

statement, a new application note instructs the court to consider the seriousness of the offense; the involvement in the offense, if any, of members of the defendant's family; and the danger, if any to members of the defendant's immediate family as a result of the offense.

In addition to considering those factors, the amendment further restricts family ties departures by adding an application note that establishes heightened criteria for departures based on loss of caretaking or financial support. In such cases, the court must find all of the following four circumstances: (1) That a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking or essential financial support to the defendant's family; (2) that such loss exceeds the harm ordinarily incident to incarceration; (3) that there are no effective remedial or ameliorative programs reasonably available, making the defendant's caretaking or financial support irreplaceable to the defendant's family; and (4) that the departure effectively will address the loss of caretaking or financial support. The Commission determined that these heightened criteria are appropriate and necessary in order to distinguish hardship or suffering that is ordinarily incident to incarceration from that which is exceptional.

The amendment also eliminates community ties as a separate ground for departure and renames § 5H1.6 accordingly.

Third, the amendment makes conforming modifications to § 5H1.7 (Role in the Offense), reiterating that a defendant's role in the offense is not a basis for departure, and to § 5H1.8 (Criminal History), providing that the only grounds for departure based on the defendant's criminal history are set forth in § 4A1.3 (Departures Based on Inadequacy of Criminal History Category).

Part III of the amendment limits several departure provisions in Chapter Five, Part K (Departures). First, the amendment adds a factor to § 5K2.10 (Victim's Conduct) that the court should consider when determining whether a departure is warranted based on victim's conduct. The amendment provides that, in addition to five previously existing factors, the court should consider the proportionality and reasonableness of the defendant's response to the victim's provocation.

Second, the amendment adds a similar factor to § 5K2.12 (Coercion and Duress). The amendment provides that the extent of a departure based on

coercion and duress ordinarily should depend on several considerations, including the proportionality of the defendant's actions to the seriousness of the coercion, blackmail, or duress involved.

Third, the amendment limits the availability of departures pursuant to § 5K2.13 (Diminished Capacity) by adding a causation element. The amendment provides that in order to receive a departure for diminished capacity, the significantly reduced mental capacity must have contributed substantially to the commission of the offense. The amendment similarly limits the extent of departure by stating that the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Fourth, the amendment significantly restructures § 5K2.20 (Aberrant Behavior) and further restricts the availability of departures based on aberrant behavior. The Commission promulgated § 5K2.20 effective November 1, 2000, in order to resolve a longstanding circuit conflict and more properly define when a departure based on aberrant behavior may be warranted. See Appendix C, amendment 603. A departure based on aberrant behavior may be warranted only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.

The amendment provides greater emphasis to these strict requirements by moving them from an application note to the body of the policy statement. The amendment also gives the court greater guidance in applying these requirements with a new application note that clarifies that repetitious or significant, planned behavior does not meet the requirements for receiving a departure under § 5K2.20. A fraud scheme, for example, generally would be prohibited from receiving a departure pursuant to § 5K2.20 because such a scheme usually involves repetitive acts, rather than a single occurrence or single criminal transaction, as well as significant planning.

The amendment also further restricts the availability of departures based on aberrant behavior by adding several strict prohibitions to the list that has existed in § 5K2.20 since its initial promulgation. Prior to this amendment, § 5K2.20 prohibited the court from departing based on aberrant behavior if (1) The offense involved serious bodily injury or death; (2) the defendant

discharged a firearm or otherwise used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood); or (5) the defendant has a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter Four.

The amendment gives greater prominence to those previously existing prohibitions and expands them in significant ways. The amendment eliminates defendants who have any significant prior criminal behavior from consideration for a departure pursuant to § 5K2.20, regardless of whether such behavior is countable under Chapter Four, and even if such behavior is not a state or federal felony. In addition, the amendment expands the class of drug trafficking defendants prohibited from consideration for a departure pursuant to § 5K2.20 by expanding the definition of "serious drug trafficking offense." Specifically, the amendment expands the definition of "serious drug trafficking offense" in the accompanying application note to include any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. 844, that provides a mandatory minimum term of imprisonment of five years or greater, regardless of whether the defendant meets the criteria of § 5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases). Prior to this amendment, only drug trafficking defendants who were subject to such mandatory minimum penalties and who did not meet the criteria set forth in § 5C1.2 were precluded categorically from consideration for a departure under § 5K2.20.

Part IV of the amendment substantially restructures § 4A1.3 (Departures Based on Inadequacy of Criminal History Category) to set forth more clearly the standards governing departures based on criminal history, to prohibit and limit the extent of departures based on criminal history for certain offenders with significant criminal history, and to require written specification of the basis for a criminal history departure.

Section 4A1.3(a) provides that an upward departure may be warranted if reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.