04-3771

and 04-3772

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellant – Cross-Appellee,
v.

BIRJ DECKMEJIAN,
Defendant – Appellee – Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

OPENING BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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PRELIMINARY STATEMENT

The United States appeals from that part of the final judgment imposing sentence on defendant Birj Deckmejian by U.S. District Judge Thomas P. Griesa (S.D.N.Y.).

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The district court entered final judgment on June 3, 2004. The United States timely filed its notice of appeal on July 1, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred by granting Deckmejian a downward departure primarily on the basis of medical conditions that are not extraordinary and without finding that the Bureau of Prisons would be unable to accommodate them.

2. Whether the district court erred in the extent of the substantial downward departure, which excused Deckmejian from imprisonment altogether.

3. Whether the district court erred by refusing to impose any fine when Deckmejian, who admits to having substantial assets, did not show any inability to pay.

STATEMENT OF THE CASE

The Department of Justice for several years has investigated bid rigging, fraud, and tax evasion in the advertising and graphic services industries in New York. Recently, part of this investigation has focused on related conspiracies centered around Grey Global Group, Inc. ("Grey"), an advertising agency headquartered in Manhattan.

One of these conspiracies was a phony billing scheme involving The Color Wheel, Inc. ("Color Wheel"), a Manhattan supplier of graphic services to Grey, and defendant Deckmejian, who was one of Color Wheel's sales representatives and the senior salesperson on the Grey account. Pursuant to this conspiracy, from 1991 until July 2000, Color Wheel issued to Grey roughly 140 invoices – fraudulently inflated by some $450,000 – in an effort secretly to recoup expenses for which Color Wheel ordinarily would not be paid. These expenses included substantial goods and services for the benefit of Grey executives and employees, such as more than $60,000 worth of tickets to theater, sporting, and cultural events, and more than $200,000 worth of graphics items such as wedding invitations, cards, and brochures, plus expenses in connection with jobs for other Grey clients that had gone over budget. Grey paid these invoices and, in turn, was reimbursed by its clients, who were unaware that the invoices had been inflated.

Deckmejian was first charged on May 16, 2002, under 18 U.S.C. § 371, with conspiracy to violate 18 U.S.C. § 1341 (mail fraud) in connection with the above-described scheme. Trial of this charge began on October 21, 2003. Deckmejian testified over the course of two days. The trial ended on November 7, 2003 with the jury finding Deckmejian guilty.[1] Before and during trial, Deckmejian did not ask the government or the court for any dispensation or accommodation based on his health.

To date, more than 40 individuals have been convicted of antitrust, fraud, and tax violations in the government's investigation of the advertising and graphic services industries. The vast majority have pled guilty, including the "ringleaders" of the Grey-related conspiracies, Haluk K. Ergulec, the owner of Color Wheel, and Mitchell E. Mosallem, an executive vice president and director of graphic services at Grey. Ergulec was sentenced to 37 months' imprisonment, and Mosallem was sentenced to 70 months' imprisonment.

At sentencing, which took place on May 4, 5, and 21, 2004, the district court determined that Deckmejian was subject to a United States Sentencing Guidelines ("USSG") range of 24 – 30 months' imprisonment and a fine range of $5,000 –

[1] Deckmejian was tried with John F. Steinmetz, who was charged in a separate count of the indictment with rigging bids to Grey, in violation of 15 U.S.C. § 1. The jury acquitted Steinmetz.

$50,000. Over the United States' objections, the district court granted a downward departure and sentenced Deckmejian to three years' probation with home confinement for the entire period. The court based its decision on Deckmejian's medical conditions, and perhaps age (69),[2] and found that any term of imprisonment would adversely affect his health. The court also refused to impose a fine, contending that restitution of $186,000 was sufficient punishment.

STATEMENT OF FACTS

Minutes after the jury returned its guilty verdict against Deckmejian, and before receiving any expert medical testimony or medical records,[3] the district court told the prosecution and defense counsel that the court questioned the "fairness in subjecting [Deckmejian] to a prison sentence. I put that right out." Joint Appendix ("A-") 15. The court commented in part:

> So if he had been selling heroin, which undoubtedly it would have killed a lot of people and wrecked their lives; if he had been robbing banks; if he had been even engineering this whole thing, that would be one thing. Then one

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[2] The district court's oral explanation of the downward departure mentions health and age. The final judgment entered by the court does not contain any narrative justification for the departure. It lists the reason for the departure as "Health," but does not mention age. Special Appendix ("SPA") (attached hereto) 30. For purposes of this appeal, the United States assumes that age was a basis for the departure.

[3] As part of his trial testimony, Deckmejian described his health in general terms.

> would not – maybe I would not be engaged in this. But I think you've got to weigh the level of his culpability with his condition, and really consider whether anything like 30 to 37 months prison represents even the slightest breath of justice. Because I don't believe it does.

A-24.[4]

At sentencing, the district court rejected both the upward enhancement to the offense level urged by the United States and the reductions urged by Deckmejian.[5] The court determined the amount of the loss to be $450,000, based on trial exhibits detailing roughly 140 invoices in which Color Wheel fraudulently billed Grey's clients for entertainment tickets provided by Deckmejian for Grey executives, free graphics items produced for executives of Grey, and expenses in connection with jobs for other Grey clients that had gone over budget. A-34-35. The base offense level for fraud, together with the $450,000 loss and a two-level increase for more than minimal planning, indicated a total offense level of 17 which, in conjunction with criminal history category of I, yielded a guideline range of 24 – 30 months' imprisonment and a fine range of $5,000 – $50,000.

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[4] The 30 – 37 month range represented the prosecutor's quick calculation of the offense level on the afternoon of the verdict, including an enhancement for obstruction of justice.

[5] The United States requested an upward enhancement for obstruction of justice (perjury in Deckmejian's trial testimony). Deckmejian requested reductions for mitigating role in the crime and acceptance of responsibility.

SPA-29, A-117.[6]

On Deckmejian's health, the court received certain medical records for Deckmejian and letters from Murray J. Berenson, M.D., Deckmejian's personal physician for 25 years, and H. Thomas Foley, M.D., J.D., a career federal government doctor with experience at the National Cancer Institute and reviewing the medical records of cancer patients who currently teaches at the Veterans Administration Hospital in Washington, D.C. and continues to see patients on a limited basis. *See* A-234-240 (Foley curriculum vitae).

Dr. Berenson's written submission opined that "the possibility of death in the event of further physical deterioration will be increased if [Deckmejian] is incarcerated" and "considering all the physical and emotional stress that Mr. Deckmejian has been under, the possibility of incarceration in itself is enough to put him at the highest risk of physical deterioration." A-188, 192. *See also* A-518-519 (Berenson additional letter). Dr. Foley's response discussed each of Deckmejian's alleged conditions and concluded that "[b]ecause none of Mr. Deckmejian's conditions require active medical intervention at this time, and because I believe that the Bureau of Prisons can provide the follow up care and

[6] Because the crime did not continue after November 2001, the November 2000 edition of the Guidelines was used.

surveillance required for them, I do not believe that incarceration *per se* would negatively affect his health." A-227.

The United States also submitted a letter and attachment from the Health Systems Administrator, Federal Bureau of Prisons, Northeast Regional Office. A-230-233. The Administrator stated that she reviewed the same letters from Drs. Berenson and Foley and, based on the conditions described, stated that "[t]he BOP has the physicians, staff, expert community consultant staff and facilities to provide for Mr. Deckmejian's medical condition, at both medical referral centers and general populations institutions." A-231. She added that the Bureau of Prisons has "numerous medications for the treatment of Mr. Deckmejian's medical needs" and that "the Bureau of Prisons houses approximately 12,000 inmates with hypertension and 6,700 inmates with diabetes," two of Deckmejian's most salient conditions. *Id.*

The court also heard brief testimony from Drs. Berenson and Foley. Dr. Berenson explained Deckmejian's medical conditions as follows:

- Lung cancer – Removal of part of one lung in 2001, but "[a]t the present time we have no current or clinical evidence that he has active cancer." A-76. No ongoing medication (checkup every three months). A-87.
- Bladder cancer – Tumor removed in 2000, but no active cancer and no ongoing medication or treatment (checkup every six months). A-76, 89-90.

- Diabetes – Type II adult-onset diabetes, but no medications (controlled by diet and exercise). A-74, 86.

- High blood pressure – Takes a common medication, Vasotec (10 mg twice per day). A-74-75, 83.

- Reduced kidney function, but no medications other than Vasotec. A-75-76.

- Bouts of diverticulitis (colon infection) and gout. A-74, 78.

- Peripheral neuropathy (pain in feet). A-77.

Dr. Berenson was asked, by Deckmejian's counsel, specifically why he thought incarceration would adversely affect Deckmejian. Dr. Berenson answered:

> Birj knows, for instance, and my entire practice knows, that they can call me any time of the day or night. In the middle of the night Birj has called me and talked to me about abdominal pain, an onset of fever and some diarrhea. By questioning him I can tell him whether it is a bout of diverticulitis that might be developing; I can describe to him how I would handle it overnight if we can't see each other[.]

A-78.

On cross-examination, Dr. Berenson admitted that he had no familiarity with Bureau of Prisons medical services or facilities and that he made no inquiries to the Bureau of Prisons before submitting his letters to the court, A-82; that Deckmejian has lived with high blood pressure for 25 years, A-84; that Deckmejian experienced a stressful trial, conviction, and period awaiting

sentencing without needing any change in his blood pressure medication or requiring medication for diabetes, A-85-86; that Deckmejian has no medical restrictions on travel or work (but is restricted from vigorous exercise), A-87; that Deckmejian has never required hospitalization for diverticulitis and, more generally, has not been hospitalized within the past five years except for the lung cancer surgery and bladder tumor removal, A-91-92; and that there is a "significant" likelihood of Deckmejian's health substantially declining in the next few years even if he were *not* to be imprisoned. A-92.

Dr. Foley described the medical records that he reviewed and opined that "the records that I had from 2003 were sufficiently sort of the dog that didn't bark type. There were no references to anything serious going on. I didn't believe that there was anything in the records that would have shown anything serious going on, that was still going on." A-102. Dr. Foley gave his prognoses for Deckmejian's conditions as follows:

- Lung cancer – Deckmejian had "the earliest type of cancer" with no metastasis, and required no radiation therapy or chemotherapy. A-103. He has "only about 10 more percent chance that he will develop evidence of metastasis in the next four years." A-105.

- Bladder cancer – Deckmejian's tumor was "low grade" and "considered very superficial." A-110. There is "no reason" to suppose that imprisonment would significantly increase the likelihood of any cancer returning. A-110-111.

- Diabetes – Deckmejian has "a really mild form of diabetes" that is "treated completely by diet and exercise." A-106. Any potential need for future medication "may happen in or out of jail and wouldn't have anything to do with being in prison." A-109.

- Kidney function – "[I]t is clear that anything he has with his kidney right now is not related in his particular instance to his diabetes." A-107. The medical records show a slight increase in one of Deckmejian's kidney tests, but "the most likely cause is probably the relationship to a drug that he was taking." *Id*.

- High blood pressure – "Dr. Berenson's records again show pretty good control of the hypertension on this current dose of Vasotec." A-108.

Dr. Foley saw no reason to expect that any of Deckmejian's interrelated conditions – hypertension, diabetes, and kidney disease – would spiral out of control in the next two or three years. A-108-109.

The district court then briefly questioned Deckmejian, who testified that he is unemployed but would be willing to work, even in a grocery store, A-113, 116; that he walks his dog daily for several blocks and helps his wife shop, A-114, but "[t]he health problems are a major problem in [his] life," A-115; and that he has leg cramps and shortness of breath. *Id*.

The district court began its ruling by stating that it had no doubt about the qualifications or expertise of either Dr. Berenson or Dr. Foley. A-118. But the court expressed its concern about the risks noted in Dr. Berenson's pre-sentencing

letter, especially his conclusion that "considering all the physical and emotional stress that Mr. Deckmejian has been under, the possibility of incarceration in itself is enough to put him at the highest risk of physical deterioration." A-118-119. The court then stated:

> But neither the law nor common sense really tells us that the end of the question is the availability of medical treatment in a federal prison. The prison environment is something that must be considered. Also, although federal prisons do their best within that prison environment to administer medical treatment, I know from experience that there are lapses, undoubtedly unintentional, where people do not get the treatment they need. A prison is a prison, and prisons have lots of requirements. They are difficult places to run. And with all the best intentions and sometimes with the best equipment medical treatment can be somewhere down the list. I know this from applications I have had from people who are incarcerated in federal institutions.

A-120.[7] At a later continuation of the sentencing, the court repeated that it had weighed the judge's own "acquaint[ance] with prison medical facilities . . . along with [Dr. Berenson's] opinion." A-132-133.

The court then granted the downward departure "on the grounds of the age and health" (A-155) from 24 – 30 months' imprisonment to three years' probation, repeating its reliance on the conclusions of Dr. Berenson's letter. A-121-122. The

[7] The court also commented: "I don't deny, I have seen the prison health facilities. I haven't seen a federal one recently, but I have seen one up in the state prison and they are doing their absolute best. But it doesn't answer the question." A-95.

court did not identify the offense level to which it intended to depart, nor did the court explain how it arrived at 36 months of probation and home confinement when the guideline range was 24 – 30 months. Deckmejian did not object to the probation. Only on the third and final day of sentencing, after the government requested home confinement, did the court impose any conditions on Deckmejian.

The court imposed restitution of $186,000 but no fine, saying:

> I believe that the $186,000 is a very substantial amount, and I am not levying a fine. It seems to me that the maximum consideration should go to reimbursing the victims, and that's why I am agreeing with the Government 100 percent on its estimate of the amount due, and I'm ordering payment of all of that in the way of restitution, but that is enough of a financial penalty.

A-171.[8] The final judgment says that any fine is "waived or below the guideline range because of inability to pay." SPA-29. Deckmejian did not argue inability to

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[8] The district court seemed to make the restitution order conditional, stating:

> Now, I think it is quite obvious that if the government chooses to appeal, and there was somehow a prison sentence, I will, to say the least, reconsider the amount of restitution. . . . But a prison sentence for Mr. Deckmejian would quite obviously reduce the idea of the victim of the monies-owed scheme or the victims being made whole. That $186,000 restitution order will not stand if there is a prison sentence resulting from any further litigation in this matter.

A-170-171. The United States believes that restitution was mandatory in this case and that restitution cannot be conditioned on the government's decision to appeal or be made a substitute for imprisonment. If the district court reduces the amount of restitution on remand, the United States reserves its right to seek appropriate review.

pay, and he did not submit any evidence on inability to pay. The Probation Office determined that Deckmejian has a net worth of almost $2 million (*see* Presentence Investigation Report separately attached).

SUMMARY OF ARGUMENT

The district court erred as a matter of law in granting the downward departure. Neither Deckmejian's medical conditions nor age are extraordinary. His medical conditions are controlled and simply require monitoring. The district court did not find that the Bureau of Prisons would be unable to accommodate Deckmejian's conditions, and the court could not do so because Deckmejian gave the court no factual basis whatsoever to support such a finding. Instead, the district court's decision was infected by a legally inappropriate factor: the judge's personal, subjective, and anecdotal "acquaintance" with Bureau of Prisons medical care.

The district court abused its discretion in the extent of the departure, because Deckmejian's health does not justify excusing him from prison altogether. The court readily could have recommended designation to a Bureau of Prisons hospital facility, as has been done for comparable defendants with medical problems, and thereby satisfied both the need for deterrence and its concerns about Deckmejian's health. Alternatively, the court could have imposed a prison term of less than 24

months followed by a period of supervised release.

The district court erred as a matter of law by refusing to impose any fine because the Guidelines mandate a fine absent inability to pay. Deckmejian did not show any inability to pay. Indeed, the Probation Office found that Deckmejian has substantial assets.

ARGUMENT

I. Standard of Review

18 U.S.C. § 3742(e), as amended by the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003) ("PROTECT Act"), "requires us to apply a de novo standard of review when the sentence imposed is outside the applicable Guideline range to determine whether a departure is justified by the facts of the case." *United States v. Kostakis*, 364 F.3d 45, 51 (2d Cir. 2004) (internal quotation and citation omitted). *Accord United States v. Huerta*, 371 F.3d 88, 94 (2d Cir. 2004); *United States v. Leiva-Deras*, 359 F.3d 183, 188 (2d Cir. 2004) ("That [PROTECT] Act directs us to review downward departures *de novo*.").[9]

[9] The PROTECT Act "also imposes on district courts a new requirement that they must, in granting departures of any kind, 'state[] with specificity' in the judgment the 'specific reason' for the departure. 18 U.S.C. § 3553(c)(2)." *Huerta*, 371 F.3d at 96. In *Huerta*, this Court held the statement "extraordinary family circumstances" to be insufficiently specific. *See id.* Here, the judgment

The extent of a downward departure is reviewed for abuse of discretion. *See Kostakis*, 364 F.3d at 51. Factual findings supporting the departure are reviewed for clear error. *See id.*

II. The District Court Erred By Granting the Downward Departure

A district court may depart from a defendant's guideline range when it "finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.'" USSG § 5K2.0 (2000) (quoting 18 U.S.C. § 3553(b)). Age and health are subjects covered by the Guidelines and indisputably were taken into consideration by the Sentencing Commission. Section 5H1.1 says that age is not a basis for departure unless the defendant is "elderly and infirm," and § 5H1.4 adds that only an "extraordinary physical impairment" justifies departure on health grounds for persons not yet "elderly."

"If the special factor is a discouraged factor, . . . the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." *Koon v. United States*, 518 U.S. 81, 96 (1996). *Accord United States v. Tappin*, 205 F.3d 536, 540 (2d Cir.) ("because one of the major purposes of the Guidelines was to eliminate

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was equally deficient, saying only "Health." SPA-30.

unjustified disparities in sentences among similarly situated defendants, '[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline.'") (quoting *Koon*, 518 U.S. at 98), *cert. denied*, 531 U.S. 910 (2000).

A. Deckmejian's Circumstances Are Not So Extraordinary As to Justify a Downward Departure

"The general presumption is that the defendant's circumstances are not unusual enough to justify departure. Hence, the defendant must provide evidence that shows his situation is outside the heartland of the applicable guidelines." *Leiva-Deras*, 359 F.3d at 193. In the case of physical condition, this Court has made clear that "[t]he standards for a downward departure on medical grounds are strict." *United States v. Persico*, 164 F.3d 796, 806 (2d Cir.), *cert. denied*, 527 U.S. 1039 and 528 U.S. 870 (1999). "Section 5H1.4 of the Sentencing Guidelines restricts departures based on physical condition to defendants with an 'extraordinary physical impairment,' such as those which render a defendant 'seriously infirm.'" *United States v. Altman*, 48 F.3d 96, 104 (2d Cir. 1995).

Deckmejian's own doctor conceded that none of his conditions are imminently life-threatening, and they do not restrict him from working, traveling, or normal daily activities. A-75, 87. Deckmejian's cancer is in remission, and he

requires only monitoring. A-90, 105. *Cf. Altman*, 48 F.3d at 104 ("The health problems cited by the defendant simply need monitoring, and Altman does not challenge the district court's finding that the Bureau of Prisons would be fully able to monitor his health."). Deckmejian's diabetes does not require medication. A-86. His blood pressure is under control from a common medication. A-108. He has no treatment for sleep apnea. A-228. His occasional episodes of diverticulitis are controlled by drinking liquids and, if necessary, antibiotics. A-79.

By comparison, many defendants with more serious medical conditions have been sent to prison. In *Persico*, this Court affirmed denial of a downward departure despite the fact that the defendant, while imprisoned, had received a triple coronary bypass, had a cancerous kidney removed, and also suffered from hypertension. *See* 164 F.3d at 801. In *Altman*, a downward departure was denied where the 64 year old defendant had a serious heart problem and degenerative hip condition that had resulted in aortic valve replacement surgery and two hip operations. *See United States v. Napoli*, 179 F.3d 1, 18 (2d Cir. 1999) (describing Altman's medical condition), *cert. denied*, 528 U.S. 1162 (2000). *See also United States v. Johnson*, 318 F.3d 821, 824-26 (8th Cir. 2003) (departure based on coronary heart disease, hypertension, and Hodgkins Disease was abuse of

discretion where Hodgkins was in remission and other conditions controlled); *United States v. Guajardo*, 950 F.2d 203, 208 (5th Cir. 1991) ("there is nothing about Guajardo's . . . health (cancer in remission, high blood pressure, a fused right ankle, an amputated left leg, and drug dependency) that justifies such a downward departure"), *cert. denied*, 503 U.S. 1009 (1992); *United States v. Farraj*, 211 F. Supp.2d 479, 480 (S.D.N.Y. 2002) ("health condition that requires monitoring every two months and might, in the future, require additional procedures to remove skin cancer," plus inability to walk for long periods, was not extraordinary impairment).

But even if Deckmejian's conditions could be considered extraordinary, there is no basis for finding that imprisonment would worsen his health in any way. Dr. Foley testified squarely that imprisonment would have no effect, A-109-111, and if some of Deckmejian's conditions should deteriorate, they would do so regardless of imprisonment. A-109. The district court's medical basis for the downward departure, Dr. Berenson's conclusory letter, was undermined by Dr. Berenson's live testimony. Dr. Berenson admitted that Deckmejian's health is likely to worsen *even if he is not imprisoned*. A-92. More specifically, when asked directly why prison might be expected to affect Deckmejian adversely, all Dr. Berenson could offer was that Deckmejian would not be able to call him on

the telephone as readily as he can now. A-78-79.

If Deckmejian can avoid prison on the facts of this case, then potentially thousands of defendants who at some time were treated for cancer and have mild diabetes and hypertension will be able to avoid prison as well. The district court never explained why Deckmejian's health conditions are more extraordinary than – or even atypical when compared to – the "20,000 [Bureau of Prisons] inmates per year who have acute, chronic, terminal, and resolved medical illnesses," A-232, the "12,000 inmates with hypertension," A-231, or the "6,700 inmates with diabetes." *Id*.

B. The District Court Made No Finding That the Bureau of Prisons Would be Unable to Care for Deckmejian's Medical Conditions

The "extraordinary physical impairment" required by the Guidelines for justifying a health-based departure requires "medical conditions that the Bureau of Prisons is unable to accommodate." *Persico*, 164 F.3d at 806 (citing *Altman*, 48 F.3d at 104). *Accord United States v. Krilich*, 257 F.3d 689, 693 (7th Cir. 2001) (impairment is "extraordinary in the sense that prison medical facilities cannot cope with it"), *cert. denied*, 534 U.S. 1163 (2002). To make that finding, the district court had to "ascertain, through competent medical testimony, that the defendant needs constant medical care, or that the care he does need will not be

available to him should he be incarcerated." *Krilich*, 257 F.3d at 693 (citation omitted).

The district court made no factual finding of a medical condition that the Bureau of Prisons would be unable to accommodate. To the contrary, the court assumed that the prison system *would* be able to accommodate Deckmejian's conditions:

> I will assume that the Bureau of Prisons would take steps that are medically necessary to provide Mr. Deckmejian with medications, with testing, and with treatment. . . . [I]f somebody got on the stand and spoke about the Bureau of Prisons, I am sure they would say everything will be treated and there will be testing and precautions and all that[.]"

A-71. But, in the court's view, that accommodation would not be sufficient. *See id.*

In any event, the district court had no basis for finding an "extraordinary physical impairment" that the Bureau of Prisons would be unable to accommodate because Dr. Berenson admitted to having no familiarity whatsoever with the medical facilities or treatment available in the Bureau of Prisons system. A-82. Neither Deckmejian, nor Dr. Berenson in particular, offered any evidence to rebut the United States' submission that the Bureau of Prisons can accommodate Deckmejian's conditions and that the Bureau of Prisons currently administers

treatment for thousands of inmates with hypertension and diabetes. A-231.[10] *Cf. United States v. Martinez*, 207 F.3d 133, 139 (2d Cir. 2000) (no evidence that defendant's diabetes could not be cared for by Bureau of Prisons); *United States v. Petrelli*, 306 F. Supp.2d 449, 453 (S.D.N.Y. 2004) ("nor does the record suggest that the treatment available while in custody would be inadequate in the event a period of incarceration is imposed"). Moreover, Dr. Berenson did not testify that Deckmejian needs constant care, and he did not testify that Deckmejian's current care would be unavailable in prison.

Dr. Berenson's conclusions therefore were pure speculation. He never gave a single example of care or treatment that Deckmejian would not be able to get in prison that he currently receives or might need in the future. Deckmejian therefore failed to challenge the Bureau of Prisons' ability to accommodate his conditions, and the district court had no basis for finding an "extraordinary physical impairment."

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[10] The letter submitted by the United States from the Health Systems Administrator, Bureau of Prisons Northeast Regional Office was not merely a form letter. Ms. Cadogan stated that she reviewed the same letters from Drs. Berenson and Foley that were submitted to the court, and she addressed her letter to Deckmejian's conditions, specifically mentioning hypertension and diabetes. In any event, Dr. Foley also told the court that the Bureau of Prisons would be able to handle Deckmejian's conditions, and even the court said that Dr. Foley "is familiar with the type of medical facilities in a federal prison to a degree that Dr. Berenson is not." A-120.

C. The District Court Relied On A Legally Inappropriate Factor

The district judge emphasized, with some vehemence, that he "weighed" his own "acquaint[ance] with prison medical facilities" together with Dr. Berenson's opinion in deciding to grant the departure. A-132-133. The court's acquaintance with the Bureau of Prisons was purely anecdotal, based on "applications I have had from people who are incarcerated in federal institutions," A-120, and a visit to a New York *state* prison. A-95.

The district judge's personal, subjective, and anecdotal knowledge of Bureau of Prisons capabilities cannot be a proper factor to weigh in determining whether to grant a downward departure. First, the United States had no opportunity (or even ability) to cross-examine or present contrary evidence on that factor. The district judge never identified the inmates who sent him the "applications" and did not explain their particular circumstances. Second, a proper finding about Bureau of Prisons capabilities cannot be based on anecdote. Given the record, it is just as likely that Deckmejian could be the case in which an inmate receives care and treatment *superior*, rather than inferior, to what he would have obtained outside prison.

In any event, even if Bureau of Prisons medical facilities or care is sub-optimal, that fact still would not justify a downward departure. *Cf. United States*

v. Restrepo, 999 F.2d 640, 645 (2d Cir.) (even if it were Bureau of Prisons policy to deny reassignment to relaxed-security facilities to alien prisoners who must be deported, that policy would be inappropriate basis for downward departure), *cert. denied*, 510 U.S. 954 (1993). *See also Krilich*, 257 F.3d at 694 ("That the Bureau has not provided (and does not propose to provide) the quality of care that top private specialists provide is neither here nor there; wealthy defendants can afford exceptional care, but this does not curtail the punishment for their crimes."). If the district court believes that Bureau of Prisons medical care is inadequate, "the appropriate way to remedy that defect would be pursuit of an action that challenges such a policy head-on, not the ad hoc granting of departures that have the effect of creating the very type of disparity in sentencing that the adoption of the Guidelines was intended to eliminate." *Restrepo*, 999 F.2d at 646.

D. The District Court Never Compared Deckmejian's Circumstances to Any Other Case

In *United States v. Sentamu*, 212 F.3d 127, 134 (2d Cir. 2000), this Court quoted the Supreme Court's explanation that "whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part *by comparison with the facts of other Guidelines cases*" (quoting *Koon*, 518 U.S. at 98) (emphasis added). *Accord*

United States v. Pereira, 272 F.3d 76, 80 (1st Cir. 2001) (same).

Here, the prosecutor pointed out to the court that the record contained no comparisons of Deckmejian to other defendants, A-134, and tried to explain that, in the experience of the Antitrust Division, other defendants sentenced to prison for antitrust and other "white collar" violations had more acute illnesses than Deckmejian. A-129-130. The district judge, however, cut off the discussion, stating: "I have no basis for comparing him [Deckmejian] to all these other people that you talk about, and it really doesn't mean very much. I think we should move on[.]" A-134-135. The court thus made no attempt to compare this case to other Guidelines cases – indeed, it rejected the concept – but simply focused on Deckmejian alone and concluded, without adequate foundation, that his health would worsen in prison.

E. The District Court Made No Finding that Deckmejian's Age Was Unusual In Any Respect

Although the district court orally mentioned Deckmejian's age, the court made no finding that Deckmejian's age was extraordinary, or even merely unusual, in any way. To the contrary, the court commented that "69 years of age is not elderly[.]" A-71. Since the court did not even consider Deckmejian to be elderly, USSG § 5H1.1 provides no basis for a departure. Deckmejian's age therefore

cannot support the district court's decision. *See Krilich*, 257 F.3d at 692-93 (vacating downward departure for 69-year old defendant; "§ 5H1.1 and § 5H1.4 put normal age-related features off limits as grounds for reduced sentences. Older criminals do not receive sentencing discounts."); *e.g.*, *United States v. Marin-Castaneda*, 134 F.3d 551, 556-57 (3d Cir.) (age 67 did not warrant downward departure), *cert. denied*, 523 U.S. 1144 (1998); *United States v. Goff*, 20 F.3d 918, 921 (8th Cir.) (age 67; downward departure reversed), *cert. denied*, 513 U.S. 987 (1994); *United States v. Tucker*, 986 F.2d 278, 280 (8th Cir.) (same), *cert. denied*, 510 U.S. 820 (1993).

III. The Extent of the Downward Departure Was an Abuse of Discretion

This Court reviews the extent of a downward departure for reasonableness. *United States v. Barresi*, 316 F.3d 69, 72 (2d Cir. 2002). "[T]he key question is whether the reasons given by the district court are sufficient to justify the magnitude of the departure." *Id.* at 73 (citation omitted).

Here, even assuming that a downward departure was appropriate in this case,[11] the reasons given by the district court did not make it reasonable to excuse Deckmejian from prison altogether. The court's concern about Deckmejian's

[11] In fact, as noted above, the United States does not believe that any downward departure was justified in this case.

health could have been satisfied by sentencing Deckmejian to prison with a recommendation that he be designated to a Bureau of Prisons hospital facility such as Fort Devens in Massachusetts. The prosecutor specifically alerted the court to this option and pointed out that "we have had defendants much more acutely ill as they stand before the court for sentencing sent, with the court's recommendation, accepted by the Bureau of Prisons, to Fort Devon [sic] to serve their sentence, and this includes defendants that have had open heart surgery within three months of having to surrender[.]" A-129-130. The district court gave no explanation why this option would not work for Deckmejian, but simply rejected the United States' position by saying – paradoxically, given that the court used the alleged severity of Deckmejian's conditions to justify the departure – "I don't believe he needs to be in a hospital and I think it would be very detrimental to have him in a hospital." A-130-131.

Alternatively, the court could have sentenced Deckmejian to a prison term of less than 24 months followed by home detention or supervised release. *Cf. United States v. Bonito*, 57 F.3d 167, 175 (2d Cir. 1995) (initial sentence included four-level departure based on cancer, diabetes, hypertension, and gout to 6 months imprisonment, with recommended placement in a medical facility, followed by 3 years of supervised release), *cert. denied*, 516 U.S. 1049 (1996); *United States v.*

Kloda, 133 F. Supp.2d 345 (S.D.N.Y. 2001) (one-level departure to imprisonment for one year and one day in light of 63 year old defendant's age, health problems, and family considerations).

A recent case in this Court reflects an exercise of discretion in granting a departure based on health that preserved a term of imprisonment in the interest of deterrence. In *United States v. A. Alfred Taubman*, No. 02-1253 (*see also* 297 F.3d 161 (2d Cir. 2002)), the former Chairman of Sotheby's auction house was convicted of price fixing in fine art auctions. Taubman was older (78) than Deckmejian and claimed in his public filings in this Court (even though he did not appeal his sentence) to have more serious health problems, including coronary heart disease that had caused heart attacks and required three invasive interventions (twice on an emergency basis); cerebrovascular disease that caused small and medium strokes; diabetes that required medication; hypertension that required medication; kidney problems; severe sleep apnea that required treatment; an enlarged prostate that required medication; depression that required medication; and severe hearing loss. Taubman claimed to need *15 different daily medications*.

Based in part on these conditions, the district court granted a downward departure from a range of 24 – 30 months' imprisonment to a prison term of one year and one day. The Bureau of Prisons then designated Taubman to its special

medical facility at Rochester, Minnesota, which has a working relationship with the Mayo Clinic. Taubman served his sentence and did not claim to have suffered any extraordinary health problem in prison. *See* Warren St. John, *Advice From Ex-Cons to a Jet-Set Jailbird: Best Walk on Eggs*, N.Y. TIMES, July 13, 2003 (*available at* LEXIS, News Library, NYT File).

By excusing Deckmejian from any prison time, the district court undermined a critical purpose of the criminal laws and the Sentencing Guidelines: deterrence. "Business crimes are particularly suitable to deterrence. The certainty of a jail term appropriate to tax cheaters like the Klodas deters others who might otherwise be tempted to cheat." *United States v. Kloda*, 133 F. Supp.2d at 347. The same applies to Deckmejian.

The assertion in Dr. Berenson's letter that *any* prospect of imprisonment would worsen Deckmejian's condition was not credible and was undermined by his live testimony. First, Dr. Berenson's assertion was based on the "stress" that Deckmejian experienced relating to indictment, trial, and conviction. A-192. But Dr. Berenson admitted on cross-examination that throughout the pretrial, trial, and sentencing period (which included Deckmejian testifying on two days) that Deckmejian did not need any change in medications, was never hospitalized, and experienced no notable health effects. A-85-86. Second, any criminal defendant

can be expected to experience "stress" relating to indictment, trial, and conviction. Under Dr. Berenson's reasoning, no convicted criminal with health problems could be sent to prison, because the mere prospect of imprisonment would impair his or her health.

Accordingly, to excuse Deckmejian from prison altogether was an abuse of discretion.[12]

IV. The District Court Erred By Refusing to Impose Any Fine

USSG § 5E1.2(2) (2000) states: "The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." Absent a finding of inability to pay, a fine within the guideline range therefore is mandatory. *See, e.g.*, *Bonito*, 57 F.3d at 175; *United States v. Thompson*, 227 F.3d 43, 45 (2d Cir. 2000); *United States v. Salameh*, 261 F.3d 271, 276 (2d Cir. 2001) ("The burden of establishing inability to pay rests on defendant."), *cert. denied*, 536 U.S. 967 and 537 U.S. 847 (2002); *accord United States v. Sanchez-Estrada*, 62 F.3d 981, 989 (7th Cir. 1995)

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[12] In addition, because the extent of the departure was based in part on the legally inappropriate factor of the district judge's personal and anecdotal knowledge of Bureau of Prisons capabilities, as discussed above, the sentence should be vacated. "Having found that the district court relied on some improper grounds in determining the extent of the departure, the appropriate course is to remand for resentencing." *Barresi*, 316 F.3d at 75-76.

(language of § 5E1.2 "is to be taken seriously" and district court "*must* impose a fine, unless the defendant demonstrates that he cannot pay *anything*") (emphasis in original) (citation omitted); *United States v. Khawaja*, 118 F.3d 1454, 1459 (11th Cir. 1997) ("The Guidelines require the imposition of a fine, unless the defendant establishes [inability to pay].").

Deckmejian did not argue or offer any evidence regarding inability to pay. Nor did Deckmejian object to the Presentence Investigation Report's findings on his financial condition. Indeed, Deckmejian himself submitted a financial statement reporting almost $2 million in net worth. *See* Presentence Report (separately attached hereto). And the district court agreed that Deckmejian has "substantial assets which could be used to promptly pay the restitution." A-162. To the extent that the final judgment can be considered a finding of inability to pay, that finding is unsupported by the evidence.

The district court's reasoning that restitution could substitute for a fine was erroneous. *See, e.g., United States v. Ahmad*, 2 F.3d 245, 248 (7th Cir. 1993) ("Priority for victims does not excuse a fine" and "Restitution is not a reason to waive the fine or depart downward, although the court may consider restitution when selecting a fine within the range"); *United States v. Malpeso*, 943 F. Supp. 254, 258, 260 (E.D.N.Y. 1996) (same), *aff'd*, 126 F.3d 92 (2d Cir. 1997). Indeed,

the court's finding that Deckmejian can pay substantial restitution is inconsistent with any implied finding of inability to pay a fine. *Cf. Ahmad*, 2 F.3d at 248.

Accordingly, "since the fine was mandated by the Guidelines, the district judge was required to give [a valid] explanation before waiving its imposition." *Bonito*, 57 F.3d at 175. Refusing to impose any fine was error. *E.g.*, *United States v. Ferrin*, 994 F.2d 658, 666 (9th Cir. 1993) (error to refuse a fine before making finding as to defendant's inability to pay; "If Ferrin can pay one, the court must impose one.").

CONCLUSION

The sentence should be vacated in all respects other than the restitution order, and the case remanded with instructions to re-sentence Deckmejian to imprisonment within the Guideline range and a fine within the Guideline range. *See* 18 U.S.C. § 3742(g).

Respectfully submitted.

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Dated: September 17, 2004

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John J. Powers III

CERTIFICATE OF SERVICE

I hereby certify that today, September 17, 2004, I caused two copies of the accompanying Opening Brief for Appellant United States of America, plus a copy of the Presentence Report (separately filed) and Joint Appendix, to be served on the following by Federal Express:

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