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 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 occurenc[e]." *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.

cc: The Deputy Attorney General
The Associate Attorney General
The Solicitor General
The Acting Assistant Attorney General, Criminal Division
The Assistant Attorney General, Antitrust Division
The Acting Assistant Attorney General, Civil Rights Division
The Assistant Attorney General, Environment and Natural Resources Division
The Assistant Attorney General, Tax Division
The Assistant Attorney General, Civil Division

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:
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> (1) *Departures that change the "Zone" in the Sentencing Table*: An adverse decision must be reported if the following three criteria are met:
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> (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:
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> (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:
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> (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.