 180 days after enactment of the Amendment, new guidelines that "ensure that the incidence of downward departures are substantially reduced" [FN25] and a new policy

270 F.Supp.2d 1318
(Cite as: 270 F.Supp.2d 1318)

Page 5

statement "authorizing a downward departure of not more than 4 levels if the Government files a motion or such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney." [FN26] Finally, the Amendment directs the Attorney General to take certain steps toward aggressively appealing improper downward departures. [FN27]

FN22. See PROTECT Act, Pub.L. No. 108-21, § 401(d), 117 Stat. 650, 670 (to be codified as 18 U.S.C. § 3742(e)(3)).

FN23. See *id.*

FN24. See PROTECT Act, Pub.L. No. 108-21, § 401(g), 117 Stat. 650, 671 (to be codified as 28 U.S.C. § 994(a)).

FN25. PROTECT Act, Pub.L. No. 108-21, § 401(m), 117 Stat. 650, 675 (to be codified as 28 U.S.C. § 994).

FN26. PROTECT Act, Pub.L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (to be codified as 28 U.S.C. § 994).

FN27. See PROTECT Act, Pub.L. No. 108-21, § 401(l)(2)(A) & § 401(1)(3), 117 Stat. 650, 674 (to be codified at 18 U.S.C. 3553 note).

None of these reforms restrict the ability of a district court to depart downward (or upward). The Feeney Amendment does, however, make one *limited* change in the ability of district courts to depart downward in child abduction and sex offense cases--a limited change that has been described in dramatically different terms. For example, a prominent journal circulated to defense attorneys seemingly suggested that the Feeney Amendment *1323 "essentially eliminates judges' discretion to depart below the Guidelines in *all* cases." [FN28] This description is not accurate, as the brief review of legislative history just recited makes clear. The Feeney Amendment ultimately adopted by Congress

is substantially narrower than originally proposed. For child abduction and sex offenses, the Amendment does limit downward departures to the grounds specifically listed in the sentencing guidelines for these offenses. [FN29] But for all other offenses--such as the felon-in-possession offense at issue here--the Feeney Amendment makes no change. As Senator Hatch, the Chairman of the Judiciary Committee and member of the Conference Committee on the Act explained: "The compromise agreed to in conference will affect only crimes against child and sex crimes--that is, sexual abuse, pornography, prostitution, and kidnaping/hostage taking. These types of cases represent only 2 percent of the federal criminal case load." [FN30]

FN28. Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary? Why Congress' Fear of Judicial Sentencing Discretion may Undermine a Generation of Reform*, 27 CHAMPION 6, 9 (2003) (emphasis added).

FN29. See PROTECT Act, Pub.L. No. 108-21, § 401, 117 Stat. 650, 667 (to be codified as 18 U.S.C. § 3553(b)).

FN30. 149 CONG. REC. S5113-01 (daily ed. April 10, 2003) (statement of Sen. Hatch).

Even with respect to the narrow category of cases involving child abduction and sex offenses, the claim that the Feeney Amendment "eliminates" a judge's ability to depart downward appears to be significantly overstated. The Feeney Amendment appears to restrict a judge's ability to depart downward to grounds for departure specifically identified in the Sentencing Guidelines. See PROTECT Act, Pub.L. No. 108-21 § 401, 117 Stat. 650, 667 (to be codified as 18 U.S.C. § 3553(b)(2)(A)). As Senator Hatch explained, "Contrary to the oft repeated claims of the opponents, the compromise proposal is not a mandatory minimum. Judges hands handling these important criminal cases can sometimes exercise discretion to depart downward, but only

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

22

270 F.Supp.2d 1318
(Cite as: 270 F.Supp.2d 1318)

Page 6

when the Sentencing Commission specifies the factors that warrant a downward departure, only when they have the right to do so as listed by the Sentencing Commission." 49 CONG. REC. S5113-01 (daily ed. April 10, 2003) (statements of Sen. Hatch). Given that the Guidelines identify a number of grounds for downward departure--presumably including the most frequently-encountered grounds for departure--the Amendment appears to restrict departures in only a minority of cases.

The court has gone to the lengths of writing an opinion on this point because hyperbolic claims about how departure authority has been "eliminated" in "all cases" can be positively harmful to individuals awaiting sentencing. If criminal defense attorneys believe such statements and operate under the misapprehension that downward departures are no longer permissible, they might refrain from filing departure motions in appropriate cases. This could lead to criminal defendants serving unduly long prison terms (not to mention inappropriately consuming valuable federal prison space that should be reserved for other offenders). It is therefore critically important that defense counsel understand the narrow parameters of the Feeney Amendment and continue to file motions for downward departure where appropriate. Of course, the government should continue to file upward and downward departures where appropriate as well.

When departure motions are filed, this court will review them in the same way that it always has--it will be grant them where proper and deny them where improper. The reason for emphasizing this obvious point is that suggestions have been made that federal judges might somehow be "intimidated" by the Feeney Amendment's reporting requirements. [FN31] For example, *1324 during the Senate debate on the final version of the bill, the ranking member of the Judiciary Committee argued:

FN31. 149 CONG. REC. H3059-02 (daily ed. April 10, 2003) (statement of Ms. Jackson-Lee).

The amendment effectively creates a judicial "black list" of judges that stray from the

draconian mandates of this bill. The [final] language retains the Feeney amendment's attempt to intimidate Federal judges by compiling a "hit list" of all judges who impose sentences that the Justice Department does not like in any type of criminal case. It takes a sledge hammer to the concept of separation of powers. [FN32]

FN32. 149 CONG. REC. S5137-01 (daily ed. April 10, 2003) (statement of Sen. Leahy).

The basis for contention about a "black list" appears to be the provision in the Feeney Amendment requiring the Attorney General to submit a report to the House and Senate Judiciary within 15 days whenever a district court judge departs downward in a case (other than for reasons of substantial assistance to the government). [FN33] This report would identify the judge who departs by name. It is unclear whether this provision will ever take effect, however, because its effective date has been suspended for 90 days and, if the Attorney General take steps to ensure "vigorous pursuit of appropriate and meritorious appeals" of unjustified downward departures it appears that the provision is suspended indefinitely. [FN34] Even were such a provision to take effect, however, the overriding fact remains that judicial departure decisions (like any other judicial action) are *already* matters of public record. This court's sentencing decisions, for example, are all easily available both in the court's public files and on an internet website, www.utd.uscourts.gov. In any event, since the suggestion has been raised, this court wishes to observe that it is not concerned about close scrutiny of its downward (or upward) departure decisions by Congress, the public, or otherwise.

FN33. See PROTECT Act, Pub.L. No. 108-21, § 401(l)(2)(B), 117 Stat. 650, 676 (to be codified as 18 U.S.C. 3553 note).

FN34. See PROTECT Act, Pub.L. No. 108-21, § 401(l)(2)(A) & § 401(1)(3), 117 Stat. 650, 674 (to be codified as 18 U.S.C. 3553 note).

C. Procedural Changes in the Feeney Amendment.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

23

270 F.Supp.2d 1318
(Cite as: 270 F.Supp.2d 1318)

Page 7

While the Feeney Amendment does not substantively change the ability of district courts to depart in most cases, it does make a *procedural* change that deserves brief discussion. The Amendment requires all departures--both downward and upward--to be described with specificity in writing in the judgment. After the Amendment, the relevant statutory language now reads:

The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--...

is outside the range[] described in [in the sentencing guidelines], the specific reason for the imposition of a sentence different from that described, *which reasons* [sic] *must also be stated with specificity in the written order of judgment and commitment* [FN35]

FN35. PROTECT Act, Pub.L. No. 108-21 § 401(c), 117 Stat. 650, 669 (to be codified as 18 U.S.C. § 3553(c)).

Therefore, in contrast to previous practice under which a district judge could orally state the reasons for a departure at the time of sentencing, the new legislation requires that such reasons be stated "with specificity" in writing. This provision's rationale appears to be facilitating appellate review of district court departure decisions, as such review is expanded by the Feeney Amendment.

This new practice requires the court, prosecutors, and defense counsel, to think *1325 about how departure findings can best be reduced to writing expeditiously. Delay in finalizing criminal judgments should be avoided because defendants are unable to receive a designation from the Bureau of Prisons until the judgment is completed and signed by the judge. Defendants are better off if they move quickly to facilities designed for long term confinement and equipped to provide vocational and other training. In addition, the public has a strong interest in rapid completion of criminal judgments. Any delay at this stage creates significant additional expense to the taxpayers, as the use of temporary facilities for housing prisoners often substantially exceeds that of the Bureau of Prison facilities. Moreover, in many jurisdictions (including Utah) temporary jail space for federal prisoners is difficult to locate.

How to reduce reasons for departures to writing

quickly deserves general consideration. Perhaps this court's standard judgment and conviction form should be modified to provide space for entry of such findings. Alternatively, it might be useful if the writing could occur during the sentencing proceeding itself, perhaps with the assistance of the parties. Prosecutors will most frequently be involved in departure motions, as the vast bulk of downward departure motions are made by the government seeking recognition of a defendant's "substantial assistance" to government authorities. The government less frequently files upward departure motions, but when these motions are filed they typically involve extraordinarily serious cases. It may be that the government, when filing departure motions--either upward or downward--should also include a proposed written order that could be attached to the judgment stating with specificity the reasons for departure. [FN36] Likewise, defense counsel may wish to do the same when filing their motions for a downward departure. No doubt, there are other approaches that could be pursued. In this case, the court will attach this opinion to the judgment as its statement of reasons for the departure. The court, however, invites counsel in criminal cases to consider ways in which the writing requirement can be expeditiously handled.

FN36. Government prosecutors may also wish to consider how to smoothly implement another part of the Feeney, which allows a reduction in the offense level of three levels (rather than the standard two levels) upon a prosecutor's "formal motion at the time of sentencing." PROTECT Act, Pub.L. No. 108-21, § 401(g), 117 Stat. 650, 671 (to be codified as 28 U.S.C. § 994(a)). The administrative problem that this provision might create is modifying every presentence report in all cases in which the three-level reduction is granted. At the time the probation office prepares the pre-sentence report, the formal motion for the third-level reduction will not have been made. As a result, the office might prepare a report reflecting only a guidelines calculation based on a two-level reduction, which would then need to be formally amended at the time of sentencing to reflect a three-level reduction. This could lead to a

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

24

270 F.Supp.2d 1318
(Cite as: 270 F.Supp.2d 1318)

Page 8

proliferation of "amendments" to pre-sentence reports, which is burdensome to the courts and confusing to the those (such as the Bureau of Prisons) who have to rely on their calculations. To avoid this problem, the government might consider placing a provision in its plea agreement to the effect that it anticipates making a motion. That would permit the probation office to prepare the pre-sentence report on the assumption that the three-level motion would be forthcoming. This approach would limit the need for an amendment of the pre-sentence report to the relatively rare case where such a motion was not forthcoming.

One last issue deserves brief mention. The Feeney Amendment, as part of the PROTECT Act, became effective on April 30, 2003. [FN37] Because the Feeney Amendment does not operate to retroactively disadvantage *1326 VanLeer, there is no ex post facto problem here. [FN38]

FN37. See PROTECT Act, Pub.L. No. 108-21 § 401, 117 Stat. 650, 667 (to be codified as 18 U.S.C. § 3553(b)).

FN38. See *United States v. Sullivan*, 255 F.3d 1256, 1260 (10th Cir.2001), cert. denied, 534 U.S. 1166, 122 S.Ct. 1182, 152 L.Ed.2d 124 (2002).

To summarize, the Feeney Amendment does not change the pre-existing law which allowed a downward (or upward) departure where the court determines that, given the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole," [FN39] the case at hand is outside the Guidelines' heartland. [FN40]

FN39. *Rivera*, 994 F.2d at 949 (internal quotation omitted).

FN40. See *Koon*, 518 U.S. at 95, 116 S.Ct. 2035.

III. Departures for Felons Dispossessing Themselves of Firearms

[2] VanLeer argues that because he was *dispossessing* himself of the firearm covered in the indictment that his behavior lies "outside the heartland" of the charged offense. This argument gains support from one specifically-listed ground for departure: where the defendant's "conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue." [FN41] The Tenth Circuit has instructed that this harm-not-threatened departure "should be interpreted narrowly." [FN42]

FN41. U.S.S.G. § 5K2.11.

FN42. *United States v. Warner*, 43 F.3d 1335, 1338 (10th Cir.1994).

VanLeer pled guilty to violating 18 U.S.C. § 922(g), which forbids felons (among other dangerous persons) from possessing firearms. The harm the law seeks to prevent is violent crimes and consequent personal injury and even death. [FN43] Thus, a downward departure would be appropriate where the defendant's conduct does not threaten these outcomes.

FN43. See *United States v. Lewis*, 249 F.3d 793, 796 (8th Cir.2001); *Huddleston v. United States*, 415 U.S. 814, 824-25, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974).

In this case, VanLeer's brief possession of a firearm does not threaten the harms at which § 922(g) was directed. The facts plainly reveal that VanLeer briefly possessed the gun only because he intended to dispose of the gun. Indeed, it is undisputed that he did in fact dispossess himself of the firearm at a pawn shop. In that process, he used his own name and gave his own fingerprint. Nothing in the circumstances surrounding that transaction suggest any criminal intent. Rather, VanLeer was simply trying to take his property and pawn it to obtain money.

To be sure, as a convicted felon, VanLeer should

25

270 F.Supp.2d 1318
(Cite as: 270 F.Supp.2d 1318)

Page 9

have left the firearm where it was or, arguably, had his friend pawn it for him. But the question before this court at this stage is not whether VanLeer's conduct was lawful (it plainly was not) but rather whether it was outside the "heartland" of offenses covered by the applicable guideline. When a felon acts illegally to get rid of a firearm, that criminal offense is simply less culpable than when a felon continually possesses a firearm. Viewed another way, a gun that leaves the hands of a felon is less dangerous than a gun remaining in the hands of felon.

The Eight Circuit has reached a similar conclusion on somewhat similar facts. In *United States v. Lewis*, [FN44] the Eight Circuit reviewed a situation where the defendant, a felon, took a shotgun and pawned it for \$50 to pay utility bills. The shotgun was a family heirloom, and the defendant returned a few days later to retrieve it. To retrieve the gun, the defendant completed an ATF Form 4473 in which he falsely *1327 denied being a felon. In reversing a district court's decision not to depart downward, the Eighth Circuit held that "the sentencing commission must have envisioned departures under § 5K2.11 when an illegal weapon is not possessed for an unlawful purpose." [FN45] The Circuit remanded for further consideration, explaining that "the district court certainly could conclude that briefly possessing a firearm in order to pawn it to pay bills and attempting to keep a family heirloom in the family were not the types of harms or evils envisioned by Congress when it enacted § ... 922(g)(1)." [FN46]

FN44. 249 F.3d 793 (8th Cir.2001).

FN45. *Id.* at 795 (citing *United States v. White Buffalo*, 10 F.3d 575, 576 (8th Cir.1993)).

FN46. *Id.* at 796.

In reaching this conclusion, the court is mindful of the Tenth Circuit's mandate that the harms-not-threatened departure guideline "should be interpreted narrowly." [FN47] Likewise, the court is fully aware of the substantial possibility that convicted felons may well lie about the

circumstances surrounding their unlawful possession of a firearm--lies that the government may have a difficult time disproving. This court has frequently heard dubious claims from felons that they intended to get rid of a gun or had a gun only briefly. This case, however, stands on quite different footing from more routine situations. Here, the indisputable facts establish: (1) the defendant's possession of the firearm was quite brief (he had only been released from prison a few weeks earlier); (2) the possession was motivated solely by an interest in disposing of the property (he took it directly to a pawn shop); (3) the defendant made no secret of his possession (he used his own name and placed his own fingerprint on the federally required form); and most importantly, (4) the defendant in fact disposed of the gun in what would have otherwise been an entirely lawful transaction (sales of firearms to pawnshops are legal). In light of all these unusual factors, this case falls well outside the heartland of the usual felon-in-possession case and does not involve the kind of harms envisioned by Congress when it enacted the prohibitions against felons possessing firearms. The court will, therefore, depart downward.

FN47. *Warner*, 43 F.3d at 1338 (10th Cir.1994).

[3] The remaining question is the extent of the departure. The court believes that a four-level departure, from a level 12 to a level 8, is appropriate. This modest departure serves to differentiate VanLeer's conduct from more culpable conduct of other felons. A four-level departure is roughly proportionate to the six-level downward departure that the guidelines authorize in other circumstances for unlawful possession of a firearm for lawful sporting purposes [FN48] and to the four-level upward departure that the guidelines authorize for possession of a firearm in connection with another felony offense. [FN49]

FN48. *See* U.S.S.G. § 2K2.1(b).

FN49. *See* U.S.S.G. § 2K2.1(b)(5).

CONCLUSION

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

26

270 F.Supp.2d 1318
(Cite as: 270 F.Supp.2d 1318)

Page 10

For the foregoing reasons, the court grants the defendant's motion for a downward departure. The court departs downward from a level 12 to a level 8 and sentences the defendant to a term in prison of 18 months.

270 F.Supp.2d 1318

END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

27

Louisville

Federal Judges "Courageous," Says Justice Kennedy

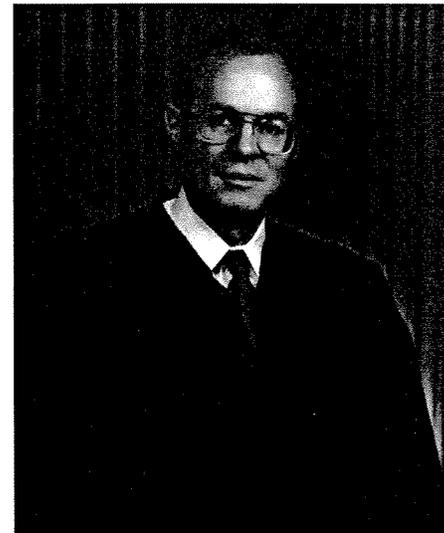
In an exchange last month during the Supreme Court's House appropriations hearing, Justice Anthony Kennedy supported greater sentencing discretion for federal judges and criticized federal mandatory minimum sentences.

"I do think federal judges who depart downward [from the sentencing guidelines] are courageous, and are exercising the independence and the authority of the judiciary not to follow blindly unjust guidelines," said Kennedy.

His remarks came during his and Justice Clarence Thomas' appearance before the House Appropriations Subcommittee on Commerce, Justice, State, and the Judiciary where they testified on the Supreme Court's Fiscal Year 2005 appropri-

tions request. In the question and answer period that followed, Subcommittee Chair Frank Wolf (R-VA) noted that Kennedy had criticized federal mandatory minimum sentences and urged the American Bar Association (ABA) to establish a commission to study the nation's imprisonment policies. Kennedy responded that the U.S. has a per capita incarceration rate eight times higher than most Western European countries.

"Something is very wrong," said Kennedy. "Fifty-five percent of those in federal prison—and we have over 150,000 just in federal prison—are for drug offenses, non-violent offenses. The mandatory minimums enacted by the Congress are, in my view, unfair, unjust, unwise." Kennedy cited an example of federal sentencing. "There is a case," he said, "where a kid on the George Washington Parkway, which is a federal facility, is stopped by the park police, and he has got just over five grams of co-



Justice Anthony Kennedy

caine in the seat, which he should not have. A minimum of five years. If he had gone off an exit, it would have been six months. This is silly and it is wrong."

The ABA has a commission which is studying the nation's imprisonment policies and is expected to give its report before the next ABA annual meeting in August.



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



April 30, 2004

Honorable Richard B. Cheney
President of the Senate
276 Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, DC 20502

Dear Mr. President:

On behalf of the United States Sentencing Commission, we are pleased to transmit to Congress the enclosed amendments to the federal sentencing guidelines, policy statements, and official commentary. The Commission's work this amendment cycle implementing new legislation and responding to specific congressional directives demonstrates its continuing commitment to work closely with Congress.

The Commission continued to perform its important role of establishing appropriately severe guideline penalties for offenses that threaten our homeland security. Prior to the tragic events of September 11, 2001, the Commission promulgated several guideline provisions to provide increased penalties for nuclear, chemical, and biological weapons offenses, and we have been quick to implement subsequent legislation aimed at fighting terrorism, including the USA PATRIOT Act and the Homeland Security Act.

This amendment cycle the Commission adopted several specific provisions to address additional issues in the area of national security. These new provisions include an enhancement that assures that the statutory maximum penalty is provided for the unlawful possession of certain portable rockets, missiles, or launching devices; a substantial increase in the guideline sentence for fraudulently obtaining or using a United States passport; an enhancement for public officials who accept bribes to facilitate entry into the United States; and a provision inviting courts to sentence above the applicable guideline range if the defendant commits a hazardous materials transportation offense with terrorist motive.

The Commission also continued its ongoing efforts to deter and appropriately punish economic and white collar crimes. In February 2002, prior to the series of corporate scandals that led Congress to pass the Sarbanes-Oxley Act of 2002, the Commission formed an ad hoc advisory group to examine the effectiveness of the guidelines for sentencing corporations and

Honorable Richard B. Cheney
April 30, 2004
Page 2

other organizations. These amendments incorporate several recommendations made by this expert body and impose new rigorous standards which corporations and other organizations must meet to be considered to have an effective compliance and ethics program. These amendments are intended to both deter criminal conduct and encourage ethical cultures within organizations. The Commission hopes these amendments, working in conjunction with the Commission's Economic Crime Package of 2001 and its earlier implementation of several directives in the Sarbanes-Oxley Act, will reduce the incidence of economic and white collar crimes.

Another area of white collar crime of concern, public corruption, also is addressed by these amendments. A comprehensive amendment to the bribery and gratuity guidelines provides increased penalties generally, with particularly heightened penalties for high-level public officials and elected officials.

Many of the enclosed amendments respond to recent legislation or congressional directives. For example, in response to several congressional directives and changes in the statutory penalties enacted by the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the "PROTECT Act"), an amendment modifies a number of guidelines to provide appropriately severe penalties for child pornography and sexual abuse offenses and adds a new guideline targeted at offenders who engage in interstate travel or transportation to commit these crimes.

In response to another directive in the PROTECT Act, an amendment significantly increases the penalties for gamma hydroxybutyric acid (GHB) trafficking, and includes specific sentencing enhancements both for the use of GHB, or any other drug, to commit date rape and for the sale of illegal drugs using the Internet. Another amendment creates a guideline to provide heightened penalties for use of a minor to commit a crime of violence, a new offense enacted by the PROTECT Act.

The amendments also incorporate new offenses and address directives contained in the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act of 2003") regarding the fraudulent use of "spam," the SAFE ID Act regarding illegal trafficking in authentication features such as holograms, and the 21st Century Department of Justice Appropriations Authorization Act regarding illegal possession of body armor by violent felons, and assault or retaliation against federal judges and certain other officials.

A number of amendments address specific concerns raised by Congress and others. The amendments build upon recent modifications to the involuntary manslaughter guideline and incorporate certain recommendations by the Commission's ad hoc Native American advisory group by increasing the guideline penalties for several homicide offenses, while providing limited decreases for certain assault offenses. The amendments also provide a more graduated

Honorable Richard B. Cheney
April 30, 2004
Page 3

approach to the existing maximum base offense level received by certain drug offenders who perform a mitigating role in the offense.

The effective date of these amendments is November 1, 2004, absent congressional action to the contrary. The Commission would be pleased to assist Congress during its review of these amendments, and we appreciate your support and interest in our work.

Sincerely,

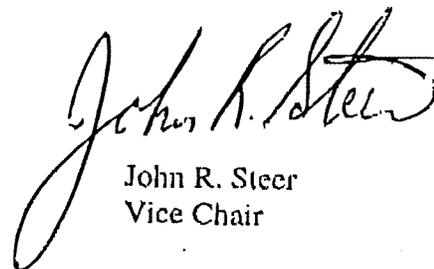


Ruben Castillo
Vice Chair

Enclosures



William K. Sessions, III
Vice Chair



John R. Steer
Vice Chair

Westlaw.

Slip Copy
(Cite as: 2004 WL 771851 (6th Cir.(Ohio)))

Page 1

Only the Westlaw citation is currently available.

This case was not selected for publication in the Federal Reporter.

NOT RECOMMENDED FOR FULL--TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

United States Court of Appeals, Sixth Circuit.

UNITED STATES OF AMERICA, Appellant,
v.
Lisa Lerma MARINE, Appellee.

No. 02-3317.

April 8, 2004.

Background: Defendant was convicted, on plea of guilty before the United States District Court for the Northern District of Ohio, of conspiracy to distribute more than 15, but less than 50, kilograms of cocaine, and received 10-level downward departure sentence. Government appealed from sentence.

Holding: The Court of Appeals, Clay, Circuit Judge, held that downward departure sentence was justified by defendant's status as irreplaceable caretaker of her three children and one grandchild.

Affirmed.

Suhrheinrich, Circuit Judge, dissented with opinion.

[1] Criminal Law ↪0

110k0 k.

Court of Appeals would review de novo trial court's downward departure in sentencing defendant convicted of conspiracy to distribute more than 15, but less than 50, kilograms of cocaine, pursuant to Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act. 18 U.S.C.A. § 3742(e).

[2] Sentencing and Punishment ↪0

350Hk0 k.

Sentencing court's 10-level downward departure in sentencing defendant convicted of conspiracy to distribute more than 15, but less than 50, kilograms of cocaine, based upon discouraged sentencing departure factor of defendant's family responsibilities, was justified by defendant's status as irreplaceable caretaker of her three children and one grandchild; defendant lived with her children and grandchild and was their sole financial support, children's father had been convicted along with defendant and sentenced to almost five years' incarceration, and defendant could not rely on family or friends to care for children. 18 U.S.C.A. § 3553(b).

On Appeal from the United States District Court for the Northern District of Ohio.

Louis M. Fischer, Steven L. Lane, U.S. Department of Justice, Washington, DC, for Plaintiff-Appellant.

Robert L. Rascia, Rascia & Rascia, Chicago, IL, for Defendant-Appellee.

Before SUHRHEINRICH, CLAY and SUTTON, Circuit Judges.

CLAY, Circuit Judge.

*1 The government appeals the sentence imposed on Defendant Lisa Lerma Marine, who pled guilty

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Slip Copy
 (Cite as: 2004 WL 771851 (6th Cir.(Ohio)))

Page 2

in the United States District Court for the Northern District of Ohio to one count of conspiracy to distribute more than 15, but less than 50, kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The government contends that the district court erred in departing downward from the applicable sentencing guideline range based on Marine's family responsibilities. Because the district court's downward departure was justified by the facts of the case, we AFFIRM the sentence.

I

Defendant Lisa Lerma Marine was one of 35 defendants, including her husband, Randy Marine, and six other family members charged in a drug distribution conspiracy. She pled guilty in the United States District Court for the Northern District of Ohio to one count of conspiracy to distribute more than 15, but less than 50, kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. According to Marine's plea agreement, the government agreed not to oppose the application of U.S. Sentencing Guidelines Manual § 5C1.2, which permits the court to sentence a defendant without regard to the statutory minimum sentence set forth in § 841(a)(1), so long as the defendant satisfies certain criteria. The presentence report indicated an offense level of 34, a two level reduction pursuant to Guidelines § 5C1.2, and a three level reduction pursuant to Guidelines § 3E1.1(a) and (b) (acceptance of responsibility). The resulting offense level of 29 carried a sentencing guideline range of 87 to 108 months of incarceration. The court denied Marine's request for a downward departure for her alleged minimal role in the conspiracy.

At issue on appeal is Marine's request, and receipt of, a ten level downward departure under Guidelines §§ 5H1.6 and 5K2.0 based on her family circumstances. The following evidence of her family circumstances was presented to the district court: (1) Marine has three children, ages 11, 14 and 17; (2) the 17 year-old daughter has a nine-month old child for whom Marine has cared, allowing the daughter to complete her high school education; (3) Marine provides economic support for her children and grandchild; (4) her husband, who also was involved in the drug conspiracy, was sentenced to 57 months in prison; and (5) there are no family members available to take care of her children. After conducting legal research and thoughtfully deliberating over the matter, the

district court granted the ten level departure, reasoning as follows:

It is clear that the mere existence of parental responsibilities is not extraordinary. It is also clear that there are myriads of single parent homes with three or four children in them, so that in and of itself is not extraordinary.

It is also evident that many families cannot rely on the possibility of family or close friends rather than strangers assuming custody of the children, and in many instances, like this case, there is also the absence of criminal history. It is where that rare case comes along where several of these instances or conditions coalesce that serious consideration of downward departure should exist.

*2 It's been represented to me in this court that the defendant's mother cannot or will not care for the children and that there is no one else able to do so. Their father was sentenced a week ago to 57 months in prison. There are three children at home, 17 years, 11 and seven, the oldest of whom has a nine month old child.

Lisa [Marine] has no criminal history points at all, has been working third shift [sic] at a bakery, and so we're faced with four young lives which are impacted directly by this case, by this crime, a crime not to be condoned but in which this defendant apparently profited little but played a significant role.

* * *

It is my conclusion that the circumstances coalescing in this case do, in fact, justify a downward departure, not because of the defendant but because of the children in this case and the responsibility of the defendant in caring for those children.

(J.A. 157-59.)

Because the court departed downwardly 10 levels to level 19, Marine was subject to a Guidelines range of 30 to 37 months in prison. The court then sentenced Marine to 30 months of prison. Thereafter, Marine requested, and was granted, permission to participate in The Intensive Confinement Center Program (Boot Camp), as set forth in 18 U.S.C. § 4046. The government objected to the departure, and this appeal followed.

II

[1] Section 401(d)(2) of the Prosecutorial

Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub.L. No. 108-21, 117 Stat. 650, 670 (Apr. 30, 2003) changed the standard of review for decisions to depart from the Sentencing Guidelines. *United States v. Camejo*, 333 F.3d 669, 675 (6th Cir.2003). Prior to the PROTECT Act, this Court reviewed the decision to depart for an abuse of discretion. *Id.* (following *United States v. Tarantola*, 332 F.3d 498, 500 (8th Cir.2003)). Due to the PROTECT Act, however, the decision to depart from the Sentencing Guidelines is reviewed *de novo*. See 18 U.S.C. § 3742(e) (providing that whether a district court's decision to depart outside the applicable guideline range is justified by the facts of the case is to be reviewed *de novo*).

What is less clear is whether the PROTECT Act applies to cases such as this that were pending on appeal as of the PROTECT Act's effective date. A panel of this Court declined to address this issue because it would have affirmed the district court's departure under either standard of review. *Camejo*, 333 F.3d at 675 (following *Tarantola*, 332 F.3d at 500). It appears, however, that the new standard would apply to Marine's appeal because the new standard of review effected only a procedural change to the law, thereby obviating any concerns about retroactive application of the new standard. See *United States v. Andrews*, 353 F.3d 1154, 1155 n. 2 (10th Cir.2003); *United States v. Bell*, 351 F.3d 672, 675 (5th Cir.2003); *United States v. Stockton*, 349 F.3d 755, 764 n. 4 (4th Cir.2003); *United States v. Mallon*, 345 F.3d 943, 946-47 (7th Cir.2003); *United States v. Frazier*, 340 F.3d 5, 14 (1st Cir.2003); *United States v. Hutman*, 339 F.3d 773, 775 (8th Cir.2003). We need not resolve the issue, because we hold that the district court's downward departure withstands the more rigorous *de novo* review.

*3 [2] A sentencing court is required to impose a sentence within the applicable Sentencing Guidelines range "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." 18 U.S.C. § 3553(b). "To determine whether a circumstance was adequately taken into consideration by the Commission, Congress instructed courts to 'consider only the sentencing guidelines, policy statements,

and official commentary of the Sentencing Commission." ' *Koon v. United States*, 518 U.S. 81, 92-93, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996) (quoting 18 U.S.C. § 3553(b)). According to the Guidelines Manual, the Sentencing Commission did not adequately take into account cases that are "unusual." ' *Id.* at 93 (quoting 1995 U.S.S.G. ch. 1, pt. A, intro. comment. 4(b)). The Introduction to the Sentencing Guidelines explains:

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

U.S. Sentencing Guidelines Manual ch. 1, pt. A, intro. cmt. 4(b) (2002).

The Sentencing Guidelines list certain facts that never can be bases for departure, such as race, sex, national origin, creed, religion and socio-economic status. *Id.* § 5H1.10. Other factors are not prohibited, but are discouraged. Discouraged factors are those "not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range." *Id.* ch. 5, pt. H, intro. comment. One example of a discouraged factor is "family ties and responsibilities." *Id.* § 5H1.6. According to the Commission, such a factor should be relied upon to depart from a mandatory minimum only in "exceptional cases." *Id.* ch. 5, pt. H, intro. comment. Thus, the Supreme Court has held that "[i]f the special factor is a discouraged factor, ... the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." *Koon*, 518 U.S. at 96.

To determine whether a case is exceptional, the district court must make "a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Id.* at 98. Whether a discouraged sentencing departure factor, such as the defendant's family responsibilities, "nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases ." *Id.* The Supreme Court has opined that, because district courts have an institutional advantage over appellate courts in

determining the propriety of departures, they have a "special competence" to determine what is ordinary or unusual in a particular case. *Id.* at 99 (internal quotation marks and citation omitted). For this reason, Congress originally directed the courts of appeals to "give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e)(4) (2002). As noted above, however, Congress recently amended § 3742(e), eliminating an appellate court's deference to the district court's "application of the guidelines to the facts" with respect to departures from the applicable Sentencing Guidelines range. 18 U.S.C. § 3742(e) (2003).

*4 The leading case in the Sixth Circuit on the propriety of a downward departure for family responsibilities is *United States v. Reed*, 264 F.3d 640 (6th Cir.2001). There, the district court departed downward 13 levels to account for the defendant's family circumstances. *Id.* at 653. The defendant had assumed a significant role in the development and upbringing of her five nieces and nephews, four of whom were under the age of 18. *Id.* She helped ensure that the children ate properly and did their homework and provided them with emotional support. *Id.* Because the defendant's sister allegedly was extremely immature and dysfunctional, a family assessment report concluded that defendant's imprisonment likely would result in the family falling apart and the younger children being sent to foster care. *Id.* In departing downward, the district court found that the defendant was essentially the children's surrogate parent, providing them "invaluable and incalculable emotional and financial support." *Id.* at 654.

The *Reed* Court began its analysis by noting that it "has generally not approved of downward departures for family responsibilities based on a parent's obligation to a child." *Id.* (citing, among others, *United States v. Brewer*, 899 F.2d 503, 508-09 (6th Cir.1990) (reversing district court's downward departure for two married mothers convicted of embezzlement because mothers failed to explain how their family circumstances involving young children distinguished them from other embezzlers who have family responsibilities)). The Court further noted that "[o]ther circuits have been similarly reluctant to find that even a single parent's responsibility for a child was a family circumstance so exceptional as to merit a sentencing departure." *Id.* (citations omitted). The Court then held as

follows:

In light of this and other circuits' reluctance to permit downward departures for single parents with young children, even for those who provide financial and emotional support for their children, and even when the children are likely to be placed in foster care pending their parent's incarceration, we do not believe that [the defendant] has presented any evidence to demonstrate that her family circumstances are exceptional.

Id. at 655. Applying the now-defunct, but highly-deferential abuse of discretion standard, the Court held that the district court had abused its discretion in departing downward. *Id.*

We hold that Marine's situation is distinguishable from the defendant's situation in *Reed* in that Marine is the biological mother of the children at issue, whereas the defendant in *Reed* was not a custodial caretaker; she was an aunt. *Reed*, 264 F.3d at 655. In addition, unlike the defendant in *Reed*, Marine lives with her children and provides financial support for them. *Id.* There also is no evidence in the record that Marine regularly has taken extended vacations away from her children, a fact that severely undermined the district court's decision to depart downward in *Reed*. *Id.* Thus, Marine's family ties are far more significant than those at issue in the *Reed* case and, additionally, the combination of family circumstances suggests that her incarceration would impose a far more onerous burden on those for whom she cares.

*5 The district court below noted generally that the existence of parental responsibilities is not extraordinary, nor are single parent homes, or the fact that many families cannot rely on family members or close friends to assume custody of their children. Taken individually, any one of these family circumstances is not extraordinary. *See also Brewer*, 899 F.2d at 508 ("Unfortunately, it is not uncommon for innocent young family members, including children to suffer as a result of a parent's incarceration.") (internal quotation marks, punctuation and citation omitted). The court found in Marine's case, however, that all of these conditions existed simultaneously; they "coalesced" to render her situation extraordinary: (1) she takes care of her own three biological children aged 17, 11 and seven, [FN1] and her infant granddaughter; (2) she is effectively a single parent because her husband was sentenced to almost five years in prison; and (3) there are no family or friends to care

Slip Copy
 (Cite as: 2004 WL 771851 (6th Cir.(Ohio)))

Page 5

for her children, thereby rendering it likely that they would end up in foster care.

In essence, the district court found Marine to be "irreplaceable," a circumstance that other courts have found justifies a downward departure based on family ties. See *United States v. Leon*, 341 F.3d 928, 931-33 (9th Cir.2003) (observing that "[p]ermissible downward departures generally involve situations where the defendant is an *irreplaceable* caretaker of children, elderly, and/or seriously ill family members, and the extent of the departure appropriately serves to protect those family members from the impacts of the defendant's prolonged incarceration"; affirming downward departure under *de novo* standard because of the defendant's indispensable role in caring for his wife) (emphasis in original; citations omitted); *United States v. Pereira*, 272 F.3d 76, 80-83 (1st Cir.2001) (noting that a district court must find that defendant is "irreplaceable" before granting downward departure under Guidelines based on discouraged factor of family obligations) (citations omitted). We agree with the district court that the extraordinary facts of this case showed Marine to be an irreplaceable caretaker of her children. Accordingly, the district court's downward departure based on Marine's family ties and responsibilities was justified. 18 U.S.C. § 3742(e).

While Judge Suhrheinrich's dissent raises several forceful questions about our disposition of this case, they are not without answers. For one, to say that a downward departure in this area requires extraordinary circumstances, as we agree, is not to say that those circumstances may never exist. They can, and they do in this case. For another, any departure in this area is susceptible to a divide-and-conquer response in which each individual factor is open to criticism as a ground for departure by itself. The point here, as the district court correctly recognized, is that this aggregation of circumstances presents the rare instance where the constellation of pertinent factors warrants a departure. For still another reason, the case law supporting this outcome is not as anemic as the dissent suggests. See e.g., *United States v. Aguirre*, 214 F.3d 1122 (9th Cir.2000) (affirming district court's downward departure for defendant whose incarceration would leave her eight year-old without a custodial parent); *United States v. Gauvin*, 173 F.3d 798 (10th Cir.1999) (affirming district court's downward departure for defendant who was

primary supporter of four young children); *United States v. Johnson*, 964 F.2d 124 (2d Cir.1992) (affirming district court's downward departure for defendant who was solely responsible for raising her three young children- including an infant-and the young child of her institutionalized daughter); *United States v. Alba*, 933 F.2d 1117 (2d Cir.1991) (affirming district court's downward departure for defendant who had responsibility for two daughters-four and eleven years in age-a disabled father and a paternal grandmother).

*6 The dissent also creates the impression that the our holding today runs contrary to case law in this circuit. All of the cases cited by the dissent, however, are manifestly distinguishable on their facts or otherwise consistent with our disposition of this case. First, Marine's family ties and responsibilities are far more compelling than those of the defendant in *Reed*, *supra*. See discussion, *supra*.

Second, the opinion in *United States v. Calhoun*, 49 F.3d 231 (6th Cir.1995) fails to indicate whether the defendant in that case was the sole custodian of the child at issue or whether there was another potential family member who was willing and able to care for the child. In Marine's case. these facts were critical to the district court's downward departure.

Third, the two defendants in *United States v. Brewer*, 899 F.2d 503 (6th Cir.1990) had "stable family relationships" and their spouses were "gainfully employed." *Id.* at 508. Thus, there was an alternative source of support and care for the defendants' children. Marine's situation is not at all comparable.

Fourth, the opinion in *United States v. Sailes*, 872 F.2d 735 (6th Cir.1989) fails to indicate whether the defendant in that case was the sole custodian of the children at issue or whether there was another potential family member who was willing and able to care for them. In fact, there is some suggestion that there may have been another caretaker available. At sentencing, the defendant asked for a sentence reduction because she "really need[ed] to help take care of [her] kids." *Id.* at 737 (emphasis added). In addition, the district court refused to depart downward because the defendant had involved one of her children in her criminal activity, the distribution of drugs. This fact supported the

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

court's finding that the development of her children might be facilitated by their removal from her direct influence. *Id.* at 739. There were no such findings in Marine's case.

Last, the opinions in *United States v. Tocco*, 200 F.3d 401 (6th Cir.2000) ("*Tocco I*") and *United States v. Tocco*, 306 F.3d 279 (6th Cir.2002) ("*Tocco II*") offer little direction regarding the disposition of Marine's case. *Tocco I* reached no conclusion as to the propriety of a downward departure in that case, instead instructing the district court on remand to examine the defendant's personal involvement in the care of his wife and family and to consider whether his wife "ha[d] alternative sources of support other than her husband." *Tocco I*, 200 F.3d at 435-36. Arguably, this language suggests that a district court should look to the existence of alternate sources of childcare for a defendant like Marine who is facing incarceration. This is exactly what the district court did in Marine's case. On remand after *Tocco I*, the district court found as a factual matter that a departure based on the defendant's wife's health would not be appropriate. *Tocco II*, 306 F.3d at 294-95. This Court never reviewed the substance of that finding on appeal.*Id.* at 295. Thus, *Tocco II* has nothing at all to say on the issue of downward departures based on family ties and responsibilities.

III

*7 For the foregoing reasons, the district court's sentence imposed on Defendant Lisa Lerma Marine is hereby AFFIRMED.

SUHRHEINRICH, Circuit Judge, dissenting.

SUHRHEINRICH, Circuit Judge.

Because the facts of this case do not support a downward departure for family ties and responsibilities under the clear rule of the Guideline and this Circuit's precedent, I DISSENT.

I.

The Guideline clearly makes departure for "family ties and responsibilities" a discouraged factor. U.S.S.G. § 5H1.6. It is only appropriate in "exceptional cases" and if "present to an

exceptional degree." U.S.S.G. § 5K2.0(a)(4) and cmt. (3)(C). Given this explicit direction, this Circuit has consistently refused to grant a downward departure based on a parent's obligation to a child because there is nothing extraordinary about such obligations. See *United States v. Reed*, 264 F.3d 640 (6th Cir.2001) (reversing district court's downward departure to the aunt of five children who contributed significantly to the development and upbringing of the children); *United States v. Calhoun*, 49 F.3d 231, 237 (6th Cir.1995) (affirming district court's refusal to depart downward for mother who was sentenced to 87 months in prison because the fact that defendant's fourteen-month-old "infant may suffer does not give rise to an extraordinary circumstance that should be reflected in sentencing"); *United States v. Brewer*, 899 F.2d 503, 508-09 (6th Cir.1990) (reversing district court's downward departure for two married mothers convicted of embezzlement because mothers failed to explain how their family circumstances involving young children distinguished them from other embezzlers who have family responsibilities); *United States v. Sailes*, 872 F.2d 735, 739 (6th Cir.1989) (affirming district court's refusal to depart downward for mother of seven children who was convicted of drug crime and sentenced to 45 months in prison).

This Court has never actually upheld a district court's downward departure for family ties and responsibilities. [FN1] The only time this Court has even entertained the possibility that extraordinary family circumstances could amount to an exceptional case warranting a departure is when the defendant is *personally required* to take care of a seriously ill spouse or family member. *United States v. Tocco*, 200 F.3d 401, 435-36 (6th Cir.2000). In *Tocco*, the district court granted a downward departure four levels for overwhelming community service, four levels for age and debilitating health and two levels based on Tocco's family ties, namely his wife's health, for a total departure of ten levels. With regard to family ties, the district court found that Tocco needed to be with his wife, who was ill with cancer and emphysema and had recently undergone surgery. Tocco and his wife had eight children, all of whom were successful and supportive. The Government appealed, arguing that the district court erred in departing downward ten levels.

*8 This Court stated that family circumstances may

justify a departure only in exceptional cases and that "usually, this factor is taken into account when a defendant *personally* is required to take care of a seriously ill spouse or family member." *Id.* at 435. In so stating, we noted with approval the discussion regarding the type of family circumstances necessary for such a departure found in *United States v. Haverstat*, 22 F.3d 790 (8th Cir.1994). *See Tocco*, 200 F.3d at 435. In *Haverstat*, the district court granted a five-level downward departure based on four factors, including exceptional family circumstances. *Haverstat*, 22 F.3d at 796-98. The defendant's wife had a serious psychological illness, which had potentially life threatening effects, and the defendant was an "irreplaceable" part of the treating physicians treatment plan for her. [FN2] *Haverstat*, 22 F.3d at 797.

The *Tocco* Court ultimately remanded the case to the district court to determine specifically the extent of the defendant's personal involvement in his wife's care and whether his wife had alternate sources of support. *Tocco*, 200 F.3d 435-36. The Court noted the fact that *Tocco* and his wife had eight grown children, seven of whom lived in the area and one of whom was a doctor. *Id.* at 436. On remand, the district court refused to grant a downward departure, finding that the health needs of the defendant's wife were not so extraordinary as to warrant a departure. *See United States v. Tocco*, 306 F.3d 279, 294 (6th Cir.2002). On a second appeal, we found the district court's denial of the departure not cognizable. *Id.* at 295.

II.

There are no facts in this case to support a downward departure under this case law. Marine presented evidence that she had three minor children, all students, that she and her husband were both subject to incarceration, leaving the children with no custodial parent and a total loss of family financial support, that she had no extended family support available, and that incarceration would result in the loss of the care provider for her infant granddaughter. In granting the departure, the district court identified three factors as warranting a downward departure. First, Marine cares for her three biological children, aged 17, 14 and 11, as well as her infant granddaughter. Second, Marine's husband was sentenced to almost five years in prison, making her effectively a single parent. Third, Marine has no family or friends with whom

she can leave her children, making it likely that they would be placed in foster care.

Both the district court and the majority realize that each of these factors is not extraordinary. Maj. Op. at 8. In fact, these are the identical trials facing virtually every defendant-parent who is sentenced under the Guidelines. The plain fact is that innocent young children suffer when a parent is incarcerated. Nevertheless, the Sentencing Commission decided not to make parental status a factor for downward departure. To get around this obvious impediment, the majority agrees with the district court's finding that "in Marine's case ... all of these conditions existed simultaneously; they 'coalesced' to render her situation extraordinary." *Id.* In short, the majority agrees with the "district court that the extraordinary facts of this case showed Marine to be an irreplaceable caretaker of her children." *Id.* at 9.

*9 I, for one, am quite at a loss to see how the factors listed by the majority: "(1) [Marine] takes care of her own three biological children aged 17, 11 and seven [sic], [FN3] and her infant granddaughter; (2) she is effectively a single parent because her husband was sentenced to almost five years in prison; and (3) there are no family or friends to care for her children, thereby rendering it likely that they would end up in foster care" are either extraordinary or make Marine irreplaceable. Maj. Op. at 8-9. The coalescing of these factors cannot be extraordinary since it is impossible to view them independently of one another. Indeed, parenthood is inescapably joined to the existence of children. Thus, factor number two cannot exist separately from factor number one. Additionally, the threat of foster care cannot possibly exist if one does not have children, making factor number three dependant on factor number one as well. Furthermore, in most cases in which foster care is a threat, the defendant will be a single parent, uniting all three circumstances. If this is extraordinary, any single parent sentenced to prison would be entitled to a downward departure for family ties and circumstances simply because a child or children would need foster care.

I am unaware of any authority, however, that supports the proposition that foster care is extraordinary. There is nothing intrinsically evil in foster care, especially when contrasted with the reality that the children of criminal parents otherwise live in a criminal environment, as in this

case. In fact, over half a million children are in foster care every year. The possibility of foster care cannot be so extraordinary that it would cause a case to fall outside of the heartland of factors considered by the Sentencing Commission when the Sentencing Guidelines were drafted. It is not for the court to decide that foster care is a greater evil for children than residing in the custody of delinquent and criminal minded parents.

Thus the only possible remaining "extraordinary" factor is the number of children involved. Again, case law is against departure on this ground. In *United States v. Sailes*, 872 F.2d 735 (6th Cir.1989), we upheld the district court's denial of a downward departure to a mother of seven. In *Sailes*, a case similar to the instant case, Mrs. Sailes aided and abetted her eighteen- year-old son, her eldest child, in his drug selling activities. The Court denied Mrs. Sailes' request for a downward departure so that she could care for her six minor children. *Id.* at 739. In contrast, Marine is the mother of only three children, none of whom is very young.

Furthermore, like Mrs. Sailes, Marine is not an exemplary mother. She engaged in drug trafficking with her husband and numerous relatives, thereby exposing her children to criminal activity and the threat of having both of their parents incarcerated. As in *Sailes*, there is no evidence to suppose that the children would suffer from a separation from their mother, in fact they might even prosper.

*10 Other circuits have similarly found circumstances like Marine's to be unextraordinary. See *United States v. Sweeting*, 213 F.3d 95 (3d Cir.2000) (holding that the district court erred in granting a downward departure based on extraordinary family circumstances to a single mother of five children, one of whom had a substantial neurological impairment); *United States v. Headley*, 923 F.2d 1079 (3d Cir.1991) (holding that the district court did not err in denying a downward departure to a single mother of five minor children); *United States v. Brand*, 907 F.2d 31 (4th Cir.1990) (holding that the district court erred in granting a downward departure to the sole custodial parent of two minor children, ages seven and one and one-half, when the mother was separated from her husband and the children would have to be placed in foster care).

A sole, custodial parent is not a rarity in today's society, and imprisoning such a parent will by

definition separate the parent from the children. It is apparent that in many cases the other parent may be unable or unwilling to care for the children, and that the children will have to live with relatives, friends, or even in foster homes.... '[The defendant] has shown nothing more than that which innumerable defendants could no doubt establish: namely, that the imposition of prison sentences normally disrupts spousal and parental relationships....'

Id. at 33 (quoting *United States v. Daly*, 883 F.2d 313, 319 (4th Cir.1989)).

Additionally, the majority finds that the facts of this case show Marine to be an irreplaceable caretaker of her children, but the majority does not explain why this is so. The word "irreplaceable" means impossible to replace, not merely difficult. There is no evidence to suggest that Marine is impossible to replace. I agree with the majority that other courts have found a downward departure for family ties justified when the defendant is "irreplaceable." Maj. Op. at 9. However, even the cases cited by the majority that support this principle do not support the finding that Marine is "irreplaceable."

In *United States v. Leon*, 341 F.3d 928 (9th Cir.2003), which the majority cites, the court granted a downward departure based upon Mrs. Leon's poor emotional and physical health in conjunction with a psychologist's report that "Mrs. Leon would be at risk of committing suicide if she were to lose her husband due to death or incarceration." *Id.* at 932. The gravity of the consequences to Mrs. Leon, in the event that she committed suicide, made the family circumstances in that case extraordinary and the defendant irreplaceable. No similarly grave circumstances exist here.

Interestingly, the majority also cites *United States v. Pereira*, 272 F.3d 76 (1st Cir.2001), in support of the proposition that downward departures are appropriate when the defendant is irreplaceable. In *Pereira*, the district court granted a downward departure based upon the extensive care that the defendant provided to his elderly and disabled parents. In reversing the district court, the First Circuit engaged in a four page analysis of the circumstances necessary for downward departure. *Id.* at 80-83. After citing a litany of cases in which the district courts' grants of downward departures

were reversed, the Court stated "[c]onsidering the immense hardships that fall within the "heartland," it is difficult to conclude that Pereira's circumstances fall outside of it." *Id.* at 81. The Court noted that the "extensive care that Pereira provides his parents is no more, and likely less, time-consuming than the care required by young children with neurological deficiencies." *Id.* The Court referenced *United States v. Rybicki*, 96 F.3d 754 (4th Cir.1996) [FN4] and *United States v. Sweeting*, 213 F.3d 95 (3d Cir.2000) [FN5] in which departures were denied to parents of children with neurological deficiencies. The Court also noted the likelihood that Pereira's parents would be unable to continue living independently if he were incarcerated and would need to move in with one of their children or become dependent upon an assisted living facility or home nursing. *Pereira*, 272 F.3d at 82. Nevertheless, the Court noted that there were feasible alternatives of care relatively comparable to that provided by the defendant, including the possibilities of home nursing and sibling assistance. *Id.* at 83. Therefore, the defendant was not irreplaceable.

*11 The majority does not attempt either to relate or to distinguish the cited cases. In fact, the majority offers no reason at all to explain why Marine is irreplaceable to her children. Specifically, the majority does not explain why foster care is not a feasible alternative. Neither does the majority explain how the circumstances of this case differ from the countless cases, with substantially similar circumstances, in which a departure was denied.

Instead, the majority seeks to justify its conclusion that the facts of this case warrant a downward departure by comparing this case to *Reed, supra*. In *Reed*, the district court granted a thirteen-level downward departure based on the fact that Reed had assumed a significant role in the upbringing of her five nieces and nephews. *Reed*, 264 F.3d at 653. The Government appealed, arguing that Reed was not the legal guardian of the children, her financial support was meager, her time commitment paled in comparison to that of a parent, and that prior to her conviction she spent several months of the year on vacation in Jamaica. *Id.* at 654. This Court reversed the district court's downward departure, agreeing with the Government that Reed's responsibilities for her nieces and nephews fell "far short of that of a typical parent." *Id.* at 655.

The first problem with the majority's strategy, however, is that the facts in *Reed* did not justify a departure. That the facts of this case are stronger than in *Reed* does not indicate that a downward departure is warranted. The majority's analogy would be appropriate if the departure in *Reed* had been affirmed; but the fact that Marine's circumstances are stronger than circumstances in which we denied departure does not lend credibility to the departure in this case. It does not necessarily follow that because the facts of this case are stronger than in *Reed* a case for downward departure is made; Marines' circumstances must still exceed the "heartland" of the Guidelines. As noted above, the majority has not actually shown that Marine is irreplaceable. [FN6] She is, in fact, still within the Guidelines.

Strikingly, even the district court implicitly acknowledged that the family circumstances in this case were not truly extraordinary. In a soliloquy the district court stated

I'm going further afield than usual because it is difficult to perceive what our society is doing as a result of these drug crimes, but it is also always true that the families are the people who suffer, and the question before this Court is can we do anything to prevent the disintegration of a family beyond that which has already been suffered. Can we find these circumstances so extraordinary to be outside of the heartland contemplated by the guidelines and frowned upon but not prohibited from consideration by 5(h)1.6 [sic] of the guidelines.

....

It is my conclusion that the circumstances coalescing in this case do, in fact, justify a downward departure, not because of the defendant but because of the children in this case and the responsibility of the defendant in caring for those children.

*12 (J.A. at 159).

The Third Circuit found similar remarks unacceptable in *Sweeting, supra*. In *Sweeting*, the district court stated:

It is a breakdown in the family, a breakdown that is all too common. And we collectively, as a society, should do what we can to support the family and to sometimes take--you can call it a risk or make an investment in a decision that supports the family. And I have decided in this case that I will make that investment collectively

on behalf of society that invests in me the discretionary authority to depart downward based upon extraordinary circumstances.

Sweeting, 213 F.3d at 101. The problem with both district courts' assessments, as recognized by the Third Circuit, is that "[d]isruptions of the defendant's life, and the concomitant difficulties for those who depend on the defendant, are inherent in the punishment of incarceration. Disintegration of family life in most cases is not enough to warrant departures." *Id.* at 102 (quoting *United States v. Gaskill*, 991 F.2d 82, 85 (3d Cir.1993)). Marine has simply not produced any evidence of circumstances even remotely extraordinary to justify a departure.

The error of granting a downward departure in this case is compounded by the fact that, even if the circumstances were extraordinary, the downward departure granted would be inappropriate because a departure under § 5H1.6 for care or support must "effectively address the loss of caretaking or financial support." U.S.S.G. § 5H1.6 cmt. 1(B)(iv). At the time of sentencing, Marine had three children ages 17, 14 and 11 and a nine-month-old granddaughter. The downward departure was granted based, in part, upon the fact that Marine was irreplaceable in that she cared for her granddaughter, allowing her daughter to complete high school. Since the reduced sentence still required Marine to serve thirty months, by the time she completed the sentence, her daughter would be nineteen or twenty and would have graduated from high school, the infant would be at least three years old, and the other children would be well into their teenage years. Thus, the reduced sentence does not even address the caretaking and support circumstances for which it was granted.

In its ultimate paragraph, the majority suggests that a "divide and conquer response" is inappropriate because in this case the "aggregation of circumstances, presents the rare instance where the constellation of pertinent factors warrants a departure." Yet the majority fails to explain *how* nought plus nought equals one. The majority also defends its decision with "case law supporting this outcome." The problem with this support is that it comes from other circuits, and there is case law in this Circuit to the contrary, namely *Reed, supra*; *Calhoun, supra*; *Brewer, supra*; *Sailes, supra*; and *Tocco, supra*.

The majority attempts to distinguish this precedent,

but the attempt merely illuminates the fact that the majority has not explained how Marine's circumstances are extraordinary. First, as previously stated, the fact that Marine's circumstances are more compelling than the circumstances in this Circuit's precedent does not, of itself, prove that her circumstances are extraordinary. Second, the majority's attempt to distinguish *Calhoun, Brewer* and *Sailes* on the basis that the defendants in those cases had, or may have had, family members with whom to leave their children fails because there is no indication that the departures in those cases would have been granted had the defendants been without extended family support.

*13 In *Brewer*, the Court stated that the fact that innocent children may suffer is not uncommon. *Brewer*, 899 F.2d at 508. Contrary to the majority's inference, the Court did not rely on the fact that the defendants had "stable family relationships" and "gainfully employed spouses" in denying the departure. In fact, the Court stated

The district court failed to point out why the defendants' community support or family ties were "substantially in excess" of those generally involved in other ... cases ... The defendants have stable family relationships, had good jobs at the bank, their spouses were gainfully employed, and they had no financial difficulties which they claimed justified them in any way in committing this serious economic crime. Many [criminals] have long tenured employment, enjoy community support, have families to raise and support, or other family responsibilities. We have serious doubt that these factors are sufficiently unusual to warrant departure.

Id. (citation and quotation marks omitted). This statement does not justify a legal conclusion to the effect that lack of family support to care for children justifies a downward departure. Similarly, in *Calhoun* the Court again stated that "[the Guidelines, right or wrong, contemplate that innocent people may suffer as a result of a defendant's incarceration.... That Calhoun's infant may suffer does not give rise to an extraordinary circumstance that should be reflected in sentencing." *Calhoun*, 49 F.3d at 237.

As the majority notes, the opinions in *Calhoun* and *Sailes* fail to reference whether there were means of alternate care, but the fact that in these cases whether the defendant was the sole custodian or had alternate means of support is not mentioned in the

Slip Copy
(Cite as: 2004 WL 771851 (6th Cir.(Ohio)))

Page 11

analysis only implies that it is not particularly relevant. In short, the majority has still not addressed how Marine is irreplaceable or how the possibility of foster care transports this case into the realm of the extraordinary.

For all of the foregoing reasons, I respectfully DISSENT.

FN1. As pointed out by the dissent, the actual age of Marine's children at the time of her sentencing appears to have been 17, 14 and 11.

FN1. In *United States v. McKelvey*, 7 F.3d 236, 1993 WL 339704 (6th Cir. Sep.01, 1993) a downward departure was granted based on a totality of circumstances including the defendant's age, his health and his family responsibilities, which included caring for two ill adults and a minor.

FN2. The Eighth Circuit found that three of the four bases for departure were impermissible and remanded the case to the district court because the family circumstances, although a permissible basis for departure, did not justify the magnitude of the departure. *Haverstat*, 22 F.3d at 798.

FN3. The ages of the children were 17, 14, and 11.

FN4. In *United States v. Rybicki*, 96 F.3d 754 (4th Cir.1996), the Court reversed a downward departure granted to the defendant who cared for his nine-year-old son with neurological impairment and his wife with fragile mental health.

FN5. In *United States v. Sweeting*, 213 F.3d 95 (3d Cir.2000), the Court reversed a downward departure granted to a single mother of five, one of whom had a serious neurological impairment.

FN6. In fact, it is obvious that Marine is not an irreplaceable caretaker of her children since she was incarcerated for 30 months during which time her children must have had alternate means of care and support.

2004 WL 771851 (6th Cir.(Ohio))

END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works