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A Sketch of the PROTECT (Amber Alert) Act and the Sentencing Guidelines

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Summary

Title IV of the Protect Act, P.L. 108-21 (S. 151/H.R. 1004), sometimes known as the Amber Alert Act: (1) restricts the future membership of the Sentencing Commission to no more than 3 federal judges; (2) limits downward departures from the sentencing guidelines in various child or sex offense cases; (3) regardless of the offense requires a motion by the government to trigger the offense level reduction available for acceptance of responsibility in serious cases; (4) demands that in the case of either an upward or downward departure the court's statement of its reasons for the departure be in the written order of judgment and commitment; (5) 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); (6) 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; (7); 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; (8) calls for review and reports to Congress from the Department of Justice and the Sentencing Commission on action taken in response to the legislation; (9) eliminates the requirement that the crimes involve more than a single victim before some of the sentencing enhancements for recidivist sex offenders take effect; and (10) amends the guidelines governing possession or trafficking in child pornography to include sentence level increases ranging from 2 to 5 levels depending on the number of images involved.

This is an abbreviated version of CRS Report RL31917, *The PROTECT (Amber Alert) Act and the Sentencing Guidelines*.

Introduction. Title IV of the PROTECT 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 to an individual guideline that provides a "base offense level" and that adds or subtracts "offense levels" to account for the presence of any of a list of 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 either upward (impose a more severe penalty) or downward (impose a less severe penalty) from the applicable guideline sentencing range 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:

> 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.
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> 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.
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> 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. . . .
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> 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 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 form the federal sentencing guidelines. According to the testimony of the Department of Justice, this is especially a problem in child pornography cases.
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> Although the guidelines continue to state that departures should be very rare occurrences, they have in fact proved to be anything but. . . .
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> 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.
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> 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.Rep.No. 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).

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. 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 in large measure to apprehensions over possible judicial hostility towards the guidelines.

Downward Departures in Certain Child Abuse and Sex Offense Cases. Earlier law permitted federal courts to impose a sentence outside the applicable sentencing guideline range, if "the court 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 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.

The Act changes the rules in the case of certain child abuse and sex offenses, *i.e.*, cases following conviction for a violation of:

- 18 U.S.C. 1201 (nonparental kidnaping) involving a minor victim;
- 18 U.S.C. 1591 (sex trafficking of children or by force, fraud, or coercion);
- 18 U.S.C. ch.71 (obscenity);
- 18 U.S.C. ch. 109A (sexual abuse);
- 18 U.S.C. ch. 110 (sexual exploitation and other abuse of children); or
- 18 U.S.C. ch. 117 (transportation for illegal sexual activity and related crimes).

In such cases, 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 otherwise depart downward only with the support of a specific authority in the guidelines to do so.

The subject matter of the legislation and the source of the concerns seem to have dictated the selection of the crimes in the list. 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.Rep.No. 108-66, at 58-9 (2003).

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 limited downward departures for assistance to the prosecution, old age, coercion and duress, voluntary disclosure of an offense, and physical impairment. To lessen the possibility of inappropriate downward departures in the case of disqualifying child abuse and sex offenses, however, the Act forecloses otherwise authorized downward departures based on family ties and responsibilities or community ties, diminished capacity, or aberrant behavior.

Acceptance of Responsibility. In the calculation of the final offense level and applicable sentencing range and 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.

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.

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 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 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 that "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.

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," 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.

Implementing Studies and Reports. 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. The Attorney General 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. And the Sentencing Commission is to study the practice of downward departures and make appropriate alterations in the guidelines.

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 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. 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.

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