Nos. 03-2011, 03-2012, 03-2019, 03-2036

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee/Cross-Appellant

v.

WILLIAM FULLER, MATIAS SERRATA, JR., and KENDALL LIPSCOMB,

Defendants-Appellants/Cross-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
THE HONORABLE WILLIAM P. JOHNSON

REPLY BRIEF FOR THE UNITED STATES AS CROSS-APPELLANT

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INTRODUCTION

The central theme that defendants strike in their responses to the United States' cross-appeal is that the district court, although never articulating its reasons with great specificity, properly judged the defendants' circumstances as exceptional, and is owed substantial deference in that determination by this Court. There are two flaws in this argument. First, the recently enacted PROTECT Act eradicated the previously controlling deferential standard of review and directed appellate courts to evaluate departures from the Sentencing Guidelines under a largely plenary standard. Second, the factors upon which the trial judge predicated

his downward departures are characteristics common to most defendants, if not much of the population. The record here is simply barren of evidence – and it is the defendants who have the burden of proof – that defendants' life history or current predicament is so unusual or atypical as to take them outside the heartland of cases embraced by the Sentencing Guidelines. Accepting the facts presented on this record as "extraordinary" would introduce just the type of significant and unwarranted degree of uncertainty that the Guidelines were specifically intended to eliminate.

ARGUMENT

I

THIS COURT MUST APPLY THE PROTECT ACT'S *DE NOVO* STANDARD OF REVIEW IN EVALUATING THE DISTRICT COURT'S DOWNWARD DEPARTURE

Although defendant Kendall Lipscomb correctly acknowledges that this court must review the trial judge's downward departure from the Sentencing Guidelines under a *de novo* standard (L.Rep.Br. 11), defendants William Fuller and Matias Serrata maintain that an abuse of discretion standard governs the review of this issue. (F.Rep.Br. 2-4; S.Rep.Br. 14-16).[1] The arguments advanced by Fuller and Serrata do not stand up to scrutiny.

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[1] "F.Rep.Br." refers to Fuller's Reply/Cross-Appellee Brief. "L.Rep.Br." refers to Lipscomb's Reply/Cross-Appellee Brief. "S.Rep.Br." refers to Serrata's Reply/Cross-Appellee Brief. "U.S.Br." refers to the United States' Brief as Appellee/Cross-Appellant. "R." refers to the record entry number on the district court docket sheet. "11/13/02 Tr." followed by a number refers to the transcript of the sentencing hearing held on November 13, 2002.

The Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650, which became effective immediately upon its being signed into law by the President on April 30, 2003, dramatically altered the methodology by which appellate tribunals must review district court departures from the federal Sentencing Guidelines. Specifically, Section 401 of the Act abrogated the unitary abuse of discretion standard previously applicable to guideline departures, and adopted in its place a much more rigorous *de novo* review. See *United States* v. *Jones*, 332 F.3d 1294, 1299 (10th Cir.), cert. denied, 124 S.Ct. 457 (2003). Under this new legislation, which effectively overruled *Koon* v. *United States*, 518 U.S. 81 (1996), appellate courts are now directed to evaluate *de novo* whether a district judge's departure from the Guidelines is predicated on a factor that (i) does not advance the objectives set forth in 18 U.S.C. 3553(a)(2); or (ii) is not authorized under 18 U.S.C. 3553(b); or (iii) is not justified by the facts of the case.[2] See 18 U.S.C.

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[2] Congress accomplished its objective in Section 401(d)(2) of the PROTECT Act by amending 18 U.S.C. 3742(e) to mandate -- statutorily -- the more intensive appellate review standard. Under the amended statute, the court of appeals now must determine whether the sentence:

> (3) is outside the applicable guideline range, and
> (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 factor that--
> (i) does not advance the objectives set forth in section 3553(a)(2); or
> (ii) is not authorized under section 3553(b); or

(continued...)

3742(e)(3).

Defendants insist that the new standards adopted in the PROTECT Act do not apply to their appeals because they each were sentenced prior to the passage of this legislation. They contend -- construing their briefs very liberally -- that retroactive application of the PROTECT Act to their sentences is not dictated by the terms of the statute and, in any event, would contravene the *Ex Post Facto Clause* of the Constitution. These arguments have no merit.

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[2](...continued)

(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 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);

***

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) or (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.*

18 U.S.C. 3742(e) (emphasis added).

A. The PROTECT Act's De Novo *Review Standard For Guideline Departures Applies To Sentences Imposed Prior To The Enactment Of The Legislation*

With respect to defendants' statutory interpretation claim, the Tenth Circuit has held definitively that the PROTECT Act's heightened review standards are triggered in any case pending before the court of appeals on the effective date of the Act. See *United States* v. *Andrews*, 353 F.3d 1154, 1155 (2003) ("Because this case was pending before us on the effective date of the PROTECT Act, we will apply the Act's new appellate standards on our review."). Indeed, every other circuit to have considered the issue has reached the same conclusion. See *United States* v. *Thurston*, Nos. 02-1966 & 02-1967, 2004 WL 203162, at *17-18 (1st Cir. Feb. 4, 2004); *United States* v. *Phillips*, 356 F.3d 1086, 1097-1102 (9th Cir. 2004); *United States* v. *Saucedo-Patino*, No. 03-10877, 2004 WL 117766, at *2 (11th Cir. Jan. 27, 2004); *United States* v. *Stockton*, 349 F.3d 755, 764 n.4 (4th Cir. 2003), petition for cert. pending, No. 03-8858; *United States* v. *Mallon*, 345 F.3d 943, 946-947 (7th Cir. 2003); *United States* v. *Hutman*, 339 F.3d 773, 775 (8th Cir.), cert. denied, 124 S. Ct. 842 (2003). Not only have defendants made no effort to distinguish these cases, but they have also failed to advance a single argument in support of their statutory non-retroactivity theory.

There is good reason for the unanimity among the circuits. As a threshold matter, the relevant provisions of the PROTECT Act explicitly regulate conduct --

in particular, the standard of review -- by the *court of appeals* from April 30, 2003, forward. *Thurston*, 2004 WL 203162, at *17. Thus, even under the general canon of statutory construction that new laws are presumptively assumed to operate only prospectively, see *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265-66 (1994), the PROTECT Act's amendments would still apply here given that defendants' appellate review lay in the future as of April 30, 2003. *Mallon*, 345 F.3d at 946.

Moreover, the modified appellate review standards represent a purely procedural change that does not affect any of defendants' substantive rights or otherwise present constitutional impediments to their invocation in this appeal. See *Thurston*, 2004 WL 203162, at *18. The PROTECT Act merely alters the scrutiny that appellate courts must give to trial court sentencing decisions; it does not focus on the legality of a defendant's conduct prior to the statute's enactment, upsets no settled expectations, and attaches no new legal consequences to a defendant's prior actions. In other words, the Act has no retroactive effect. See *Landgraf*, 511 U.S. at 280 (statute does not operate retroactively unless "it would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed").

B. Application Of The PROTECT Act's De Novo *Standard Of Review To Pending Cases Does Not Violate The* Ex Post Facto Clause

Defendants next contend that applying the PROTECT Act's *de novo* standard of review to their appeals would contravene the Constitution's *Ex Post Facto Clause* because this more rigorous appellate review renders it more difficult to sustain downward departures than under the previous procedural framework and, by extension, increases defendants' possible sentences. (F.Rep.Br. 2-3; S.Rep.Br. 15-16). This argument is completely unfounded and rests on a fundamental misunderstanding of this constitutional provision.

The Supreme Court explained in *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990), that "although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them" (citing *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390-392 (1798)). In his seminal opinion in *Calder*, Justice Chase identified four categories as falling within this rubric:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime,

> when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

3 U.S. at 390. Accord *Carmell* v. *Texas*, 529 U.S. 513, 521-522 (2000); *Collins*, 497 U.S. at 41-43 & n.3. None are applicable in the case at bar.

Nothing in the PROTECT Act alters the statutory penalties for the crimes that defendants committed. Nor does the Act change in any way the calculation of the Sentencing Guideline range or the circumstances in which departures are authorized. As the Seventh Circuit noted in rejecting an argument identical to the one advanced by defendants here:

> [Section] 401(d) of the PROTECT ACT * * * changes *who* within the federal judiciary makes a particular decision, but not the legal standards for that decision. Instead of one district judge, three appellate judges now decide whether a departure is justified. An increase in the number of judges who must consider an issue reduces the variance of decisionmaking but should not affect the mean or media outcome.

Mallon, 345 F.3d at 946.[3]

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[3] In many respects, the legal issues at play here parallel those confronted by the Supreme Court in *Dobbert* v. *Florida*, 432 U.S. 282 (1977). In that case, the defendant challenged, on *ex post facto* grounds, a state statute -- passed after the commission of his criminal act -- that allowed trial judges to overrule jury determinations of sentences in capital cases. At trial, the jury had recommended a life sentence, but the judge, given authority he did not have at the time of the crime, overruled the jury determination and imposed a death sentence. Rejecting the

(continued...)

In fact, every circuit to have examined the issue has concluded easily that the application of the PROTECT Act's plenary review standard to criminal appeals pending at the time of the Act's implementation is entirely consistent with the *Ex Post Facto Clause*.[4] See *Phillips*, 356 F.3d at 1099 ("The Ex Post Facto Clause applies only to 'penal' legislation, which encompasses four traditional categories, none of which include a change in the standard of review upon appeal."); *Saucedo-Patino*, 2004 WL 117766, at *2 (same); *United States* v. *Bell*, 351 F.3d 672, 674-75 (5th Cir. 2003) (same); *United States* v. *Stockton*, 349 F.3d 755, 764 n.4 (4th Cir. 2003) (same); *Mallon*, 345 F.3d at 946-947 (same); *United States* v. *Hutman*, 339 F.3d 773, 775 (8th Cir.) (same), cert. denied, 124 S. Ct. 842 (2003). Defendants having offered no reason why the PROTECT Act's modified appellate review

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[3](...continued)
defendant's constitutional claim, the Supreme Court held that the new statute "simply altered the methods employed in determining whether the death penalty was to be imposed, and there was no change in the quantum of punishment attached to the crime." *Id.* at 294. The fact that the procedural modification arguably worked to the defendant's disadvantage was deemed immaterial for constitutional purposes.

[4] Serrata's reliance (S.Rep.Br. 15) on *United States* v. *Svacina*, 137 F.3d 1179, 1186 (10th Cir. 1998), is unavailing. In *Svacina,* this Court held that "[t]he Ex Post Facto Clause is violated if the court applies a guideline to an event occurring before its enactment, and the application of that guideline disadvantages the defendant by altering the definition of criminal conduct or increasing the punishment for the crime." *Ibid.* (internal quotations omitted). But, as noted above, neither the underlying criminal statutes nor the Sentencing Guidelines at issue in this case were modified at all by the PROTECT Act.

standards should not be applicable to the government's cross-appeal, this court should apply a *de novo* standard in reviewing the district court's downward departures.

II

THE DISTRICT COURT RELIED ON IMPERMISSIBLE FACTORS IN DEPARTING DOWNWARD FROM THE SENTENCES PRESCRIBED BY THE SENTENCING GUIDELINES

In their responses to the government's cross-appeal, defendants largely reiterate the factors upon which the district court relied in departing downward from the Sentencing Guidelines. None of their explanations, however, come close to supporting the departures awarded in this case. As the government noted in its opening brief (U.S.Br. 52), every basis cited by the district court for its downward departure was either a "forbidden factor," which the Sentencing Commission has stated definitively may not be used to justify a departure, or a "discouraged factor," which both the Commission and this Court have held may not be employed to justify a departure unless it is present to "an exceptional degree." See *United States* v. *Alvarez-Pineda*, 258 F.3d 1230, 1237 (10th Cir. 2001); U.S.S.G. 5K2.0.

And there is nothing so extraordinary or rare about any of the defendants that would make a deviation from their sentencing guideline ranges appropriate here.[5]

A. William Fuller

1. Family Ties And Responsibilities

Fuller devotes a significant portion of his brief to criticizing the government for purportedly mischaracterizing the district court's downward departure analysis by suggesting the court relied on forbidden or discouraged factors to a much greater degree than it actually did. (F.Rep.Br. 13-19). In particular, Fuller insists that the court's references to his employment history, economic status, and lack of prior criminal behavior, were not intended to be viewed in isolation, but were

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[5] Recognizing that the factual foundation for the district court's downward departures is not at all solid, and that circuit precedent supports none of their legal arguments, defendants urge this Court "to abate the Government's cross-appeal" (F.Rep.Br. 8), and remand for the district court to set forth in a detailed written statement its reasons for departing from the Guidelines, as required by 18 U.S.C. 3553(c)(2). (F.Rep.Br. 6-8). What defendants are clearly seeking is an opportunity to create a new record and thus give the district judge a "second bite at the apple," *i.e.*, a chance to justify an indefensible sentence. However, as the United States previously noted (U.S.Br. 51 n.20), a remand for written findings is unnecessary here. Not only were written findings not required at the time the sentence was originally imposed, but the district court also made clear its rationale for departing from the Guidelines. The problem for defendants is that *nothing in the record* – even that which was never reduced to a written finding – supports a downward departure in this case. And the burden of producing evidence sufficient to justify an "outside the heartland" downward departure rests squarely with the defendants. *United States* v. *Reyes-Rodriguez*, 344 F.3d 1071, 1073 (10th Cir. 2003). In light of the deficient proof offered by defendants in the district court, the only directive this Court should give upon remand is for the trial judge to sentence defendants within the appropriate guideline range.

instead cited to animate the court's discussion of Fuller's "family ties and responsibilities." Although it is not entirely clear how Fuller's clean criminal record and work history are appropriately categorized as "family circumstances," the distinction is ultimately of no relevance here.

Notwithstanding Fuller's rhetoric, there is nothing "extraordinary" about his family circumstances that would warrant a downward departure in this case. While it is entirely conceivable that his incarceration will have an adverse impact on his wife and child -- and the government is not unsympathetic -- there is no suggestion in the record whatsoever that they will be unable to cope with this burden. In addition, such an impact, while regrettable, cannot form the basis of a downward departure. As the United States pointed out in its opening brief (U.S.Br. 54), this Court has declined repeatedly to characterize far more unfortunate situations -- *e.g.*, where the defendant was a single parent and did not have a spouse (like Fuller) or other support network to care for the child during the defendant's imprisonment -- as "atypical" for guideline departure purposes. In *United States* v. *Archuleta*, 128 F.3d 1446, 1451 (10th Cir. 1997), for example, the Court observed:

> A sole, custodial parent is not a rarity in today's society, and imprisoning such a parent will by definition separate the parent from the children. It is apparent in many cases the other parent may be

> unable or unwilling to care for the children, and that the children will have to live with relatives, friends, or even in foster homes.

This Court cited *Archuleta*'s observation with approval again in *United States* v. *McClatchey*, 316 F.3d 1122 (10th Cir. 2003), and added that "absent evidence that the defendant was the *only* individual able to provide the assistance a family member needs," a downward departure grounded on family circumstances is unjustified. *Id.* at 1131 (emphasis added); accord *United States* v. *Gallegos*, 129 F.3d 1140, 1145 n.8 (10th Cir. 1997) (single parenthood is not an adequate basis for granting a downward departure).

Fuller also repeatedly highlights his "otherwise law-abiding life" and suggests that the district court implicitly intended to aggregate this "aberrant behavior" consideration in the family circumstances calculus. This assertion, however, is flatly contradicted by the record. At sentencing, Fuller moved for a downward departure based on aberrant behavior (R. 198 at 11-13), and the district court expressly denied the request because it did "not meet the requirements set forth in the sentencing guidelines or the requirements of controlling Supreme Court and Tenth Circuit precedent." (11/13/02 Tr. 58). Considering Fuller was convicted in part for his involvement in a *multi-year* campaign to cover up an unconstitutional assault, no other finding could possibly be justified. Moreover, the

Guidelines already took Fuller's "prior law-abiding" life into account by placing him in Criminal History Category I. Any further downward departure based on criminal history, even in the context of U.S.S.G. 5K2.0, is impermissible. *Gallegos*, 129 F.3d at 1145-1146; cf. *McClatchey*, 316 F.3d at 1137 ("Combining * * * legally impermissible and factually inappropriate grounds for departure cannot make [a] case one of the 'extremely rare' cases contemplated by § 5K2.0.").

The cases that Fuller cites in defense of his downward departure are all readily distinguishable. Each opinion pre-dates the PROTECT Act and relies on the (now statutorily abrogated) heavy deference that appellate tribunals previously owed to district judges in guideline departure determinations. Fuller attaches particular significance to *United States* v. *Pena*, 930 F.2d 1486 (10th Cir. 1991), and *United States* v. *Tsosie*, 14 F.3d 1438 (10th Cir. 1994). To the extent these opinions even remain good law, see *United States* v. *Benally*, 215 F.3d 1068, 1074 (10th Cir. 2000) (suggesting *Pena* and *Tsosie* are inconsistent with subsequent Supreme Court precedent), they are of no assistance to Fuller.

In *Pena* the defendant was a single parent who provided the sole financial support for her infant child, her sixteen-year-old daughter, and her daughter's own infant. 930 F.2d at 1494. Incarceration, the court reasoned, would put those two

infants at risk. *Ibid.* Even then, the family circumstances alone were not so extraordinary as to warrant a downward departure. Rather, as this Court later clarified, the departure in *Pena* was predicated "primarily on *aberrant behavior*, supported by family responsibilities." *Gallegos*, 129 F.3d at 1146 (emphasis added). And the aberrant behavior departure itself was subsequently called into question. Indeed, this Court underscored in *Benally* that *Pena*'s focus on the defendant's drug conviction representing a first offense would no longer serve, in the wake of *Koon* v. *United States*, 518 U.S. 81 (1996), as a valid basis for departure. *Benally*, 215 F.3d at 1074.

The downward departure in *Tsosie* was similarly grounded predominantly in aberrant behavior rather than family circumstances. *Gallegos*, 129 F.3d at 1146. Although the defendant in *Tsosie* was the single parent of two infants, this Court trained its focus largely on the significant provocation by the victim in approving the downward departure. *Tsosie*, 14 F.3d at 1441-1442. Not only was the victim in that case having an affair with the defendant's wife and aiding in taking the defendant's children away from him, but the victim, prior to being stabbed with a knife, struck the defendant on the nose with a belt.[6] *Id.* at 1442.

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[6] In addition, the defendant in *Tsosie* attempted to provide medical care to the

(continued...)

There are, by contrast, no such factors present in the instant action. While Fuller attempts to imply that his actions were the product of victim provocation (F.Rep.Br. 26-27), the record does not support this contention. As noted in the government's opening brief, Fuller's relentless beating of the victim occurred while the victim lay on the ground, not resisting, with his hands cuffed behind his back. (U.S.Br. 5-6). If there had been any physical altercation – and there was ample testimony at trial that the victim was at no point physically aggressive with officers (U.S.Br. 4-5) – it had long since ended. In fact, the district court explicitly denied Fuller's request for a downward departure based on victim conduct. (R. 198 at 7-11; 11/13/02 Tr. 58). Furthermore, Fuller, like his co-defendants, was a prison guard trained in the proper use of force and techniques for handling unruly inmates. He is thus a far cry from the defendant in *Tsosie*.

Fuller also cites prominently to *United States* v. *Jones*, 158 F.3d 492 (10th Cir. 1998), in which the Tenth Circuit upheld a downward departure involving a defendant convicted for unlawfully possessing a firearm while subject to a domestic violence restraining order. Although the defendant and his wife in that

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[6](...continued)
victim after the incident. 14 F.3d at 1442-1443. There is certainly no evidence of such assistance here. In fact, the defendants in this case sought to cover-up their crime for several years.

case were separated, the defendant had been providing substantial financial support for the couple's three children. *Id.* at 499. Critically, however, this Court held that the district judge had improperly relied on the defendant's family circumstances – even as a mere factor in a broader composite – in the downward departure calculus because they were insufficiently unusual to take them out of the heartland. *Ibid.* Inasmuch as the wife was capable of providing for the children, there was no basis for using family circumstances as a ground for departure. *Ibid.*[7] The same is equally true here.

Finally, defendant seeks to compare his situation to *United States* v. *Gauvin*, 173 F.3d 798 (10th Cir.), cert denied, 528 U.S. 906 (1999). In that case, the defendant's incarceration forced his wife to work fourteen hours a day (with two additional hours of commuting) in order to support the couple's four young children. *Id.* at 808. There was no extended family to offer assistance, and the

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[7] Fuller also attempts to avail himself of the "aberrant behavior" discussion in *Jones*, which invokes a more liberal standard than that adopted in prior decisions. See *Jones*, 158 F.3d at 500 (citing *Archuleta*, 128 F.3d at 1450). This claim falls flat under either standard. Indeed, Fuller was convicted not just of violating the victim's constitutional rights, but also of engaging in a multi-year effort to cover the incident up and thereby obstruct justice. See *McClatchey*, 316 F.3d at 1135 ("Although this circuit has never held that application of the aberrant behavior downward departure requires the crime at issue to have been spontaneous, behavior is aberrant only if it represents a *short-lived*, marked departure from an otherwise law-abiding life.") (internal quotation omitted).

wife's absence led tribal authorities to investigate whether the children should be removed from her custody. *Ibid.* Deferring to the district court's judgment, the Tenth Circuit affirmed the downward sentencing departure. *Id.* at 808-809.

There are no such unusual circumstances in the case at bar. Unlike in *Gauvin*, or any of the other cases referenced above, the record here adduces no evidence that Fuller's wife (or extended family and friends) is not capable of caring for his child during his absence. The situation confronting the Fuller family is simply not atypical. "Even if Mrs. [Fuller] had to quit her job to care for her son, such a family sacrifice would be insufficient to justify a downward departure, because disruptions of the defendant's life, and the concomitant difficulties for those who depend on the defendant, are inherent in the punishment of incarceration." *McClatchey*, 316 F.3d at 1132 (internal quotation omitted). In sum, there is no hole in which to squeeze the family circumstances peg under the facts of this prosecution.

2. Community Support

Fuller makes no effort to argue that his community ties are so extraordinary as to warrant independently a downward departure. Instead, he maintains that his community support, "*in combination with the other permissible factors*," takes his

case outside the heartland. (F.Rep.Br. 20-21). But as the government noted in its initial brief, (U.S.Br. 58 n.22), the letters and testimony that Fuller offered in support of this factor are wholly conclusory in nature, and provide no basis for concluding that Fuller's situation is particularly exceptional.[8]

3. Civic, Charitable, And Public Service

Fuller likewise offered no evidence suggesting that his civic, charitable, and public service were unusual. Perhaps recognizing this proof deficiency, he now avers that he had no obligation to show his service was extraordinary because the court only relied on this factor as one of several others in ordering a downward departure. (F.Rep.Br. 21-22). This argument is erroneous as a matter of law. See note 9, *supra*. Even if the district court had been able to rely on this consideration at sentencing, however, Fuller's aggregate of permissible (albeit "discouraged") departure factors would remain conspicuously small. Whether examined independently or compositely, those factors simply do not support a downward departure in this case. Fuller's circumstances are, in fact, similar to those of many married, first-time offenders. Characterizing his situation as atypical would create

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[8] Fuller oddly contends that a defendant's community support need not be "extraordinary" to support a downward departure unless it is "used as the *sole* basis" for the departure. (F.Rep.Br. 20). Although he cites *Jones* for this proposition, the Tenth Circuit made clear there that *any* factor must be atypical for it to be properly considered in the downward departure analysis. 158 F.3d at 499.

an enormous hole in the consistency that the Sentencing Guidelines were intended to create.

B. Matias Serrata

In Serrata's brief response to the government's cross-appeal, he suggests that his "extraordinary work history" and "history of charitable service" combine to justify a downward departure. (S.Rep.Br. 17-18). As to the former, he emphasizes that he procured employment as a correctional officer at another penal facility even after he was arrested in this case, and only stopped working following his conviction. It cannot be seriously argued, however, that stable employment is an atypical factor. Cf. *United States* v. *Winters*, 174 F.3d 478, 484 (5th Cir.) (defendant's lengthy service as a correctional officer did not justify downward departure following his conviction for depriving inmate of constitutional rights; if anything, it is an aggravating factor), cert. denied, 528 U.S. 969 (1999). To embrace this contention is to turn the Guidelines on their head.

With respect to Serrata's charitable work, although his pastor did testify as to his contributions to the church, there is no indication in the record that this service was so unusual as to constitute one of those extremely rare cases justifying a sentencing departure. See *United States* v. *Thurston*, Nos. 02-1966 & 02-1967,

2004 WL 203162, at *23-24 (1st Cir. Feb 4, 2004) (active involvement in volunteer work for church did not warrant a downward departure); *United States* v. *Jones*, 160 F.3d 473, 481 (8th Cir. 1998) (same). Yet that is exactly what Serrata must demonstrate to sustain his Guideline departure because all of the other factors cited by the district court are entirely insupportable. (U.S.Br. 60-63). Given Serrata's inability to make such a showing, this Court should reverse his downward departure.

C. Kendall Lipscomb

In Lipscomb's cross-appeal response, he reiterates the factors relied upon by the district court in granting a downward departure (L.Rep.Br. 12-14), but fails to articulate how any of those circumstances – whether considered in whole or in part – are extraordinary. He mentions, for example, that the loss of his current job will cause his family to lose medical benefits. Although this situation is obviously regrettable, it is a common occurrence in every case in which an employed defendant faces prison time. Furthermore, this sort of hardship constitutes a socio-economic factor expressly forbidden from being used to justify a downward departure.

Lipscomb also notes that he began working as a correctional officer in New Mexico soon after troubled times hit the oil industry in the region. In making this point, he apparently is suggesting that his employment history is unusual. See *Jones*, 158 F.3d at 498-499 (holding that defendant's employment history may be used as one factor in downward departure calculus if it is particularly unusual). But to the extent such facts would even be relevant -- and the government vigorously maintains they would not -- there is nothing in the record indicating that the regional economy where Lipscomb resides is disproportionately depressed compared to other parts of the country, that his "relatively stable" employment was unique to individuals in the area, or that the collateral employment consequences of Lipscomb's incarceration would be atypical.

Finally, Lipscomb also references his respectable charitable work in the community and at church.[9] As is true with Serrata, this civic service is the *only* factor that was permissible for the district court to consider in evaluating the propriety of a Guideline departure for Lipscomb. And even then, it is a discouraged factor that is deemed by the Guidelines to be "not ordinarily relevant"

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[9] The government hastens to add that, while Lipscomb was participating in these community services, he was simultaneously engaged in a multi-year cover-up to obstruct justice.

in considering possible departures. U.S.S.G. 5H1.11. Here, the record simply does not support a finding that Lipscomb's charitable work was so extraordinary as to warrant a sentence outside the Guideline range.

The United States respectfully submits that the similarity of the factors on which the district court grounded its downward departures for each defendant helps demonstrate how their circumstances are typical of many defendants and, for that matter, much of the population. Incarceration of any married defendant will have a negative impact on his family. Indeed, this is part of the selfishness of criminal activity. Moreover, tens of millions of Americans (including many individuals who engage in criminal activity) attend church regularly and participate in their communities, just like defendants here. While these common activities are of course laudable, they are not extraordinary or atypical. The Sentencing Guidelines, meanwhile, were designed to create uniformity, and the Sentencing Commission has thus determined that departures cannot be grounded in "good works" unless they are present to "an exceptional degree." *United States* v. *Andrews*, 353 F.3d 1154, 1158 (10th Cir. 2003). To hold that defendants' circumstances in this case represent such an extraordinary situation would sanction arbitrary deviations that directly contradict the purpose of the Guidelines.

CONCLUSION

This Court should affirm defendants' convictions, vacate their sentences, and remand for resentencing in compliance with the Sentencing Guidelines.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

As required by Federal Rule of Appellate Procedure 32(a)(7)(B), I, Mark Gross, counsel for appellee/cross-appellant United States, certify that this brief is proportionally spaced Times New Roman, 14-point font, and contains 5,392 words. I relied on WordPerfect 9 software to count the words.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2004, two copies of the Reply Brief for the United States as Appellee/Cross-Appellant were mailed to the following counsel of record:

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