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## **The PROTECT (Amber Alert) Act and the Sentencing Guidelines**

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# The PROTECT (Amber Alert) Act and the Sentencing Guidelines

## Summary

Congress enacted the Protect Act (also known as the Amber Alert Act), P.L. 108-21 (S. 151 /H.R. 1104), to deal with crimes of violence against children, minors, juveniles, adolescents, infants, and those under the age of 18. Title IV of the Protect Act amends the law relating to the federal sentencing guidelines in order to ensure that sex offenders are punished appropriately. Its provisions are a response to the Justice Department's concern that, all too often particularly in cases of sexual offenses, the federal courts had departed from the sanctions called for in the guidelines to impose less stringent penalties (i.e., granting downward departures).

The Act, among other things:

- balances representation on the Sentencing Commission so that in the future no more than 3 of its members may be federal judges;
- at least temporarily prohibits downward departures in sex offense cases (sexual abuse, sexual exploitation of children, transportation for sexual purposes, obscenity, nonparental child kidnapping, or sexual trafficking in children) except to the extent specifically authorized in the sentencing guidelines;
- in sex offense cases, limits specifically authorized downward departures based on family and community ties, diminished capacity, or aberrant behavior;
- temporarily changes the standard used for appellate review of downward departures *from* due deference to the trial court's determination *to de novo* review (thereby departing from the Supreme Court's statutory construction in *Koon v. United States*)[the provision amended is no longer in force, *United States v. Booker*];
- requires more extensive report on sentencing matters from federal judges, the Justice Department, and the Sentencing Commission; and
- provides for additional offenses levels in child pornography cases based on the number of images possessed or trafficked.

Related reports include CRS Report RS21522, *A Sketch of the PROTECT (Amber Alert) Act and the Sentencing Guidelines*, and CRS Report 94-33, *How the Sentencing Guidelines Work*.

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# The PROTECT (Amber Alert) Act and the Sentencing Guidelines

## Introduction

Title IV of the PROTECT Act (Prosecution Remedies and Other Tools to end the Exploitation of Children Today Act), P.L. 108-21, 117 Stat. 650 (2003), sometimes known as the Amber Alert Act, amends the sentencing procedures used in federal cases, particularly those involving sex offenses and other crimes against children.

Sentencing within the federal criminal justice system is governed to a large extent by United States Sentencing Commission's sentencing guidelines. Congress authorized the Commission to construe and maintain the guideline system in order to eliminate the disparity that unguided, judicial sentencing discretion might produce. The guidelines establish a series of steps, calibrated according to the seriousness of the violation, beneath the statutory maximum provided for a particular offense and above any applicable mandatory minimum sentence.

The guidelines process is essentially a score card process. Most federal crimes have been assigned an individual guideline that provides a "base offense level"<sup>1</sup> and that adds or subtracts "offense levels" to account for the presence of specifically identified aggravating or mitigating circumstances. The final offense level score requires a sentence within one of six relatively narrow sentencing ranges. The six ranges vary in severity according to the extent of the offender's criminal record. Heretofore, a sentencing court might depart from the applicable guideline sentencing range either upward (impose a more severe penalty) or downward (impose a less severe penalty), if it found "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines," 28 U.S.C. 3553(b).

The Act's amendments to the guideline process, added during debate in the House, 149 *Cong. Rec.* H2420-437 (daily ed. Mar. 27, 2003), appeared to have been the product of Department of Justice concerns over the extent of downward departures. The House Judiciary Committee hearings on the Amber Alert proposal (H.R. 1104) were held in conjunction with consideration of a proposal that included a change in the standard of appellate review in sentencing guideline cases (H.R. 1161). During those hearings, the Department of Justice recommended changes in the structure of the guidelines to reduce the number of "downward departures" found in federal case law:

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<sup>1</sup> Crimes that have not been assigned a specific base offense level are treated like the crimes to which they are most closely analogous, U.S.S.G. 1B1.2.

H.R. 1161 contains certain additional provisions not found in the Senate bill. In particular, section 12 of the bill would enact long-overdue reforms to address the growing frequency of “downward departures” from the Sentencing Guidelines. This is especially a problem in child pornography cases.

\* \* \*

Much of the damage is traceable to the Supreme Court's decision in *Koon v. United States*, 518 U.S. 81 (1996). In *Koon*, the Court interpreted the Sentencing Reform Act to require appellate courts to apply a highly deferential standard of review to departure determinations by sentencing judges. The Court also disapproved the practice whereby appellate courts had previously determined that certain grounds of departure were impermissible. Instead, the Court held that any factor not explicitly disapproved by the Sentencing Commission (or by statute) could serve as ground for departure, in an appropriate case as determined by the district court in its discretion.

Under *Koon*, judges who dislike the Sentencing Reform Act and the sentencing guidelines have significant discretion to avoid applying a sentence within the range established by the Commission, and it is difficult for the Government effectively to appeal in such cases. Consequently, the rates of downward departure have steadily accelerated since *Koon*. Moreover, *Koon's* expansion of the permissible grounds of departures had led to a growing trend of increasingly vague grounds of downward departure. . . .

Section 12 of H.R. 1161 would provide much-needed and long-overdue reform by establishing that decisions to depart from the godliness are to be reviewed under a de novo standard of review. To that extent, *Koon* would be explicitly overruled. While we enthusiastically support this measure, we do not believe it goes far enough. We strongly urge the Subcommittee to include appropriate language that would overrule *both* of the key holdings in *Koon*. Specifically, the bill should include language that would prohibit departures on any ground that the Sentencing Commission has not affirmatively specified as a permissible ground for a downward departure. In doing so, the bill would effectively overrule *Koon* on this point as well. *H.R. 1104, The Child Abduction Prevention Act and H.R. 1161, the Child Obscenity and Pornography Prevention Act of 2003: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 108th Cong., 1st Sess. (2003)(statement of Assoc.Dep.Att'y Gen. Daniel P. Collins), available at [<http://www.house.gov/judiciary>].

The Committee reported out H.R. 1104, but not H.R. 1161 or any language addressing the Justice Department’s concern over downward departures, H.Rept. 108-47 (2003). During debate, however, Representative Feeney offered an amendment that incorporated sentencing guideline modifications into the bill and that echoed the sentiments of the Justice Department.

Mr. Chairman, this amendment addresses long-standing and increasing problems of downward departures from the federal sentencing guidelines. According to the testimony of the Department of Justice, this is especially a problem in child pornography cases.

Although the guidelines continue to state that departures should be very rare occurrences, they have in fact proved to be anything but. . . .

\* \* \*

Increasingly, the exceptions are overriding the rule. . . . The Department of Justice believes that much of this damage is traceable to the Supreme Court’s 1996 decision in *Koon* versus the United States. In the *Koon* case, the court held that any factor not explicitly disapproved by the sentencing commission or by statute could serve as grounds for departure. So judges can make up exceptions as they go along. This has led to an accelerated rate of downward departures.

Judges who dislike the Sentencing Reform and the sentencing guidelines now have significant discretion to avoid applying a sentence within the range established by the commission, and it is difficult for government to effectively appeal such cases.

The amendment I offer today contains a number of provisions designed to ensure more faithful adherence to the guidelines so defendants in cases involving child pornography and sexual abuse receive the sentences that Congress intended., 149 *Cong.Rec.* H2422-423 (daily ed. Mar. 27, 2003).

The amendment passed, and the language of H.R. 1104 was substituted for that of its Senate-passed counterpart, S. 151, 149 *Cong.Rec.* H2436-443 (daily ed. Mar. 27, 2003). The Senate version of S. 151 had no language comparable to the Feeney amendment, but the conferees accepted a revised version of the amendment, H.Rept. 108-66 (2003). The bill with the revised amendment passed both Houses, 149 *Cong.Rec.* H3075-76, S5156-157 (daily ed. Apr. 10, 2003) and was sent to the President who signed it on April 30, 2003, 117 Stat. 650 (2003).

## In Brief

Title IV of the Act, the revised Feeney amendment:

- limits the future membership of the Sentencing Commission to no more than 3 federal judges at a time (the original provision insisted that the 7 member Commission include *at least* 3 federal judges), 28 U.S.C. 991;
- at least temporarily amends the governing sentencing statute and guidelines to limit downward departures in various child or sex offense cases to instances where they are expressly authorized, 18 U.S.C. 3553(b)(2); U.S.S.G. §5K2.0;
- amends the guidelines in such cases to limit downward departures on the basis of aberrant behavior, diminished capacity, community ties, or family ties or responsibilities, U.S.S.G. §§5K2.20, 5K2.13, 5H1.6;
- regardless of the offense requires a motion by the government to trigger the offense level reduction available for acceptance of responsibility in serious cases (offense level 16 or higher), U.S.S.G. §3E1.1;
- demands that in the case of either an upward or downward departure the court's statement of its reasons for the departure must be in the written order of judgment and commitment, 18 U.S.C. 3553(c);
- temporarily adjusts the standard for review so that rather than giving deference (absent clear error) to a trial court's decision to depart from the guidelines an appeals court is to make its own assessment of the appropriateness of departure (de novo review), 18 U.S.C. 3742(e) [section 3742(e) is no longer in force, *United States v. Booker*, 125 S.Ct. 738, 756-57 (2005)];
- instructs trial courts whose departure decisions are overturned on review to adhere to the sentencing guidelines and any appellate directives when the cases are returned to them for resentencing, 18 U.S.C. 3742(g);

- directs the chief judge of each federal judicial district to ensure that full sentencing reports (available to the Judiciary Committees) are filed with the Sentencing Commission, 28 U.S.C. 994(w);
- calls for review and reports to Congress from the Department of Justice and the Sentencing Commission on action taken in response to the legislation, 18 U.S.C. 3553 note; 28 U.S.C. 994 note;
- eliminates (from the application note for the sentencing guideline that escalates the penalties for a pattern of repeat and dangerous sex offenses committed against minors) the requirement that the crimes involve more than a single victim, U.S.S.G. §4B1.5, App.N.4(i); and
- amends the guidelines governing possession or trafficking in materials depicting sexually explicit conduct involving a minor to include sentence level increases ranging from 2 to 5 levels depending on the number of images involved, U.S.S.G. §§2G2.2. 2G2.4.

## Composition of the Sentencing Commission

The Sentencing Commission consists of seven members, 28 U.S.C. 991. Five of its current members are federal judges. The Act provides that hereafter no more than three members of the Commission may be federal judges, although the limitation does not apply to any of the judges serving on or nominated to the Commission at the time of enactment, 28 U.S.C. 991, 991 note, 117 Stat. 675 (2003).

The limitation of judicial service presumably opens the Commission to broader representation from the academic and professional communities. Opponents of the provision lamented the prospective loss of judicial expertise.<sup>2</sup> Although not mentioned in debate, judges would appear to enjoy the additional advantage of already having successfully undergone the examinations associated with the confirmation process. Yet perhaps the provision should be attributed at least in part to apprehensions over possible judicial hostility towards the guidelines.<sup>3</sup>

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<sup>2</sup> 149 *Cong.Rec.* S5146 (daily ed. Apr. 10, 2003)(remarks of Sen. Leahy)(“it limits the number of federal judges who can serve on the Sentencing Commission because, as Chairman Sensenbrenner explained, we don’t want to have the Commission packed with federal judges that have a generic predisposition to hate any kind of sentencing guidelines. I, for one, believe that judges are extremely valuable members of the Commission. They bring years of highly relevant experience, not to mention reasoned judgment, to the table”).

<sup>3</sup> *See e.g.*, 149 *Cong.Rec.* H2423 (daily ed. Mar. 27, 2003)(remarks of Rep. Feeney) (“Judges who dislike the Sentencing Reform Act and the sentencing guidelines now have significant discretion to avoid applying a sentence within the range established by the commission”).

## Downward Departures in Certain Child Abuse and Sex Offense Cases

Earlier law permitted federal courts to impose a sentence outside the range called for by the applicable sentencing guideline range, if the court found “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described,” 18 U.S.C. 3553(b). The court might also depart from the guideline range based upon the offender’s substantial assistance to the government, U.S.S.G. §5K1.1.

At least temporarily, the Act changes the rules in the case of certain child abuse and sex offenses. It divides section 3553(b) in two. The first, section 3553(b)(1) embodies the prior rule – unless the second (section 3553(b)(2)) applies, a federal court is bound by the guidelines unless the guidelines fail to adequately account for a factor presented in the case before it. The second, section 3553(b)(2), applies to convictions for a violation of:

- 18 U.S.C. 1201 (nonparental kidnaping) involving a minor victim;<sup>4</sup>
- 18 U.S.C. 1591 (sex trafficking of children or by force, fraud, or coercion);
- 18 U.S.C. ch.71 (obscenity);<sup>5</sup>
- 18 U.S.C. ch. 109A (sexual abuse);<sup>6</sup>

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<sup>4</sup> Neither the Act nor section 1201 define who is a “minor” for purposes of this provision. Nor do title 1 nor title 18 contain a generally applicable definition. For purposes of some of the other provisions in this list a minor is one who has yet to attain the age of 18, 18 U.S.C. 1591, 2256(1), 2423, and for others it is one who has yet to attain the age of 16, 18 U.S.C. 1470, 2243.

<sup>5</sup> The offenses under chapter 71 include violations of 18 U.S.C. 1460 (possession with intent to sell, and sale, of obscene matter on federal property), 1461 (mailing obscene or crime-inciting matter), 1462 (importation or transportation of obscene matter), 1463 (mailing indecent matter on wrappers or envelopes), 1464 (broadcasting obscene language), 1485 (transporting of obscene matters for sale or distribution), 1466 (engaging in the business of selling or transferring obscene matter), 1468 (distributing obscene material by cable or subscription), 1470 (transfer of obscene material to minors).

<sup>6</sup> The offenses under chapter 109A include violations of 18 U.S.C. 2241 (aggravated sexual abuse), 2242 (sexual abuse), 2243 (sexual abuse of a minor), 2244 (abusive sexual contact), 2245 (sexual abuse resulting in death).



- 18 U.S.C. ch. 110 (sexual exploitation and other abuse of children);<sup>7</sup>  
or
- 18 U.S.C. ch. 117 (transportation for illegal sexual activity and related crimes).<sup>8</sup>

In cases under section 3553(b)(2), the courts may depart upward based on inadequate Commission consideration of a circumstance presented by the case, or depart downward on the basis of a government recommendation for substantial assistance, or depart downward with the support of a specific authority in the guidelines to do so.<sup>9</sup> Section 3553(b)(1) purports to make the guidelines binding subject to a narrow

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<sup>7</sup> The offenses under chapter 110 include violations of 18 U.S.C. 2251 (sexual exploitation of children), 2251A (selling or buying of children), 2252 (certain activities relating to material involving the sexual exploitation of minors), 2252A (certain activities relating to material constituting or containing child pornography), 2257 (record keeping requirements), 2258 (failure to report child abuse), 2260 (production of sexually explicit depictions of a minor for importation into the United States).

<sup>8</sup> The offenses under chapter 117 include violations of 18 U.S.C. 2421 (transportation generally), 2422 (coercion and enticement), 2443 (transportation of minors), 2424 (filing factual statement about alien individual), 2425 (use of interstate facilities to transmit information about a minor).

<sup>9</sup> “In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless – (i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

“(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that – (I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress; (II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and (III) should result in a sentence different from that described; or

“(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described. . .” 18 U.S.C. 3553(b)(2); *see also*, U.S.S.G. §5K2.0(b) (“Under 18 U.S.C. §3553(b)(2), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree – (1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress; (2) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and (3) should result in a sentence different from that described.

“The grounds enumerated in this part K of chapter 5 are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any

exception; section 3553(b)(2) further confines the exception recognized as a general rule under section 3553(b)(1).

The selection of crimes made subject to the more demanding downward departure requirements seems to have been based both on the subject material of the legislation and concern over the extent of downward departures in the type of cases selected. The Conference Report observed that, “those convicted of sexual abuse received a downward departure [in] over 16 percent of the cases, and [trial courts] granted reductions below the guideline range of those convicted of sexual abuse by an astonishing 63 percent from the guideline range. For those convicted of pornography and/or prostitution related offenses, trial courts departed from the recommended guidelines over 18 percent of the time, reducing these defendants’ sentences by a staggering 66 percent,” H.Rept. 108-66, at 58-9 (2003).

The Supreme Court in *United States v. Booker*, 125 S.Ct. at 756-57, struck down section 3553(b)(1) in order to make it clear that the federal sentencing guidelines are advisory and not mandatory. The Court did not address section 3553(b)(2), perhaps because the cases before it did not involve any of the crimes covered by section 3553(b)(2). The same rationale, however, might be thought to govern.<sup>10</sup>

## **Explicit Grounds for Downward Departure in Child Abuse and Sex Offense Cases**

By limiting the grounds of downward departure in child abuse and sex offense cases except as explicitly authorized, Congress raises the question of which downward departures are explicitly authorized. The guidelines authorize downward departures for assistance to the prosecution,<sup>11</sup> old age,<sup>12</sup> coercion and duress,<sup>13</sup> for

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other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 353(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted”).

<sup>10</sup> *United States v. Sharpley*, \_\_\_ F.3d \_\_\_, \_\_\_ n.3 (2d Cir. Feb. 16, 2005)(“*Booker* excises 18 U.S.C. 3553(b)(1) from the Sentencing Reform act, which makes the Guidelines generally binding on courts, but does not excise 18 U.S.C. 3553(b)(2), which makes the Guidelines binding in sentencing for convictions for certain child crimes and sexual offenses . . . Subsection (b)(2) could arguably be read to independently require a court to follow the Guidelines in convictions under [the various listed child and sexual offenses]. However, we see no unique feature of Guidelines sentences for child crimes and sexual offenses that would prevent them from violating the Sixth Amendment in the same manner as Guidelines sentences for other crimes. . . For this reason, we suspect that the Supreme Court’s failure to excise the entirety of section 3553(b) was simply an oversight”).

<sup>11</sup> U.S.S.G. §5K1.1 (“Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines”).

<sup>12</sup> U.S.S.G. §5H1.1. Age (“ . . . Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm . . .”); U.S.S.G. §5K2.22

voluntary disclosure of an offense,<sup>14</sup> and for physical impairment.<sup>15</sup> In the case of disqualifying child abuse and sex offenses, however, the Act forecloses otherwise explicitly authorized downward departures on the grounds of family ties and

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*(“In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code, age may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by §5H1.1. . .”)(here and elsewhere statutory and guideline language in italics was added by the Act).*

<sup>13</sup> U.S.S.G. §5K2.12 (“If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range. The extent of the decrease ordinarily should depend on the reasonableness of the defendant’s actions and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. The Commission considered the relevance of economic hardship and determined that personal financial difficulties and economic pressures upon a trade or business do not warrant a decrease in sentence”).

<sup>14</sup> U.S.S.G. §5K2.16 (“If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a departure below the applicable guideline range for that offense may be warranted. For example, a downward departure under this section might be considered where a defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered. This provision does not apply where the motivating factor is the defendant’s knowledge that discovery of the offense is likely or imminent, or where the defendant’s disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct”).

<sup>15</sup> U.S.S.G. §5H1.4 (“ . . . an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; *e.g.*, in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment. Drug or alcohol dependence or abuse is not a reason for imposing a sentence below the guidelines. . .”); U.S.S.G. §5K2.22 (“ . . . *An extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by §5H1.4 . . .*”).

responsibilities or community ties,<sup>16</sup> diminished capacity<sup>17</sup> or aberrant behavior<sup>18</sup> to lessen the possibility of inappropriate downward departures.<sup>19</sup>

## Acceptance of Responsibility

In the calculation of the final offense level and applicable sentencing range before the question of departure arises, a defendant's offense level may be reduced if he "accepts responsibility" for his offense, U.S.S.G. §3E1.1. The guideline governing the possible reduction has two parts. The first allows all defendants a 2 level reduction if they "clearly demonstrate acceptance of responsibility for [their] offense," U.S.S.G. §3E1.1(a). The second allows an additional 1 level reduction from an offense level of 16 or higher if the defendant announces his intent to plead guilty and fully discloses his involvement in the crime, notifies, U.S.S.G. §3E1.1(b).

The Act amends this second part. It permits the 1 level reduction upon announcement of an intent to plead guilty without insisting upon full disclosure, but insists upon the motion of the prosecution to trigger the reduction.<sup>20</sup>

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<sup>16</sup> U.S.S.G. §5H1.6 ("Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. *In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range . . .*").

<sup>17</sup> U.S.S.G. §5K2.13 (language added by the Act in italics) ("A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if . . . (4) *the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code. . .*").

<sup>18</sup> U.S.S.G. §5K2.20 ("*Except where a defendant is convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code, a sentence below the applicable guideline range may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior. . .*").

<sup>19</sup> "This amendment would also reform the existing grounds of departure set forth in the current guidelines by eliminating those that have been most frequently abused, such as aberrant behavior," 149 *Cong.Rec.* H2423 (daily ed. Mar. 27, 2003)(remarks of Rep. Feeney).

<sup>20</sup> U.S.S.G. §3E1.1(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 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 government and the court to allocate its resources efficiently, decrease by 1 additional level*").

Neither the debate nor the Conference Report explain the reason for the change, perhaps because an accompanying change in the commentary was thought sufficient: “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,” U.S.S.G. §3E1.1, App.N. 6.

## Specific Written Reasons for Departure

Prior to the Act federal courts were required to explain the reasons for a sentence outside the applicable guideline range, 18 U.S.C. 3553(c). The Act makes it clear that the explanation must be specific, in writing, and provided to the Sentencing Commission.<sup>21</sup>

## Standards for Review

Before the sentencing guidelines, a sentence within the statutory maximum imposed by a federal court was essentially beyond appellate review, *Dorszynski v. United States*, 418 U.S. 424, 431 (1974). With the creation of the guidelines process, Congress gave both defendants and the government the opportunity to appeal a sentencing decision, 18 U.S.C. 3742. It instructed the appellate courts, however, to “give due regard to the opportunity of the district court to judge the credibility of the witnesses, and [to] accept the findings of fact of the district court unless they are clearly erroneous and [to] give due deference to the district court’s application of the guidelines to the facts,” 18 U.S.C. 3742(e).

This led the Supreme Court in *Koon v. United States*, 518 U.S. 81 (1996), to conclude that Congress intended a court, reviewing the decision to grant a downward departure, to afford the lower court’s decision “due deference” in the absence of an abuse of discretion rather than to make its own determination of whether departure was appropriate (de novo review):

A district court’s decision to depart from the Guidelines by contrast, will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing

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<sup>21</sup> 18 U.S.C. 3553(c) (“The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence – (1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or (2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, *which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.* If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court’s statement of reasons, *together with the order of judgment and commitment*, to the Probation System *and to the Sentencing Commission*, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons”).

court. . . . Before 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. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or 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 facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases that appellate courts do. 518 U.S. at 98.

The Act temporarily establishes de novo review as the standard for review of whether a departure is justified by the facts of a case, a change it was felt “would be more effective to review illegal and inappropriate downward departures,” 149 *Cong.Rec.* H2423 (daily ed. Mar. 27, 2003)(remarks of Rep. Feeney). The new standard applies to review of upward and downward departures in all federal criminal cases.<sup>22</sup> Section 3742(e) became inoperable with the announcement of *Booker*.<sup>23</sup>

## Resentencing After Remand

The Act creates a specific provision covering a trial court’s resentencing in a case returned to it after its original sentencing decision has been overturned on appeal, 18 U.S.C. 3742(g). The provision is designed to “prevent sentencing courts upon remand from imposing the same illegal departure on some different theory,”

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<sup>22</sup> 18 U.S.C. 3742(e)(“Upon review of the record, the court of appeals shall determine whether the sentence – (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) is outside the applicable guideline range, and is unreasonable, having regard for – (A) the district court failed to provide the written statement of reasons required by section 3553(c); (B) the sentence departs from the applicable guideline range based on a fact that – (i) does not advance the objectives set forth in section 3553(a)(2); or (ii) is not authorized under section 3553(b); or (iii) is not justified by the facts of the case; or (C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in chapter 227 section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or; and (B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

“The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, *except with respect to determinations under subsection (3)(A) and (3)(B)*, shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts”).

<sup>23</sup> “We conclude that this provision [18 U.S.C. 3553(b)(1)] must be severed and excised, as must one other statutory section, §3742(e) (main ed. and Supp. 2004), which depends upon the guidelines’ mandatory nature,” 125 S.Ct. at 756-57.

149 *Cong. Rec.* H2423 (daily ed. Mar. 27, 2003)(remarks of Rep. Feeney). It applies in all criminal cases and to cases involving either upward or downward departures.<sup>24</sup>

## Studies and Reports to Ensure Implementation

The Act mandates a number of reports and studies to ensure effective implementation of its provisions. It requires the chief judge of each federal judicial district to report the specifics of individual sentencing decisions handed down within the district. The reports are forwarded to the Sentencing Commission and available to the Justice Department and the Judiciary Committees.<sup>25</sup> The Attorney General

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<sup>24</sup> 18 U.S.C. 3742(g) (“A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that – (1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 944(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and (2) the court shall not impose a sentence outside the applicable guidelines range except upon a ground that – (A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and (B) was held by the court of appeals, in remanding the case, to be a permissible ground for departure”); subsections as amended (f)(1) and (2) provide that “If the court of appeals determines that – (1) *the sentence* was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate; [or] (2) *the sentence* is outside the applicable guideline range and *the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence is unreasonable or* was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and – (A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate; (B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, *subject to subsection (g).*”

<sup>25</sup> 28 U.S.C. 994(w) (“~~The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed (other than a sentence imposed for a petty offense, as defined in title 18, for which there is no applicable sentencing guideline) (1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission a written report of the sentence, the offense for which it is imposed, the age, race, and sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include -- (A) the judgment and commitment order; (B) the statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range); (C) any plea agreement; (D) the indictment or other charging document; (E) the presentence report; and (F) and such other information as the Commission finds appropriate.~~

“(2) *The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying*

must report all cases of downward departure other than those granted for substantial assistance as well as any determination to appeal the departure to the Judiciary Committees.<sup>26</sup> And the Sentencing Commission is to study the practice of downward departures and make appropriate alterations in the guidelines.<sup>27</sup>

## Adjustments to Substantive Sex Offense Guidelines

Title IV of the Act also modifies the guideline for specific substantive sex offenses. Section 4B1.5 of the guidelines provides a series of minimum offense levels for conviction of a second or subsequent sex offense. It also prescribes

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*those reports described in this section, as well as other records received from courts.*

“(3) The Commission shall submit to Congress at least annually an analysis of these reports documents, and any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

“(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission may assemble or maintain in electronic form that include any information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge”).

<sup>26</sup> 18 U.S.C. 3553 note (“(A) IN GENERAL.— Not later than 15 days after a district court's grant of a downward departure in any case, other than a case involving a downward departure for substantial assistance to authorities pursuant to section 5K1.1 of the United States Sentencing Guidelines, the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate containing the information described under subparagraph (B).

“(B) CONTENTS. – The report submitted pursuant to subparagraph (A) shall set forth – (i) the case; (ii) the facts involved; (iii) the identity of the district court judge; (iv) the district court's stated reasons, whether or not the court provided the United States with advance notice of its intention to depart; and (v) the position of the parties with respect to the downward departure, whether or not the United States has filed, or intends to file, a motion for reconsideration.

“(C) APPEAL OF THE DEPARTURE. – Not later than 5 days after a decision by the Solicitor General regarding the authorization of an appeal of the departure, the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate that describes the decision of the Solicitor General and the basis for such decision”).

<sup>27</sup> 28 U.S.C. 994 note (“Not later than 180 days after the enactment of this Act, the United States Sentencing Commission shall – (1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and (2) promulgate, pursuant to section 994 of title 28, United States Code – (A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are substantially reduced; (B) a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney; and (C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by this Act, including a revision of paragraph 4(b) of part A of chapter 1 and a revision of section 5K2.0”).



imposition of an additional 5 offense levels if the defendant has engaged in a pattern of sex offenses, U.S.S.G. §4B1.5(b). It defines a pattern as the commission two or more sex offenses committed against two or more minor victims. The Act redefines pattern simply as the commission of two or more sex offenses committed against a minor, eliminating the requirement of multiple victims, U.S.S.G. §4B1.5, App.N. 4(B)(i).

In addition, the Act amends the guideline applicable to possession of material depicting a child engaged in sexually explicit conduct adding offense level increases if the offense involves portrayals of sadistic or masochistic conduct (add 4 offense levels) or if the offense involves possession of multiple images (add 2 to 5 levels depending on the number of images), U.S.S.G. 2G2.4.<sup>28</sup> The Act supplies a similar treatment for the guideline that applies to trafficking such material, except that an addition for sadistic or masochistic conduct is unnecessary because the guideline already accounts for it, U.S.S.G. 2G2.2.<sup>29</sup>

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<sup>28</sup> “(a) Base Offense Level: 15

“(b) Specific Offense Characteristics

“(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by 2 levels. (2) If the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor, increase by 2 levels. (3) If the defendant's possession of the material resulted from the defendant's use of a computer, increase by 2 levels. (4) *If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.* (5) *If the offense involved – (A) at least 10 images, but fewer than 150, increase by 2 levels; (B) at least 150 images, but fewer than 300, increase by 3 levels; (C) at least 300 images, but fewer than 600, increase by 4 levels; and 600 or more images, increase by 5 levels.*”

<sup>29</sup> “(a) Base Offense Level: 17

“(b) Specific Offense Characteristics

“(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by 2 levels. (2) (Apply the Greatest) If the offense involved: (A) Distribution for pecuniary gain, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels. (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels. (C) Distribution to a minor, increase by 5 levels. (D) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels. (E) Distribution other than distribution described in subdivisions (A) through (D), increase by 2 levels. (3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels. (4) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels. (5) If a computer was used for the transmission of the material or a notice or advertisement of the material, increase by 2 levels. (6) *if the offense involved -- (A) at least 10 images, but fewer than 150, increase by 2 levels; (B) at least 150 images, but fewer than 300, increase by 3 levels; (C) at least 300 images, but fewer than 600, increase by 4 levels; and 600 or more images, increase by 5 levels.*”

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