



U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

May 11, 2004

The Honorable Bill Frist, M.D.
Majority Leader
United States Senate
Washington, D.C. 20510

Re: *United States v. Robert Mendoza*, No. CR 03-730 DT (C.D. Cal. Jan. 12, 2004)

Dear Mr. Leader:

I am writing to advise you that the Department of Justice will not appeal the district court's order in the above-referenced case. The decision concerns the constitutionality of Section 401(I) of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (Apr. 30, 2003) (PROTECT Act or Act), which, if it had taken effect, would have required the Attorney General to transmit to the Committees on the Judiciary of the House of Representatives and Senate (Judiciary Committees) a report of any downward departure awarded by a court (other than one given based on substantial assistance). Under that provision, the Attorney General would have been required to provide specified information about the district court's action and the position of the parties. See Section 401(I)(2)(B)(i)-(v), 117 Stat. 675. In addition, had it taken effect, the provision would have required the Attorney General to submit a second report to Congress reporting the Department's decision whether to take an appeal of the departure. Section 401(I)(2)(C), 117 Stat. 675. Section 401(I)(3) provided that that provision would not take effect if, within 90 days of the PROTECT Act's enactment, the Attorney General submitted to the Judiciary Committees a report outlining a policy for the reporting and appeal of adverse downward departure decisions that met certain criteria outlined in Section 401(I)(1) of the Act. Section 401(I) therefore did not take effect because, on July 28, 2003, the Attorney General adopted a policy for the reporting and appeal of adverse downward departure decisions that satisfied the criteria of the Act. See Letter from the Honorable William E. Moschella to the Honorable Orrin G. Hatch, July 28, 2003 (attached); Letter from the Honorable William E. Moschella to the Honorable F. James Sensenbrenner, Jr., July 28, 2003 (attached).

My decision not to appeal is based on the unusual circumstances and posture of this case, and the existence of other cases that I believe present more appropriate vehicles to defend the constitutionality of the challenged provision. It does not reflect a determination on the part of the Executive Branch that Section 401(I) is unconstitutional. To the contrary, the government has vigorously defended the provision's constitutionality.

1. The defendant in this case pleaded guilty to committing a series of bank robberies. Before sentencing, the defendant filed a motion challenging the constitutionality of various provisions of the PROTECT Act relating to the composition of the Sentencing Commission, see PROTECT Act Section 401(n), 117 Stat. 675-676, the requirement that courts give a specific statement of the reasons for a departure, Section 401(c), 117 Stat. 669, the requirement that courts report sentencing data to the Sentencing Commission, see Section 401(h), 117 Stat. 672, and the reporting requirements of Section 401(l). The government opposed the defendant's motion in its entirety.

2. In an unpublished order, the district court rejected all of the defendant's claims, with the exception of his challenge to Section 401(l). The district court first found that the defendant "has the standing to challenge the reporting requirements contained in [Section 401(l)]." Order 8. The court concluded that there was "no legitimate purpose served by reporting individual judges's [sic] performance to Congress" because "Congress does not have any direct oversight over the judiciary." *Id.* at 12. The court thus purported to "invalidate[] Title IV, Section 401(l)(1) (2) and (3) * * * as an unwarranted inference with Judicial independence and a clear violation of the separation of powers set forth in the United States Constitution." *Id.* at 14. When the court orally announced its ruling, it clearly limited the reach of its decision in two respects. First, the court indicated that it had only intended to invalidate the requirement of Section 401(l) that the Attorney General report to the Judiciary Committees all adverse downward departure decisions and the Department's decision whether to appeal them. The court clearly stated that it had not intended to invalidate the Department's internal reporting procedures for adverse sentencing decisions (including downward departures), even though those procedures had been modified to comply with the standards established in Section 401(l)(1). Jan. 12, 2004 Hearing Tr. 18 ("I have no problem with the internal reporting requirements that the Justice Department [has]. * * * [T]hat's not a problem."). Second, the court indicated that it was not enjoining the government from communicating with Congress on sentencing issues. *Id.* at 22.

3. Within days of the district court's issuance of its unpublished order, two other district judges rejected similar challenges to the constitutionality of Section 401(l). The day after the district court ruled in this case, the U.S. District Court for the District of Hawaii issued a lengthy published decision in which it rejected several constitutional challenges to provisions of the PROTECT Act, including Section 401(l). That court concluded that a constitutional challenge to the provisions of Section 401(l)(2) requiring reporting to Congress was "speculative" because the provision never went into effect, and held that the Attorney General's new internal reporting procedures did not impair judicial decisionmaking or independence. See *United States v. Schnepfer*, 302 F. Supp. 2d 1170, 1196-1199 (D. Haw. 2004). A short time later, another judge of the United States District Court for the Central District of California held in *United States v. Christopher Lynn Younger*, CR 03-629-FMC, that the Department of Justice's internal reporting procedures for sentencing decisions did not unconstitutionally interfere with judicial independence. Based on these rulings, the government asked the district court in this case to reconsider its decision. The government also

asked the district court to reconsider its ruling because the presentence investigative report prepared on the defendant indicated that there was no basis for a downward departure, suggesting that the defendant's challenge to Section 401(I)'s never-implemented departure-reporting provision did not present a live controversy.

On February 2, 2004, the court orally denied the motion for reconsideration. The district court reiterated that it did not deem unconstitutional the Department's internal reporting procedure. Feb. 2, 2004 Hearing Tr. 12. The court rejected the government's argument that the defendant's claim did not present a live controversy, stating that at the time of its ruling, there was the possibility that the defendant would seek a departure. The district court then sentenced the defendant to 70 months of imprisonment, which was within the Guidelines range for his offense.


4. In the government's view, the district court's decision is incorrect. Both the defendant's standing to challenge the constitutionality of Section 401(I) and the ripeness of his challenge are highly doubtful in light of the fact that the provision never went into effect, and because he never claimed that departure from the Guidelines would be appropriate in his case. On the merits, even if Section 401(I) had gone into effect, it would not have unconstitutionally infringed on judicial authority. Neither the formal reporting by the Justice Department of downward departures to Congress, nor the practice of Department lawyers reporting internally on adverse downward departures, undermines judicial independence nor detracts from the fact that it is the judiciary that determines the propriety of awarding a departure in a particular case. See *Schnepper*, 302 F. Supp. 2d at 1198-1199.

The government nonetheless has determined that an appeal should not be taken in this case. Under 18 U.S.C. 3731 and 3742(b), the government has authority to appeal in a criminal case only in certain specified circumstances, such as when the district court imposes an illegal sentence on a defendant, dismisses an indictment, grants a new trial after verdict or judgment, or suppresses or excludes evidence. None of those events occurred in this case. Even assuming that those provisions, or others such as mandamus under 28 U.S.C. 1651(a), would afford a vehicle for appellate review, an appeal is not warranted because the district court's decision has no effect on any provision of law that at any time became operative. For that reason, the district court's decision, though plainly incorrect, does not in any way affect the government's ability to prosecute offenders or otherwise affect the operations of the Department of Justice. The district court's decision also has no precedential effect and does not restrict the government's ability to enforce or comply with any valid reporting obligation that Congress may in the future enact into law. In addition, the government may have the opportunity to defend the constitutionality of Section 401(I) in responding to appeals in the *Schnepper* or *Younger* cases, when the government will not be confronted with the same obstacles to adjudication of the claim on the merits.

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A copy of the district court's decision is enclosed. A brief seeking review of this decision would be due by June 10, 2004. Please let me know if I can be of further assistance in this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Theodore B. Olson', with a stylized flourish at the end.

Theodore B. Olson
Solicitor General

Enclosure