IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 94-1492, 94-1493

UNITED STATES OF AMERICA,
Appellee, Cross-Appellant,

v.

DANIEL MILIKOWSKY,
Defendant-Appellant,
Cross-Appellee,

MACC HOLDING CORP.,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
FOR THE DISTRICT OF CONNECTICUT

# REPLY BRIEF FOR THE UNITED STATES AS CROSS-APPELANT

ANNE K. BINGAMAN
Assistant Attorney General

DIANE P. WOOD
Deputy Assistant Attorney General

JOHN J. POWERS, III
MARION L. JETTON
Attorneys

Department of Justice
Antitrust Division - Rm. 3224
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3680

OF COUNSEL:

PETER J. LEVITAS

Attorney
Department of Justice
Antitrust Division
Washington, D.C. 20001

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

### CASES



### STATUTES, REGULATIONS AND GUIDELINES



### MISCELLANEOUS

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Nos. 94-1450, 94-1492, 94-1493

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UNITED STATES OF AMERICA,
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v.

DANIEL MILIKOWSKY,
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Cross-Appellee,

MACC HOLDING CORP.,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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# REPLY BRIEF FOR THE UNITED STATES AS CROSS-APPELLANT

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In our opening brief as cross-appellant, we asked this Court to vacate the sentence imposed on appellant Daniel Milikowsky ("Milikowsky") and to remand for resentencing. We argued that the district court had erred in departing downward from the applicable Guideline range because of the possible adverse effects of Milikowsky's incarceration on two companies owned by him.

In his brief, Milikowsky argues that his situation was in fact "extraordinary" (D. Reply Br. 12-16, 20-25);[1] that the district court had engaged in a "reasonable exercise of discretion" in departing, to

[1] "D. Reply Br." refers to the Milikowsky's reply brief as appellant and brief as cross-appellee filed in this Court. "JA" refers to the joint appendix filed in this Court. "Gov.Br." refers to the main brief filed by the United States in this Court as appellee and cross-appellant.

which this Court should "defer" (id. at 12, 17, 20); and that, in any event, the United States had waived its challenge to the departure (id. at 18-19). Milikowsky, however, applies the wrong legal standard to review of the sentence, and fails to show why departure was warranted. Further, his claim of waiver is refuted by the record.

1. The United States Properly Objected to the Ground for Departure. Contrary to Milikowsky's claim (D. Reply Br. 18-19), government counsel argued that there was nothing unusual about Milikowsky's case that would justify departure, and clearly objected to any departure based on the possibility that Milikowsky's incarceration would cause his employees to lose their jobs. At sentencing, government counsel, after referring to Milikowsky's claim "that * * * the future of the Jordan employees hangs in the balance" (JA 1782), pointed out that the controlling consideration of the antitrust Guideline is general deterrence. He argued that a departure based on hardship to Milikowsky's employees would undermine that goal. Specifically, counsel stated (JA 1782-1783):

> What message would be sent if the Court were to sentence Mr. Milikowsky to give a departure to sentence him to probation? * * * It's okay to violate the antitrust laws, you won't get sent to prison?
>
> It's okay if you are a small businessman whose very existence may depend on you, the employment of other employees may depend on you, if you violate this antitrust law, you can get probation and you can walk away from this crime with no penalty?

Government counsel later reiterated the government's opposition to departure, including departure based on Milikowsky's "employment situation," stating that such a departure was inappropriate because Milikowsky's case was "typical," and does not fall outside the

heartland of antitrust cases. He explained (JA 1786-1787, emphasis added):

> I suggest to the Court that the appropriate sentence in this case is not a departure. I don't think we've heard anything from [defense counsel] to suggest that a departure is the appropriate way to go for this Court. * * *
>
> He * * * says that either the employment or the family situation of Mr. Milikowsky warrants this Court, places this case in outside the heartland of antitrust cases, and I can suggest to the Court that * * * [Mr. Milikowsky] is almost the typical antitrust defendant.

The government thus clearly stated its opposition to a departure based on the effects of Milikowsky's incarceration on his employees, and gave its reasons. This objection gave the district court ample opportunity to "correct itself and save the need for [appellate] review," United States v. Filker, 972 F.2d 240, 241 (8th Cir. 1992) (citing United States v. Prichett, 898 F.2d 130, 131 (11th Cir. 1990)), and it adequately preserved the matter for review.

2. This Court Reviews De Novo Whether A Particular Factor Can Serve As A Basis For Departure. Milikowsky suggests that this Court should review the district court's decision that a particular circumstance is a basis for departure to determine if it is a "reasonable exercise of discretion" (D. Reply Br. 12), and should "defer" to the district court's assessment that the case presents exceptional circumstances not adequately considered by the Sentencing Commission (id. at 17, 20). Milikowsky quotes United States v. Jagmohan, 909 F.2d 61, 65 (2d Cir. 1990), in support of this standard of deference. That decision, however, expressly states that the standard is de novo review, not deference: "We review de novo a district court's determination that a particular factor was `of a

kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.'" 909 F.2d at 64 (quoting 18 U.S.C. §3553(b)).[2] See also, e.g., United States v. Restrepo, 936 F.2d 661, 666 (2d Cir. 1991).

Thus, the question of whether the Sentencing Commission viewed particular circumstances as the "heartland," to which the Guidelines range should apply, is a question of law for this Court to decide. 909 F.2d at 64. Any factual determinations relevant to that inquiry, such as whether a circumstance differs from the norm, likewise are subject to plenary review.[3]

3. Milikowsky's Circumstances Fell Within the Heartland of Antitrust Offenses. Milikowsky argues (D. Reply Br. 20, 22-25) that, because this Court previously has permitted departures based on the defendant's extraordinary family responsibilities, to avoid harm to

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[2] The partial quotation from Jagmohan on which Milikowsky relies (D. Reply Br. 17, quoting 909 F.2d at 65) contains no reference to deference, and is consistent with a de novo review standard. The sentence reads in full: "In short, we do not view this appeal as presenting an instance in which we should reject the assessment of an experienced district judge that the case presents exceptional circumstances not adequately considered by the Sentencing Commission in formulating the Guidelines." 909 F.2d at 65. Thus, after de novo review of whether "appellee's case [was] sufficiently exceptional to justify departure," this Court affirmed the determination of the district court. 909 F.2d at 65.

[3] Thus, Milikowsky is only partly correct in stating that "whether a departure is warranted depends ultimately on the facts -- and the district court's factual findings are reviewed under the clearly erroneous standard." D. Reply Br. 17. What is reviewed under the clearly erroneous standard is "a district court's factual determination that the factor in question [i]s present" in the particular case. Jagmohan, 909 F.2d at 64. For example, in a case involving severe family hardship, the district court's determination that the alleged hardship in fact exists would be reviewed under the clearly erroneous standard.

dependent family members, it should permit a departure here to avoid possible employee job loss. But we cannot agree that this Court's decisions, authorizing departure based on family responsibilities, see e.g., United States v. Johnson, 964 F.2d 124, 128-130 (2d Cir. 1992); United States v. Alba, 933 F.2d 1117, 1122 (2d Cir. 1991), are relevant in the present case. It is unrealistic to equate children's and employees' helplessness in the face of change, and therefore their need for protection. And it is simply wrong to equate the importance and permanence of family and employment bonds.

Further, decisions approving departure for family circumstances, even in the antitrust context, e.g., United States v. Haversat, 22 F.3d 790, 797 (8th Cir. 1994), only address whether the defendant's particular family responsibilities fell outside the heartland for antitrust defendants.[4] The heartland for family obligations and the heartland for collateral effects on employees are not necessarily the same. This case must be decided on its own facts: do the effects of this employer's incarceration on his employees' continued employment make this a case where "conduct significantly differs from the norm" or is it, instead, one of the "typical cases embodying the conduct that [this] guideline describes." U.S.S.G. Ch.1, Pt. A(4)(b), intro. comment.

Every court of appeals that has considered the question has concluded that the business effects of a white collar offender's

[4] In Haversat, defendant Gibson's responsibilities for his wife, who had "very severe mental health problems" that were "potentially life threatening," was held to constitute a "truly exceptional family circumstance[]," outside the heartland of antitrust cases. 22 F.3d at 797. This case presents no such life-threatening dangers.

incarceration were not a ground for departure, because these effects were not unexpected. See Gov.Br. 43-44 (collecting cases);[5] cf. United States v. Kohlbach, 38 F.3d 832, 838-839 (6th Cir. 1994)("it is usual and ordinary" for high-ranking executives to be involved in community charities and civic organizations; good works are not a basis for departure in white-collar crimes). Indeed, adverse effects on employees are particularly likely where the defendant is the owner or operator of a small business. And there is nothing extraordinary or atypical about the owner or operator of a small business being a defendant in an antitrust prosecution. See, e.g., Report of the

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[5] Milikowsky unsuccessfully attempts in various ways to distinguish or question these cases. Contrary to his suggestion (D. Reply Br. 24), the Sixth Circuit did not hold that personal responsibilities can never justify departure, but rather correctly noted that these must be more than "mine-run." United States v. Rutana, 932 F.2d 1155, 1158 (6th Cir.)(quoting United States v. Aguila-Pena, 887 F.2d 347, 350 (1st Cir. 1989)), cert. denied, 112 S. Ct. 300 (1991). Milikowsky attempts to distinguish United States v. Sharapan, 13 F.3d 781 (3d Cir. 1994), on the grounds: 1) that the defendant there was not indispensable to his business, and 2) that the Third Circuit disagrees with this Circuit because it declines to consider effects of the defendant's incarceration on third persons. D. Reply Br. 24 & n.6. But that Court was willing to assume that Sharapan's presence was necessary to avoid the company's failure, for purposes of analysis, 13 F.3d at 785; and the Third Circuit has in fact allowed departure to permit a defendant to attend to family responsibilities. See United States v. Gaskill, 991 F.2d 82 (3d Cir. 1993).

Milikowsky attempts to distinguish United States v. Reilly, 33 F.3d 1396 (3d Cir. 1994), on the ground that the case involved only a defendant being debarred from government contracts as a consequence of conviction, an ordinary event. But that defendant also made a plea on behalf of his family, and the impact of his conviction on their businesses. The plea was rejected by the Third Circuit. Milikowsky also attempts (D. Reply Br. 24, n.6) to distinguish United States v. Mogel, 956 F.2d 1555 (11th Cir.), cert denied, 113 S. Ct. 167 (1992), by asserting that it merely rejected the claim that business ownership justified departure; but that Court was faced with more -- a claim that the defendant's business might "go under" in the absence of departure.

American Bar Ass'n. Section of Antitrust Law Task Force on the Antitrust Division, 58 Antitrust L.J. 747, 755 (1990) ("Division enforcement actions have been directed largely against a narrow group of industries, such as construction, made up primarily of small local businesses."); 60 Minutes with Charles F. Rule, Assistant Attorney General, Antitrust Division, 57 Antitrust L.J. 257, 258-261 (1988)(explaining why antitrust criminal enforcement includes many relatively small companies); 60 Minutes With Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, 56 Antitrust L.J. 261, 265-266 (1987)(defending prosecution of small road builders and other small companies for deterrence value). The policy of the Antitrust Division has been to prosecute offenses where it finds them, with one prosecution often leading to another. Kenneth Starling, The Reagan Legacy in Antitrust, 35 Fed. B. News & J. 242, 242-243 (1988). The result has been that defendants in antitrust cases include both large and small firms. Ibid.[6] Thus, Milikowsky's circumstances here are the "typical case[]," not one differing "significantly * * * from the norm." U.S.S.G. Ch.1, Pt. A(4)(b), intro. comment.

[6] Descriptions of recent cases brought against small operators appear at 67 Antitrust & Trade Reg. Rep. (BNA) ("ATRR") 370 (1994)(operator of sole proprietorship selling trucks and truck parts); 65 ATRR 392 (1993)(used truck dealer); 65 ATRR 100 (1993)(bidder on government surplus property); 64 ATRR 493 (1993)(family-owned corporation); 64 ATRR 606 (1993)(sole proprietor, antiques dealer); 64 ATRR 79 (1993)(family-owned corporation that refurbishes and retails used trucks); 63 ATRR 424 (sole owner of antiques company); 61 ATRR 47 (1991)(antiques dealer); 60 ATRR 827 (1991)(real estate speculator); 60 ATRR 826 (1991)(antiques dealer); 60 ATRR 726 (1991)(real estate speculator); 60 ATRR 384 (1991)(used equipment purchaser); 60 ATRR 244 (1991)(purchaser at bulk auctions); 60 ATRR 244 (1991)(same).

Milikowsky claims that this case, nonetheless, involves extraordinary circumstances because the district court found that Milikowsky's incarceration might have an "extraordinary" impact on Milikowsky's employees. D. Reply Br. 20; JA 1795 ("I am convinced that the loss of his daily guidance would extraordinarily impact on persons who are employed by him"). But this finding was not enough to justify departure, in view of the frequency with which antitrust convictions can be expected to adversely affect the convicted executive's employees. The district court failed to make the crucial additional finding that, compared to other companies with an executive convicted of antitrust offenses, the impact of incarceration on Milikowsky's companies and his employees was highly unusual or extraordinary.[7] Under the district court's approach, departure is permitted when incarceration of a business' manager or executive for an antitrust offense seems likely to jeopardize the business, and threaten employees' continued employment. If this were the case, departure would no longer be an extraordinary or unusual event, as the

[7] Contrary to Milikowsky's claim (D. Reply Br. 21), we are not saying that prison sentences must be imposed in every antitrust case. As we stated (Gov.Br. 41-42), except where a factor is expressly precluded from consideration, such as socio-economic status, it may provide a basis for departure in the appropriate case.

Guidelines intended. See Gov.Br. 42 (collecting cases).[8] The district court, accordingly, erred in departing in this case.

## CONCLUSION

The conviction should be affirmed. The sentence should be vacated and the case remanded for resentencing.

Respectfully submitted.


ANNE K. BINGAMAN
Assistant Attorney General

DIANE P. WOOD
Deputy Assistant Attorney General

JOHN J. POWERS, III
MARION L. JETTON
Attorneys

Department of Justice
Antitrust Division - Rm. 3224
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3680

OF COUNSEL:

PETER J. LEVITAS

Attorney
Department of Justice
Antitrust Division
Washington, D.C. 20001


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[8] Milikowsky disputes whether U.S.S.G. §§5H1.2, 1.5, and 1.6, p.s. (see also §5H1.11, p.s. (1991)) apply to discourage departure in his case, arguing that his departure was based on employee hardship, not his vocational skills, employment record, or "community ties". D. Reply Br. 22-23. Sections 5H1.2, 1.5, 1.6 and 1.11, p.s., list offender characteristics that "are not ordinarily relevant" in determining whether to depart. There can be no doubt that Milikowsky is arguing that his skills are "relevant" to sentencing; he claims that his skills at managing, buying steel, and customer relations will prevent his employees' job loss. D. Reply Br. 12-15.

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 1995, I caused two copies of the foregoing REPLY BRIEF FOR THE UNITED STATES AS CROSS-APPELLANT to be served by first class postage prepaid mail upon:

Steven A. Steinbach, Esq.
Regina C. Maloney, Esq.
Williams & Connolly
725 12th Street, N.W.
Washington, D.C. 20005

_____

MARION L. JETTON
Attorney
Department of Justice
Antitrust Division
Washington, D.C. 20530
(202) 514-6380

JANUARY 1995.