
FEDERAL PUBLIC DEFENDER REPORT

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STATE VS. FEDERAL SHOCK CAMP PROGRAMS

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"I'm shocked, Rick, shocked . . ." Casablanca

Eligibility requirements for admission to state and federal intensive confinement centers ("shock camps") differ in some important respects. The differences matter when a defendant may choose between satisfying a state charge with a federal plea or visa versa, and where a defendant will receive both a state and federal sentence and could possibly be eligible for shock camp on either.

STATE SHOCK CAMP

Regulations: Corrections Law §§ 865-867; 7 NYCRR §§ 1800.1-10

Purpose: To reduce prison bed requirements by releasing specially selected eligible prisoners who complete a program of rigorous discipline and labor earlier than their court-imposed minimum sentence without compromising community protection.¹

Eligibility:

- 16-39 years old²
- Within 3 years of release
- Not be convicted of murder, manslaughter, any other A-1 or violent felony, any sex offense, escape or any absconding offense³

Program features: Similar to those for federal shock camp, discussed below.⁴

Program size: DOCS has four shock facilities with a total of 1,459 beds; 1,290 male, 169 female, and 222 beds available for orientation and screening.

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FEDERAL SHOCK⁵ CAMP

Regulations: Bureau of Prisons Program Statement (PS) 5390.08; 28 CFR § 524.30-33; *see also*, PS 5100.06 (Security Designation and Custody Classification) and PS 5162.04 (Categorization of Offenses).⁶

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Purpose: To promote personal development, self-control, and discipline by combining features of a military boot camp with the traditional correctional values of the Bureau of Prisons, followed by extended participation in community-based programs.

Program features:⁷

- strict discipline and a daily regimen of physical conditioning
- military drill and ceremony
- labor-intensive work assignments
- adult literacy program vocational training
- drug and alcohol counseling
- stress management programs⁸
- life-coping skills
- parenting programs
- positive personal attitude and self-esteem program
- family budgeting
- nutritional information
- other programs consistent with a “total wellness” concept
- no radios, little TV⁹
- a 17-hour daily, six-day work week, no performance pay
- participation is voluntary

1999 updates: Placement for Drug Abuse Program grad.s changed to insure that inmates do not receive dual benefits for completing DAP and ICC program; eligibility criteria clarified.

Eligibility:¹⁰

- sentence: more than 12 but not more than 30 months¹¹ (direct placement to ICC)

- sentence: more than 30 but not more than 60 months (redesignated for ICC placement when within 24 months of release of otherwise qualified)¹²
- first period of incarceration or a minor history of prior incarcerations¹³
- not serving a term of imprisonment for a crime of violence or felony offense that (a) has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or (b) that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device)¹⁴, or (c) that by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or (d) that by its nature or conduct involves sexual abuse offenses committed upon children¹⁵
- appropriate for housing in minimum security¹⁶
- physically and mentally capable of participating in the program¹⁷
- no pending charges or other detainers¹⁸

Policy statement: Ordinarily, priority placement consideration will be given to eligible inmates who pose a greater risk of re-involvement with criminal activity. Preference is given to those under 36 years of age. Inmates who, by virtue of their lack of program needs, do not require the intensive specialized programs offered at an ICC ordinarily are not accepted for ICC placement. “Thus, inmates demonstrating a stable employment/educational/military history, etc., will not ordinarily be approved for placement in the ICC, as the program would not benefit such individuals.”

DISCUSSION

In the election of state vs. federal sentence scenario, appreciate the different focus of state and federal shock camps. For example, an inmate over 40 will not be eligible for state shock camp, but could be accepted in federal shock camp. If a defendant has a stable work history, military experience, and higher

education (i.e., suffers from a “lack of program needs”) while not automatically barred from federal shock camp, he will be less likely to be offered the chance to go; state shock camp is more willing to accept those with limited program needs. It’s best to speak with classification personnel prior to sentencing.

May a defendant with both state and federal sentences, either of which could qualify for shock camp treatment, go to either state or federal shock camp? The answer, a resounding “maybe” requires more explanation than one might expect.

If the state and federal sentences are consecutive, and the federal sentence is to be served first, an inmate will not be permitted to attend the federal shock camp but could go to the state shock camp. This is so because a state sentence of incarceration qualifies as a “detainer” (which would necessarily preclude a defendant’s

release from the shock portion of the program to the community-based portion of the program until the state sentence is served – if a federal inmate cannot be immediately released after the shock portion of the program to the next phase of the program, they are not eligible for shock). If, when the defendant first becomes a guest of DOCS he has less than 3 years left on his minimum sentence (and assuming he remains otherwise qualified - i.e., the federal sentence was not imposed for an offense that would preclude state shock camp) he can participate in state shock camp.

If the state sentence is to be served first, the same is true, unless he is offered the opportunity to participate in the state shock camp and does, as a prior shock camp sentence disqualifies one from federal shock camp. How could this happen? Defendant gets a state sentence of 2-6, a consecutive federal sentence of 18 months, and 6 months local time credit toward the federal sentence - his date of release to parole, at least on paper is three years or less from his in-date with DOCS, so he’s time-qualified for state shock. If he goes to state shock camp he won’t be offered federal shock camp, although time-qualified for it. If he elects not to go

to state shock camp, he won’t go to federal shock camp anyway, unless BOP deems his 2-6 sentence a “minor history of incarceration” and the sentence is not for a disqualifying offense, and all the other stars line up.

What’s wrong with the example above? Well, maybe lots of things, but one compound question you might be asking, and which we’ll limit this discussion to is: “How did the defendant get six months of time credit on his federal sentence but serve his state sentence first? Doesn’t pre-conviction federal time credit suggest that defendant was subject to primary federal

“Whichever sovereign takes a defendant into custody first has primary jurisdiction, and retains primary jurisdiction (regardless of transfers to other jurisdictions for prosecution) until the defendant is released from that sovereign’s custody by bail release, dismissal of the charges, parole release, or expiration of sentence. “

jurisdiction and therefore would serve his federal sentence first?” Everybody who was asked that question, take the rest of the day off. Those who weren’t, stick around while we briefly digress, not because we want to but because we must, into the morass that is primary jurisdiction, a subject which makes an

analysis of the Rule Against Perpetuities look like child’s play.¹⁹

Here, somewhat oversimplified, are the rules of primary jurisdiction and concurrent or consecutive sentencing necessary to answer our shock camp questions.²⁰

Whichever sovereign takes a defendant into custody first has primary jurisdiction, and retains primary jurisdiction (regardless of transfers to other jurisdictions for prosecution) until the defendant is released from that sovereign’s custody by bail release, dismissal of the charges, parole release, or expiration of sentence. Primary jurisdiction is not affected by the order in which state and federal sentences are imposed.

Where sentences are imposed by state and federal authorities, the sentence imposed by the sovereign with primary jurisdiction is served first. Insuring concurrent sentencing can be tricky: if the federal judgment and commitment order is silent and if the state authorities have primary jurisdiction over the defendant, the BOP presumes that the federal sentence runs consecutively to the state sentence,

regardless of which sentence was imposed first. Although a federal judge may order a federal sentence to be served concurrently with a state sentence, the BOP position is that “there is some question” whether the federal judge can order a federal sentence to be served concurrently with a state sentence that is not yet imposed.

A federal sentence commences when the defendant is received by the Bureau of Prisons for service of his federal sentence. A federal sentence is imposed on a defendant in state custody, the federal sentence may commence when (and if) the Bureau of Prisons agrees to designate the state facility for service of the federal sentence. Otherwise, a defendant in state custody remains in state custody, and his federal sentence does not begin to run (i.e., no federal time credit) until the state authorities relinquish the defendant upon satisfaction of the state obligation.

He also remains in a state facility. The primary custodian is responsible for the custody of the defendant, until primary jurisdiction is relinquished, therefore a defendant in primary state custody must serve his state sentence (with which a federal sentence could be running concurrently) in a state facility.

O.K., breathe. What does all this mean? To insure a concurrent federal sentence, you want the state sentence imposed first. If the goal is to insure primary federal jurisdiction, the federal authorities must take custody of the defendant first (assuming a choice – the issue of primary jurisdiction is decided for you when defendant has remained in continuous custody since the date of arrest – whoever arrested him first retains primary jurisdiction). To insure both a concurrent sentence and primary federal jurisdiction, you want defendant sentenced by the state first, but taken into federal custody first.

How does this work in practice? Recall the 40-year-old defendant alluded to above. Suppose the following: 2 sentences, a state sentence of 1-3, a federal sentence of 60 months, neither for a shock camp ineligible offense. Defendant is held in primary state custody. The state sentence is imposed first. The federal sentence is thereafter imposed and ordered to run concurrent with the state sentence. Because the defendant is in primary state custody he will stay in state custody and serve his time in a state facility. Because he is 40, he will not go to state shock camp. He is conditionally released after two

years and goes to a federal prison with three years left on his federal sentence. He could go to federal shock camp at that point.

If, on the other hand, the defendant is in primary federal custody, he will serve his time in a federal facility and could go to federal shock camp, but only once released from his state sentence, which might not be until he C.R.s at two years, but might be at his minimum, since he’s not getting out of custody at that point but continuing with his federal sentence, hopefully in shock camp, saving a year over the “state-first” scenario above.

A little research and careful planning can, at times, result a time savings to your client, or an opportunity to participate in a shock camp program that would not otherwise exist.

ENDNOTES

1. NYS Division for Criminal Justice Services policy statement. Annual evaluations submitted to the Legislature since 1988 indicate that Shock graduates are as successful as, or more successful than similar offenders, despite their significantly shorter periods of incarceration. Two years after release, 75% of the Shock graduates remained in the community; the other 25% make our acquaintance. For more information, see the 12th Annual Shock Report to the Legislature.
2. Ever forward thinking, the NYS legislature apparently considered the possibility that some defendants might resort to time travel or volunteer for pre-offense incarceration in order to qualify for shock camp, as Corrections Law § 865 provides that an eligible defendant must have committed their offense between the ages of 16 and 40, but must not have reached their 40th birthday prior to admission to the shock camp program.
3. This applies to the present as well as prior convictions. These exclusions necessarily mean that an eligible inmate will have an indeterminate sentence with a minimum of no more than three years.
4. Not surprising, as virtually all “shock camp” programs employ a National Institute of Justice model for shock and post-shock programing.

5. First, don't say "shock" under pain of being immediately corrected by correctional facility employees - it's "intensive confinement" to you, bub.

6. Available at www.bop.gov/ - click on Inmate Info., then Programs and Services, then click on any of the highlighted links to get a list of the program statements.

7. Not a comprehensive review of the procedures following program admission, discipline, release from custody and subsequent community based confinement; for a comprehensive treatment of post-admission procedures, see PS 5390.08

8. Provide strategies to assist inmates in dealing with bullets 1 and 2 above?

9. See, § 524.32: "An eligible inmate who volunteers for participation in an institution-based intensive confinement center program must agree to forego opportunities which may be otherwise available to inmates in Bureau institutions. Opportunities that may be affected include, but are not limited to, visitation, telephone use, legal research time, religious practices, commissary, smoking, and grooming preferences." How Rastafarian is your client, really?

10. 28 CFR § 524.31.

11. 18 U.S.C. § 4046.

12. Direct court commitments have priority over institution transfers, (who are placed on a waiting list and accepted into the program sequentially), provided their sentences are within the specified time-frame and bed space is available.

13. Defined according to the "type of prior commitment" category in the Security Designation and Custody Classification Manual, available for your reading enjoyment at www.bop.gov/. This includes no prior shock camp sentences, state or federal.

14. Note that a 2 point weapon enhancement will be considered by BOP when assessing eligibility, even if defendant was not charged with or convicted of a weapons offense.

15. Specifically, see Categorization of Offenses Program Statement Section 6, Offenses Categorized as Crimes of Violence, and Section 7, Offenses That

at the Director's Discretion Shall Preclude an Inmate from Receiving Certain Bureau Program Benefits.

16. Although resisting arrest and misdemeanor promoting prison contraband charges are minor offenses and would not otherwise preclude shock camp participation, they may adversely affect defendant's security classification.

17. According to the program statement, a candidate's medical status is an "extremely important" factor in considering ICC eligibility and placement. The program's "rigorous physical demands ordinarily bar placement of individuals whose medical history may hinder successful program completion." All potential participants are screened medically prior to acceptance into the program.

18. Specifically, if a deportation detainer exists "or is probable," the inmate ordinarily is not a suitable candidate for ICC placement. All other detainers and pending charges must be resolved prior to ICC placement.

19. According to no lesser authority than the Bureau of Prisons website itself, "this is probably the single most confusing and least understood sentencing issue in the Federal system."

20. For a comprehensive treatment, with citations, of the issue of primary custody, including those rules not addressed here (of which there are many) visit the BOP website, cited above.





TRAINING ON ELECTRONIC CASE FILING FOR ATTORNEYS AND LEGAL PROFESSIONALS IS NOW AVAILABLE

Electronic Case Filing is scheduled to begin in the Western District of New York on January 1, 2004. Check out the district court's website (<http://www.nywd.uscourts.gov>) for information on the Electronic Case Filing Program. The clerk's office is offering various training options for attorneys and legal professionals, including demonstration seminars, technical seminars, hands-on training and self-guided training, all of which are fully outlined on the website.

Note, the Federal Public Defender's Office has invited representatives of the clerk's office to provide training to CJA counsel at our upcoming Federal Criminal Defense Practice Fall 2003 seminar. This training seminar will be the same one offered through the clerk's office and will provide

participants with the Court's User Manual, the Administrative Procedures Guide and an Attorney Registration Form. Although attendance at an ECF training seminar is not mandatory, it will provide valuable information including:

- an overview of the benefits of Electronic Case Filing
- a description of the systems requirements
- a demonstration of e-filing in civil and criminal cases
- a discussion on local rules and administrative procedures

The Clerk's Office has developed an extensive list of Frequently Asked Questions (FAQs), which are also available on the court's website. Check these often as they will be regularly updated.

**ATTORNEY GENERAL JOHN ASHCROFT
ISSUES NEW DIRECTIVES TO ALL FEDERAL PROSECUTORS**

The Attorney General has recently issued two widely reported upon and much discussed memoranda, one regarding "Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals" and the other regarding "Department Policy Concerning Charging Criminal Offenses, Dispositions of Charges, and Sentencing." Because of the importance of these memoranda to criminal defense practice, we thought it advisable to publish them in their entirety.



U.S. Department of Justice

*Executive Office for United States Attorneys
Office of the Director*

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JUL 28 2003

MEMORANDUM - Sent via Electronic Mail

TO: ALL UNITED STATES ATTORNEYS
ALL FIRST ASSISTANT UNITED STATES ATTORNEYS
ALL CRIMINAL CHIEFS
ALL CIVIL CHIEFS
ALL APPELLATE CHIEFS
ALL ADMINISTRATIVE OFFICERS

FROM: 
for Guy A. Lewis
Director

SUBJECT: Departmental Guidance on Sentencing Recommendations and Appeals

ACTION REQUIRED: Distribute to all AUSAs, and ensure compliance.

CONTACT PERSON: Robin C. Ashton
Deputy Director
Telephone: (202) 514-2121

Please see the attached memorandum from Attorney General John Ashcroft outlining requirements for all Department of Justice attorneys, pursuant to provisions of the recently enacted PROTECT Act, with respect to sentencing recommendations, sentencing hearings, and sentencing appeals. It is extremely important that all attorneys review the policies and procedures contained therein, and note the attached amendment to the U.S. Attorneys' Manual.


cc: All United States Attorneys' Secretaries



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

July 28, 2003

TO: All Federal Prosecutors

FROM: John Ashcroft
Attorney General 

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 Feeny 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 Feeny 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.

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(l)(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.

PROTECT ACT SUBSTANTIALLY ALTERS AVAILABILITY OF THIRD ACCEPTANCE OF RESPONSIBILITY POINT

One of the most significant changes wrought by the PROTECT Act of 2003 was the amendment of Section 3E1.1 of the Sentencing Guidelines, the "Acceptance of Responsibility" guideline. Prior to amendment, the guideline read as follows:

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

- (1) timely providing complete information to the government concerning his own involvement in the offense; or
- (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,

decrease the offense level by **1** additional level.

The guideline now reads:

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.

- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by 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.

The only change to the Commentary on this guideline was the addition of the following paragraph to Application Note 6:

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. See section 401(g)(2)(B) of Public Law 108-21.

Thus, under the new guideline regime, you can not get a third acceptance point unless the government moves for the additional point.

Our United States Attorney's Office (USAO) has promulgated a policy setting forth when the government will and will not move for the third acceptance point:

Post-April 30, 2003 Offenses and Acceptance of Responsibility

For offenses committed on or after April 30, 2003, a defendant's eligibility for the third level downward adjustment for acceptance of responsibility is governed by the provisions of Guidelines §3E1.1(b). The third level for acceptance may be granted by a court only upon a government motion. The touchstone for the government's motion is that the defendant's timely guilty plea "permit[ed] the government to avoid preparing for trial and permit[ed] the government and the court to allocate their resources efficiently." By the wording of the Guideline, therefore, not only is the avoidance of trial preparation a prerequisite for the third level, but also, both the resources of the government and the court must have been preserved in a meaningful fashion for the defendant to qualify for the third level. With this in mind, and realizing that each case, to a certain extent, must be judged on its own facts, the following is office policy as to when the government will and will not move for the third level:

1. In all cases, a post-indictment plea of guilty following the providing of voluntary discovery by the government (and before the government's response to motions is filed) will qualify a defendant for the third level.
2. In any case in which a motion is filed the determination of which would be dispositive of the case and which requires the holding of a hearing, once the hearing is held, the motion for the third level will not be filed.
3. Where routine, non-complex motion(s) for any type of relief are filed, a plea immediately following the resolution of the motion(s) will qualify for the third level.
4. The filing of a complex series of motions requiring briefing, argument and decision by the court will preclude a motion for the third level.
5. Once the government has begun preparing required pretrial submissions in accordance with the trial court's scheduling order, the motion for the third level will not be made.
6. In a case requiring pretrial preparation by the government in advance of the issuance of the court's scheduling order for trial, the motion for the third level will not be made. In a case where the government must begin trial preparation at any early stage in the case, it is entirely appropriate for counsel for the government to put defense counsel on notice that the government has or will shortly begin trial preparation and that plea agreements accepted after a certain date will not provide for the motion for the third level.
7. In multi-defendant cases, the conduct of each defendant in litigating the case will be looked at individually in determining eligibility for the motion for the third level.

It is within the office's standard plea policy for a plea agreement to provide for the making of the motion for the third level in accordance with the above. Further, a plea agreement which does not provide for the motion for the third level in any case will be reviewed as a standard plea. A plea agreement providing for the motion for the third level contrary to the above will be treated as a non-standard plea.

In response to certain concerns raised by the Federal Public Defender's Office (FPDO) regarding this new policy, the USAO has indicated that:

– the mere fact that the court may order briefing and argument of a motion or set of motions will not necessarily elevate otherwise straightforward and simple motions to a “complex series of motions” precluding a motion for the third point under point 4 of the policy

– AUSAs will operate in good faith and notify defense counsel that actual pretrial preparation will begin shortly, and thus the third point motion will be precluded (see points 5 and 6 of the policy), thereby giving defense counsel time to attempt a final disposition of the case by plea including the government motion for the third point

– the third point motion will be withheld only in cases where a pretrial fact hearing is virtually determinative of the case, e.g., a suppression hearing in a gun case where the gun is the only evidence of the crime charged

– even in cases where a suppression hearing is held, compelling reasons for holding the hearing, e.g., a legitimate factual or legal issue regarding the constitutionality of police action, may justify the government's making the motion for the third point after the suppression issue has been decided

Regarding this last issue, the FPDO suggested that the government, not to mention justice itself, is well served by motions to suppress based on police misconduct, as such motions offer a crucial check on police power. Forcing a defendant to have to choose between litigating a constitutional violation and gaining a third point for acceptance of responsibility will likely result in fewer motions being filed and a diluted and ultimately less beneficial defense presence in federal court. The USAO has invited defense counsel to bring to the government's attention any situation where the policy mandates an unjust result.



HIGHLIGHTS OF CHANGES TO AUTHORITY TO DEPART

Effective October 27, 2003

Carmen D. Hernandez
Washington, DC

These changes were adopted by the United States Sentencing Commission on October 8, 2003 to implement the directive to the Commission in section 401(m) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21 (the "PROTECT Act"). They go into effect, subject to technical and conforming changes, on October 27, 2003. These new amendments apply to all cases; more restrictive rules for downward departures in child-related cases went into effect April 30, 2003.

All amendments are subject to the *ex post facto* clause of the United States Constitution, Art. 1, §. 9, cl. 3.

I. AUTHORITY TO DEPART – U.S.S.G. § 5K2.0

This provision was amended in two ways: (1) substantive changes were made that eliminate several existing grounds for downward departures; and (2) technical changes were made redrafting the entire guidelines.

A. Eliminates Grounds – § 5K2.0(d):

Eliminates 5 existing or unmentioned grounds for downward departures; all *prohibited* factors are now collected in this section:

1. acceptance of responsibility;
2. minor role in the offense;
3. gambling addiction; and
4. legally required restitution (e.g., repayment of victims of white collar offenses); and
5. based solely on the existence of a plea agreement.

B. Departure must “advance the objectives set forth in 18 U.S.C. § 3553(a)(2)”

1. Just punishment;
2. Adequate deterrence;

3. Protection of public; and/or
4. Defendant's needed rehabilitation.

C. § 5K2.0(a)(2): Identified and Unidentified Circumstances ⇨ § 5K2 Grounds

1. Departure "may be warranted."

D. § 5K2.0(a)(3): Circumstances present to a degree not adequately considered

1. Available in an exceptional case; and
2. Present to a degree **substantially in excess** or below.

E. § 5K2.0(a)(4): Not Ordinarily Relevant Circumstances ⇨ 5H Offender Characteristics

1. Offender characteristic or other circumstances; and
2. Present to an **exceptional** degree.

F. §5K2.0(c), Multiple Circumstances

Amends this circumstance by bringing it out of the commentary into the body of the policy statement:

a downward departure is available based on a combination of offender characteristics and circumstances, none of which independently is sufficient if each circumstance is present to a "substantial degree" and identified in the guidelines as a permissible ground, even if not ordinarily relevant.

G. §5k2.0(e) – Specific Written Reasons for Departure.

If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those reasons with specificity in the written judgment and commitment order.

II. § 5H1.6, FAMILY TIES AND RESPONSIBILITIES

Adds factors to be considered when granting a downward departure.

A. Requires the court to first consider a non-exhaustive list of circumstances, i.e.,

1. seriousness of offense,
2. involvement of family members in the offense, and
3. danger to family members from offense.

B. Loss of Caretaking or Financial Support

If departure is based on this ground, requires the presence of four additional circumstances:

1. Service of sentence within the range will cause an **extraordinary; substantial and direct loss of essential caretaking or financial support** to the family;
2. for which no effective or ameliorative programs are reasonably available;
3. and where the departure will address the loss of the caretaking or financial support; and
4. departure will **effectively** address the loss.

III. § 5K2.20, Aberrant Behavior

Limits the availability of a downward departures based on this circumstance.

A. If defendant has > 1 CH point; prior felony conviction or "any other significant prior criminal behavior"

1. Prohibits a departure
2. Regardless of "whether the conviction or significant prior criminal behavior is countable under Chapter Four".

B. Safety Valve Defendants:

Amends the commentary so that defendants whose offense of conviction is a "serious drug offense" are precluded from eligibility for an aberrant behavior departure even when they are eligible for the Safety Valve, a circumstance that had previously made them eligible for aberrant behavior departures despite the fact that the offense of conviction was a "serious drug offense."

C. Fraud Schemes:

Adds commentary that states that fraud schemes "generally" would not meet the requirement that conduct not be "repetitious or significant planned behavior."

D. Existing Circumstances:

These new requirements are in addition to the existing restrictions, that prohibit a departure on this ground where

1. the offense involved serious bodily injury or death;
2. the defendant discharged or otherwise used a dangerous weapon;
3. the offense of conviction is a serious drug offense; and
4. the defendant had more than one criminal history point or a prior federal or state felony conviction.

IV. §4A1.3, Criminal History –**A. ACCA defendants –**

Eliminates criminal history downward departures for offenders who are Armed Career Criminals, as defined in USSG § 4B1.4.

B. Repeat Dangerous Sex Offenders, as defined in USSG §4B1.5 –

Eliminates Criminal History Downward Departures for these defendants.

C. Career Offenders –

Limits departures for Career Offenders, as defined in §4B1.1: to a single Criminal History category.

D. Safety Valve Defendants –

Prohibits the use of a criminal history downward departure to qualify a defendant for the application of the "Safety Valve;" a defendant who falls in the category may still receive a criminal history downward departure but does not thereby qualify for the Safety Valve.


E. Floor for Criminal History Departures–

Cannot depart "below the lower limit of the applicable guideline range" for Criminal History category I.

V. §5K3.1, Early Disposition Programs (as directed in section 401(m)(2)(B) of the PROTECT Act).**A. Creates a new downward departure for "Early Disposition Programs"**

not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.





*Have You
Recently
Moved Or
Made A Change?*

If you have an address, phone and/or e-mail change, please send that information to Lisa Raetz immediately, either via fax (585-263-5871) or via e-mail (Lisa.Raetz@fd.org). Lisa maintains the CJA list for the Court as well as our office, and it is vitally important to keep it current. Thank you!

CAN YOU CONTACT A CO-DEFENDANT WITHOUT PERMISSION FROM HIS LAWYER?



You are about to go to trial on a multiple defendant drug conspiracy case. One of your client's co-defendants has pleaded guilty and allocated that he was a member of the conspiracy with your client. Your client insists that you speak with the co-defendant, who has not yet been sentenced and is represented by counsel, claiming that he (the co-defendant) has information relevant to your client's defense at trial. You know you must vigorously represent your client. You also know that if you ask the co-defendant's counsel for permission to speak with his client you will almost certainly be denied permission. Can you speak with the co-defendant without first obtaining permission from his lawyer? In the Southern District of New York you risk being censured if you do.

In In re Chan, 271 F. Supp. 2d 539, 2003 U.S. Dist. LEXIS 11325 (S.D.N.Y. 2003), the Grievance Committee for the Southern District found that attorney Chan violated DR 7-104(a)(1), which states that "During the course of his representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." The Grievance Committee rejected Chan's various explanations for his conduct, including Chan's reliance on the Second Circuit's opinion in Grievance Committee for the Southern District of New York v. Simels, 48 F.3d 640 (2d Cir. 1995).

In Simels the Circuit Court reversed a Grievance Committee censure that interpreted the terms "party" and "matter" in DR 7-104 to include all persons who were involved in the investigation of a crime. In brief, attorney Simels contacted a represented person (and potential co-defendant) without first seeking consent from the witness's lawyer. The Circuit read "party" narrowly in Simels, holding that that term could not reasonably be read to encompass potential parties. The Circuit did not answer the specific question of whether actual co-defendants in a criminal case were parties within the meaning of the disciplinary rule.

The Grievance Committee in Chan answered the question, and held that the rule was violated there because the contacted witness was an actual co-defendant who by definition was a "party" to the proceeding. The Committee recognized the tension between zealous representation, "a matter of constitutional dimension, which warrants giving a criminal defense lawyer the broadest possible range of pre-trial investigation," and the applicability of the no-contact rule, which is merely "a rule of ethics, not law, that had its origins primarily as a rule of professional courtesy." The constitutional dimension notwithstanding, the Committee found that the no-contact rule had several salutary purposes, perhaps the most important being the protection of unsophisticated clients who might not be fully aware of all of the dangers of speaking to counsel, especially in narcotics cases that have "harsh mandatory penalties" and where a "client's unguarded comments in such a situation could rebound seriously to his disadvantage."

Given the fact that many (most?) of our criminal cases here in the Western District involve potential as well as actual co-defendants (not to mention represented witnesses of other stripes), a close reading of Simels, Chan and DR7-104 may be warranted.



FEDERAL CRIMINAL DEFENSE PRACTICE FALL 2003 SEMINAR

Friday, December 5, 2003

8:30 a.m. - 3:30 p.m.

Holiday Inn - Batavia

The Office of the Federal Public Defender for the Western District of New York invites you to attend our semi-annual training seminar on December 5th, 2003.

The Office of the Federal Public Defender for the Western District of New York is pleased to announce the agenda for its Fall Seminar. One of the highlights will be a presentation by the Hon. Richard C. Wesley, United States Circuit Judge for the Second Circuit Court of Appeals, who will give his views on effective appellate advocacy. There will also be important training on the new Electronic Case Filing and Case Management System, which is scheduled to begin January 1, 2004 in our district. Wadie Said will discuss issues facing Arab-Americans and our legal system in this post-9/11 world, and Herb Greenman will review recent important developments in the Second Circuit. Last but certainly not least, Marianne Mariano and Anne Blanchard will present on the several important changes wrought by the Protect Act of 2003, as well as the recent comprehensive amendments to the Sentencing Guidelines.

Attendance at the seminar will be limited to the first 125 paid registrants, with preference given to current members of the CJA Panel. Attendance at the seminar will satisfy the annual continuing legal education requirement for membership on the CJA Panel, as established by the district CJA Plan.

The seminar registration fee is \$50 for current Panel members and applicants for membership. The registration fee for all others is \$125. The registration fee will help to defray the cost of the room, coffee and danish, a buffet luncheon and a complete copy of all seminar materials.

To ensure comfortable seating and ample handout materials for all in attendance, **PLEASE REGISTER NO LATER THAN NOVEMBER 21, 2003.**

The Federal Public Defender's Office for the Western District of New York has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York from May 14, 2001 until May 13, 2004.

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