

Section 4A1.3(a) also more clearly sets forth previously existing guidance regarding determination of the extent of an upward departure based on criminal history. Similarly, § 4A1.3(b) provides that a downward departure may be warranted if reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

The amendment, however, adds several prohibitions and limitations to the availability of downward departures based on criminal history. It prohibits a downward departure based on § 4A1.3(b) if the defendant is an armed career criminal within the meaning of § 4B1.3 (Armed Career Criminal) or a repeat and dangerous sex offender against minors within the meaning of § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors). The Commission determined that such offenders should never receive a criminal history-based downward departure.

Section 4A1.3(b) reiterates the longstanding prohibition against a departure below the lower limit of the applicable guideline range for Criminal History Category I.

Section 4A1.3(b) also contains certain limitations on the extent of departure available under this provision. Specifically, a downward departure pursuant to this section for a career offender within the meaning of § 4B1.1 (Career Offender) may not exceed one criminal history category.

In addition, the amendment provides that a defendant whose criminal history category is Category I after receipt of a downward departure under § 4A1.3(b) does not meet the criterion of subsection (a)(1) of § 5C1.2 if, before receipt of the departure, the defendant had more than one criminal history point under § 4A1.1 (Criminal History Category). Thus, a departure to Category I cannot qualify an otherwise ineligible defendant for relief from an applicable mandatory minimum sentence under § 5C1.2, which is consistent with case law.

The amendment adds a new subsection, § 4A1.3(c), that requires the court, in departing based on criminal history, to set forth in writing the specific reasons why the applicable

criminal history category under-represents or over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes. This specificity requirement is consistent with the PROTECT Act and is intended to facilitate both the necessary statutory and guideline departure analysis, as well as to improve the Commission's ability to refine the criminal history guidelines in light of criminal history departure decisions.

The amendment also makes conforming modifications to § 4A1.1 and § 5C1.2.

Part V of the amendment implements the directive at section 401(m)(2)(B) of the PROTECT Act by adding a new policy statement at § 5K3.1 entitled Early Disposition Programs. The provision restates the language contained in the directive and provides that, upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides. The Commission determined that implementing the directive in this manner is appropriate at this time, pending further study and monitoring of the implementation of early disposition programs.

Part VI of the amendment revises subsections (b) and (c) of § 6B1.2 (Standards for Acceptance of Plea Agreements) to require greater specificity in the sentencing documentation in a case involving a departure either recommended or agreed to in a Rule 11(c)(1)(B) or Rule 11(c)(1)(C) plea agreement. Specifically, if the court accepts such a plea agreement, and the recommended or agreed to sentence departs from the applicable guideline range for justifiable reasons, the amendment requires the court to set forth specifically those reasons in writing in the statement of reasons or judgment and commitment order. This specificity requirement is consistent with the PROTECT Act and is intended to facilitate the necessary statutory and guideline departure analysis, as well as to improve the Commission's ability to understand the underlying reasons for departures in cases involving plea agreements.

Part VII of the amendment creates a new guideline, 1A1.1 (Authority), that clearly sets forth the Commission's authority to promulgate guidelines, policy statements, and commentary and implements the Protect Act directive requiring conforming amendments to paragraph 4(b) of Part A of Chapter One. In addition, the amendment moves *in toto* Part A of Chapter One, as in effect on November 1, 1987, to the commentary as a historical note. Part A of Chapter One was an introduction to the Guidelines Manual that explained a number of policy decisions made by the Commission when it promulgated the initial set of guidelines. This introduction was amended occasionally between 1987 and 2003. The Commission determined that in order to preserve its historical significance and context, the introduction should be returned to its original form and placed in a historical note. The Commission encourages review of this material. The amendment also incorporates relevant portions of paragraph 4(b) of Part A of the former introduction regarding departures in the background commentary to § 5K2.0.

Part VII of the amendment amends § 1B1.1 (Application Instructions) to provide uniform definitions of departure, upward departure, and downward departure.

The amendment also makes technical amendments to § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint).

This amendment complements other significant policy initiatives affecting sentencing, including the statutory changes in sentencing law and guideline changes directly made by the PROTECT Act, and recent policies implemented by the Department of Justice. The Commission believes that these general policy changes, working together, will substantially reduce the incidence of downward departures. In addition to the significant modifications made by this amendment, the Commission has identified several aspects of the guidelines affecting departures that it intends to continue studying during the current amendment cycle and beyond, including aberrant behavior, criminal history, immigration, early disposition, or "fast track," programs, and collateral consequences, among others.

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