
In April 2003, Congress passed the most sweeping federal sentencing legislation since the creation of the Sentencing Guidelines. This legislation, which is commonly known as the Feeney Amendment and was part of a larger enactment known as the PROTECT Act, imposed a series of sentencing “reforms” intended to make it more difficult for federal district judges to grant downward departures from the Guidelines and for such departures to be upheld on appeal.

As I detailed in a prior article for the Federal Sentencing Reporter, the enacted version of the Feeney Amendment was actually a moderated version of a far more radical bill that was introduced in virtual secrecy just several weeks before. At nearly the last minute, provisions that would have all but abolished most downward departures were eliminated. Instead, Congress directed the Sentencing Commission to promulgate, within 180 days, guideline amendments “to ensure that the incidence of downward departures are [sic] substantially reduced.” On October 27, 2003, the Commission complied, and issued emergency amendments intended to reduce the incidence of downward departures. This article summarizes the amendments’ most salient provisions.

Initial Judicial Reactions to the Feeney Amendment
As it worked to comply with the directives of the Feeney Amendment, the Sentencing Commission was no doubt aware that the firestorm of protest which erupted in the days surrounding the passage of the PROTECT Act did not abate. To the contrary, the judiciary – the principal target of this legislative reform – has been vibrant and persistent in its opposition. Spurred by a critique of the original Feeney Amendment from the highest-ranking jurist of them all – Chief Justice William Rehnquist – legislation was introduced in May designed to overturn the most troublesome provisions of the Feeney Amendment (which was appropriately acronymed the Judicial Use of Discretion to Guarantee Equity in Sentencing Act, or JUDGES Act). One month later, New York federal district judge John Martin, a former United States Attorney, resigned in public protest of the PROTECT Act’s major provisions, including its command that the Commission reduce the incidence of downward departures.4

Judges have not been shy about vocalizing their opposition to the PROTECT Act. For example, in United States v. Mellert, Judge Marilyn Hall Patel pulled no punches. After describing the rushed procedural history of the PROTECT Act and its curtailment of judicial sentencing discretion, the judge stated, “the wisdom of the years and breadth of experience accumulated by judges and the Sentencing Commission in adjudicating criminal cases and sentencing defendants is shocked for the inexperience of young prosecutors and the equally young think-tank policy makers in the legislative branches.” More recently, Judge Robert P. Patterson, Jr. of the Southern District of New York granted a downward departure in United States v. Kim, but then observed: “If, as a result of Congress’ increasing pressure to eliminate any departures from the Guidelines, trial judges’ sentencing decisions do not comply with the basic tenets of fairness and justice, the confidence in our citizens that the courts play an independent and fair role in the dispensation of justice will be diminished or lost. Then our system of justice will be regarded as subservient to the other branches of government – the system that prevailed for so many years behind the Iron Curtain.”

Similar criticism has emanated even from the appellate level. At a recent argument in the United States Court of Appeals for the Second Circuit, Judge Guido Calabresi grilled a prosecutor about the recent changes in sentencing law, stating that a “fundamental objection” to the present system is that “it takes discretion from independent courts and gives it to dependent prosecutors, who then have to answer to the attorney general and other political figures. . . . This case is a perfect example of you telling me that your office made some decisions with respect to what is right and just and true, and the district court is thereby prohibited from having any say in the matter, and that’s a pretty serious matter.”

Notwithstanding the barrage of judicial criticism, the Commission has complied with the PROTECT Act’s directive and has issued emergency amendments intended to reduce the incidence of downward departures.5

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departures. The Commission has sought to achieve this goal through two principal means: eliminating certain grounds for downward departure, and limiting others.

Elimination of Grounds for Downward Departures

The Commission has eliminated six separate grounds for downward departure — four created by case law, and two contained in the Guidelines. They are as follows:

1. Acceptance of Responsibility. Case law that established a downward departure for extraordinary acceptance of responsibility has been overruled. Under the new guidelines, the three-level reduction afforded under §3E1.1 is the most credit that a defendant can receive for acts constituting acceptance of responsibility for criminal wrongdoing.9

2. Role in the Offense. Similarly, the judicially-created downward departure for a defendant’s mitigating role in the offense — colloquially referred to as the “super-minimal role” departure — has been abolished. Now, the four-level reduction for role under §3B1.2 is the most that a minimal participant can receive under the Guidelines.9

3. Plea and Plea Agreement. The Commission’s research reflects that a sizeable percentage of downward departures have been granted based on a defendant’s guilty plea or the parties’ plea agreement, without further delineation of the basis for departure. No more. Departures on these bases have been prohibited by the Commission’s new amendments.10

4. Required Restitution. Previously, courts could rely on the fact that a defendant made complete restitution to his or her victims as a ground for downward departure. Under the new guidelines, however, the fact that a defendant makes restitution that was otherwise required by law cannot serve as a basis for downward departure.11

5. Gambling Addiction. Guideline §5H1.4 used to provide that any extraordinary physical impairment, other than drug or alcohol dependence, could serve as a basis for downward departure. Courts applying §5H1.4 had held that gambling addiction was one such permissible basis for departure. Under the new guideline, gambling addiction can no longer serve as a basis for downward departure.12

6. Community Ties. Guideline §5H1.6 used to provide that “[f]amily ties and responsibilities and community ties” were “not ordinarily relevant” in determining whether to depart from a guideline range. Courts, in turn, had concluded that such ties, if extraordinary, could serve as a basis for a downward departure. Under the new version of §5H1.6, the phrase “community ties” has been deleted, thereby effectively proscribing a downward departure on that basis.13

Limitations on Grounds for Downward Departures

More numerous, and arguably more significant, are the ways in which the Sentencing Commission has limited the scope of other downward departure provisions.

1. General Limitation. The Commission, in §5K2.0’s general departure guideline, has broken out downward departures into three categories: those based on factors (i) “of a kind not adequately taken into consideration” in determining a guideline range, (ii) “present to a degree” not adequately taken into consideration” in determining a guideline range, and (iii) “not ordinarily relevant” in determining whether a departure is warranted. For each of the three categories, the new guideline makes clear that departures are warranted only in “exceptional” cases or if the factor in question is present to an “exceptional degree.”14

2. Combination Departures. Previously, courts were empowered to downwardly depart based on any two or more mitigating factors so long as these factors, taken in combination, took the case out of the “heartland” of the guidelines. This authority has been significantly curtailed in three ways. First, such a departure can be granted only if the two factors, taken together, “make the case an exceptional one.” Second, each factor must be “present to a substantial degree.” Third, each factor must be “identified in the guidelines as a permissible ground for departure.” Thus, a so-called combination departure can no longer be granted based on mitigating factors subsumed under §5K2.0’s “catch-all” departure provision, but instead is limited to those mitigating factors specifically set forth in a particular guideline provision.15 Furthermore, the new application note to §5K2.0 makes clear that such combination departures should occur “extremely rarely and only in exceptional cases.”16

3. Family Ties and Responsibilities. This guideline (§5H1.6) now contains detailed criteria for when a family ties departure should be granted. In general, a sentencing court is now required to consider the seriousness of the offense, the involvement of the defendant’s family members in the offense, and the danger to the defendant’s immediate family members as result of the offense. This revision appears designed to screen out cases in which one or more of these aggravating factors is present. In addition, a departure based on the loss of caretaking or financial support — a frequent predicate for a family ties departure — now “requires” the presence of four factors: (i) a substantial, direct, specific loss of essential caretaking or financial support to the defendant’s family, (ii) a loss that
substantially exceeds the harm ordinarily incident to incarceration for a similarly-situated defendant, (iii) no effective, reasonably available remedial or ameliorative programs (thus making the defendant’s caretaking or financial support “irreplaceable”), and (iv) a departure that will effectively address the loss.”

4. Diminished Capacity. Under the prior version of § 5K2.13, a downward departure could be granted if the defendant committed the offense “while suffering from a significantly reduced mental capacity,” with the proviso that the “extent” of the departure should reflect the “extent to which the reduced mental capacity contributed to the commission of the offense.” Now, this “causation” element must be established in order for any departure to be granted, and it must be present to a greater degree: under the revised guideline, a diminished capacity departure cannot be granted unless the defendant’s condition “contributed substantially to the commission of the offense.”

5. Aberrant Behavior. This increasingly popular ground for downward departure has been altered in two principal ways. First, the definition of aberrant behavior, which used to be contained in an Application Note, has now been converted into a requirement of the guideline itself. Second, an aberrant behavior departure has been expressly prohibited where a defendant (i) has more than one criminal history point (before any criminal history departures), (ii) committed a drug trafficking offense punishable by a mandatory minimum term of five or more years imprisonment, even if the defendant is eligible for safety-valve treatment, (iii) has a prior felony conviction or “any other significant prior criminal behavior,” or (iv) has engaged in “repetitious or significant, planned behavior,” such as “a fraud scheme.”

6. Criminal History. This increasingly utilized ground for downward departure has been curtailed. While the general standard has remained substantially unchanged – authorizing a departure where a defendant’s criminal history category “substantially over-represents the seriousness of the defendant’s criminal history” or prospects for recidivism – specific types of departures have been either excluded or limited. A criminal history downward departure is now prohibited for armed career criminals (§ 4B1.4) and repeat and dangerous sex offenders against minors (§ 4B1.5). In addition, a career offender (§ 4B1.1) can only receive a departure of one criminal history category. Finally, a defendant who has more than one criminal history point prior to downward departure no longer can qualify for safety-valve treatment under § 5C1.2(a)(1), even if he or she has only one criminal history point after the departure.

7. Victim’s Conduct. Under § 5K2.10, a defendant can receive a downward departure if the victim’s wrongful conduct contributed significantly to provoking the offense. The new guideline adds a factor that a court should consider in deciding whether to grant such a departure – the “proportionality and reasonableness of the defendant’s response to the victim’s provocation.”

8. Coercion and Duress. Similarly, § 5K2.12 allows a downward departure if the defendant committed the offense because of serious coercion, blackmail or duress, but now conditions the extent of any such departure on the “proportionality of the defendant’s actions to the seriousness of coercion, blackmail or duress involved.”

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Three other provisions of the new guidelines also bear mention. First, lost in the blizzard of downward departure limitations was the creation of a new downward departure provision for “early disposition,” or fast-track, programs. This guideline, § 5K3.1, is nothing more than a verbatim implementation of the PROTECT Act’s mandate that such a departure be promulgated. Such a departure, like the § 5K1.1 substantial assistance departure, cannot be granted absent a government motion.

Second, the guidelines now require that a district judge state the grounds for a downward departure with specificity, both in court and in the written judgment. This seemingly neutral provision is evidently meant to assist appellate courts (in exercising their newly-granted powers of de novo review of departure decisions). Congress (in scrutinizing the downward departure decisions of district judges) and the Sentencing Commission (in compiling data on downward departures). Of course, it also is consistent with an unspoken but unmistakable objective of the PROTECT Act: to discourage district judges from granting downward departures.

Third, while the Commission has stated that departures continue to “perform an integral function in the sentencing guideline system,” it also has given an unmistakable and deferential nod to Congress’ intent in this area. Thus, the Commission notes that Congress “reaffirmed” in the PROTECT Act that “circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission.”

Future Limitations of Downward Departures

Simultaneous with the promulgation of these emergency amendments, the Commission issued a detailed report to Congress concerning the history of downward departures, the statistical incidence of departures and the justification for its recent amendments to the guidelines. If that report
is any guide, the Commission’s departure-reduction efforts may not be at an end. The report specifically notes that the Commission is considering abolishing entirely downward departures based on aberrant behavior as well as on the collateral consequences of conviction and incarceration.26 The report also states that the Commission may further refine the criminal history and immigration guidelines in a similar effort to reduce the frequency of downward departures in these areas.27

Conclusion
The recent changes to the Sentencing Guidelines represent the latest wave in a sea change in federal sentencing law. The Commission’s effort to reduce downward departures represents a targeted response to a strong congressional directive, with the Commission picking among a panoply of departure provisions and choosing those most vulnerable to curtailment or, in several instances, outright abolition. However careful or well-intentioned the Commission’s efforts, they nevertheless represent an unfortunate and regrettable chapter in the steady erosion of judicial discretion in sentencing.

Notes