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Departures: Model Sentencing Guidelines §5.1



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Model Sentencing Guidelines §5.1 Departures

(a) In general

The sentencing court may impose a sentence below the applicable guideline range if there exists a mitigating circumstance or combination of circumstances of a kind or to a degree not adequately taken into account in formulating the guidelines such that, in light of the nature and circumstances of the offense and the history and characteristics of the defendant and in order to advance the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2), (6), and (7), a sentence lower than that prescribed in the applicable guideline range is appropriate.

(b) Circumstances not adequately taken into account in formulating the guidelines

- (1) Identified circumstances—A sentence below the otherwise applicable guideline range may properly be based on a circumstance identified in these Guidelines as one justifying a departure.
- (2) Unidentified circumstances—A sentence below the otherwise applicable guideline range may properly be based on a circumstance not identified in these Guidelines as one justifying a departure if the court determines that the circumstance is relevant to determining an appropriate sentence and if the circumstance is of such a nature or is present to such a degree as to render the case exceptional.
- (3) Circumstances present to a degree not adequately taken into consideration—A sentence below the otherwise applicable guideline range may be warranted even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range or is enumerated as a factor to be considered in setting the sentence within the applicable range only if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which is ordinarily involved in that kind of offense.
- (4) Circumstances not ordinarily relevant—A circumstance identified in the guidelines as not ordinarily relevant in determining whether a sentence below the applicable guideline range is warranted may be relevant to this determination only if such circum-

stance is present to an exceptional degree or distinguishes the case as an exceptional one in a way that it is significant to the purposes of sentencing.

(c) Multiple circumstances

The court may impose a sentence below the applicable guideline range based on a combination of two or more circumstances, none of which independently is sufficient to warrant a departure, only if each of the identified circumstances is present to a substantial degree and if all of the identified circumstances, taken together, make the case an exceptional one.

(d) Requirement of written reasons

If the court imposes a sentence below the applicable guideline range, it shall, pursuant to 18 U.S.C. § 3553(c), state its specific reasons for departure in open court at the time of sentencing and in the written order of judgment and commitment, except to the extent that it relies upon statements received in camera pursuant to Fed.R.Crim.P. 32, in which case the court shall state that such statements were received and that the court relied upon the content of such statements.

(e) Appellate review

The decision to impose a sentence below the applicable guideline range shall be reviewable on appeal. The standard of review as to the decision to impose a sentence below the applicable range, and as to the extent of the departure below the applicable range, shall be abuse of discretion.

Application Notes:

1. *For purposes of applying this provision, a circumstance is deemed to have been taken into account in formulating the guidelines if it is: (a) a factor determinative of offense level required to be determined at trial or admitted by the defendant in accordance with Model Sentencing Guidelines §1.3; or (b) an aggravating or mitigating factor identified as one to be considered by the court in determining the defendant's sentence within the applicable sentencing range.*

Drafter's Commentary

General Observations

A central component of the guidelines structure envisioned by the Sentencing Reform Act of 1984 was judicial

authority to depart from the guideline range in the minority of cases where a within-range sentence was inappropriate. As the Sentencing Commission observes in its background commentary to the current general departure provision, U.S.S.G. §5K2.0, the departure power serves at least two key functions. First, because no set of rules can anticipate or account for “the vast range of human conduct potentially relevant to a sentencing decision,”¹ a departure power is essential to any properly designed guidelines system. Without the flexibility afforded by a power to respond to unusual or unanticipated circumstances, a guidelines system is unable to individualize sentences when necessary to achieve the recognized goals and purposes of sentencing. Second, because no set of sentencing rules is, or ever can be, perfect, the rules require continuing analysis and periodic revision. Departures represent one critical form of feedback essential to proper analysis of sentencing rules. Judges as a class are reluctant to impose sentences outside of officially sanctioned norms. Accordingly, patterns of departure in particular classes of cases represent an important signal from the judiciary (and indeed from the other frontline sentencing actors who play critical roles in the departure process) that revisions in the guidelines may be appropriate.

The need for judicial departure authority is no less compelling in a simplified system such as that proposed here. Though the sentencing ranges in the model system are wider, there will nonetheless be cases in which the rules setting the ranges fail to account for offense characteristics and personal circumstances that require a sentence outside the range if justice is to be served.

The particular departure rules proposed here are not ambitious. They draw heavily on the language of the current general departure rule, U.S.S.G. §5K2.0, and envision a regime of departures not notably different from that which prevailed throughout the pre-*Booker* period from 1987 to 2005. The astute reader will immediately note that the preceding sentence seemingly glosses over the fact that the extent of judicial departure power has been the subject of intense debate and that the scope of that power—or at least the words used to describe its scope—varied at different times in the pre-*Booker* period.² The gloss is intentional because the purpose of this model guideline is not to refight every battle of the recent departure wars. It is rather to indicate that a departure power is an essential component of the overall simplified system proposed in these pages and that the scope of the power should be analogous to that envisioned by the Sentencing Reform Act of 1984 and enjoyed by judges throughout the guidelines period.

That said, the departure rules enunciated above do embody the general preference for flexibility that informs the entire simplified guidelines project. For example, Model Guideline § 5.1(a) adopts the general phraseology of the Sentencing Reform Act’s provisions on departures and adds the specific injunction that the decision to depart

must be made “in light of the nature and circumstances of the offense and the history and characteristics of the defendant and in order to advance the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2), (6), and (7).” Likewise, the departure rules proposed here omit some of the more restrictive particulars of the rules adopted by the Sentencing Commission in the wake of the PROTECT Act.³ The working group was unanimous in thinking the general trend of the post-PROTECT guidelines amendments undesirable. Finally, Model Guideline § 5.1(f) prescribes an abuse of discretion standard of review of departures. This provision reflects two complementary considerations: First, such a standard is consistent with the consensus of the working group that enhanced flexibility is generally desirable in a guidelines system. Second, in a new system, feedback is particularly necessary if rules are to be refined and improved, and departures represent a critical form of feedback.

Upward Departures

As noted in the Constitution Project report,⁴ in the system outlined here, because of the rule of *Blakely* and *Booker*, once a defendant is assigned to a box in the simplified grid based on the jury’s fact-finding or the particulars of his plea, no sentence above the top of that box would be constitutionally possible. In consequence, no “upward departure” in the current sense of an upward deviation from the guideline range based on judicial findings of fact is possible. From a policy point of view, this is not ideal. In an ideal guidelines system, the usual or customary case should occupy a middle position from which judges should have some authority to vary upward or downward to some degree in unusual cases. However, in designing any legal framework, one is obliged to play the constitutional hand one is dealt, and the *Blakely-Booker* tandem bars upward deviations from jury-created ranges. Nonetheless, given the width of the ranges in these model guidelines and the ready availability to the prosecution of various sentencing-enhancing mechanisms, we have little doubt that severe punishment will be available in any case where it is merited.

Prohibited and Discouraged Departure Factors

The current Federal Sentencing Guidelines contain in Chapter 5, Part H, an extensive list of factors arguably relevant to imposition of a sentence inside or outside of the applicable range. Broadly speaking, this section of the guidelines categorizes these factors as encouraged,⁵ discouraged (“not ordinarily relevant”),⁶ or prohibited⁷ as grounds for departure. This model departure guideline does not contain a similar list. Some members of the working group would probably prefer that no such list be included in revised and simplified guidelines and that the identification of appropriate departure factors be left to the judiciary ruling on a case-by-case basis. They share the often-expressed view that the current Guidelines unduly restrict the use of most personal characteristics of

a defendant as justifications for departure. However, the omission of a set of guidelines regarding common potential departure factors from the current project does not express a policy choice. Rather, time and space constraints precluded us from undertaking the thorough review of this subject that would be required to do it justice. This model leaves for the future the questions of whether to replicate something like the current Chapter 5H in a simplified guidelines system and, if so, whether the restrictions on departures contained in that chapter should be retained largely unchanged or subjected to substantial revision. It is fair to say that all members of the working group would favor, at the least, a thoughtful and thorough reconsideration of the current approach.

Conclusion

It should be noted that, while our working group would prefer more flexible departure standards than those embodied in the text of the current Federal Sentencing Guidelines, the basic simplified guidelines approach endorsed by the Constitution Project and exemplified in these model guidelines is workable with varying degrees of departure flexibility. We cannot emphasize too strongly, however, that a meaningful departure mechanism that affords judges appropriate discretion to deal justly with individual defendants and unusual cases and provides the feedback essential to improving guidelines rules is indispensable to the system proposed here.

In the end, whether the departure wars between Congress, the Justice Department, and the judiciary would continue to rage even after the adoption of a simplified guidelines system would probably depend on the severity of the sentences in the new system. If, through the process of formulating a new system, we can assign sentencing ranges that judges, prosecutors, defense counsel, and the interested public feel are appropriate for the vast

majority of defendants the rules place within them, then departures will become rare, judges will feel little compulsion to depart, and interbranch tension will abate. If, on the other hand, political considerations were to trump the judgments of frontline sentencing actors and sentencing professionals to produce a simple, but unduly harsh, new regime, then departures would continue to be a flash point.

Notes

- ¹ U.S.S.G. §5K2.0 Background (quoting Historical Note to U.S.S.G. §1A1.1 (Authority)).
- ² For example, the opinion in *Koon v. United States*, 518 U.S. 81 (1996), was widely interpreted as relaxing the standard of appellate review of downward departures and thus as signaling that district courts should feel somewhat more at liberty to depart. In 2003, Congress legislatively overturned *Koon* in the PROTECT Act by imposing a de novo standard of review on appeals of downward departures. Section 401(m) of the PROTECT Act also directed the Sentencing Commission to amend the guidelines "to ensure that the incidence of downward departures is substantially reduced." The Sentencing Commission complied with a series of amendments effective October 27, 2003. U.S.S.G. App. C, amend. 651.
- ³ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. Law 108-21.
- ⁴ Constitution Project Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World*, 18 FED. SENT. REP. 310, 316 (2006).
- ⁵ See, e.g., U.S.S.G. §5H1.1 (stating that, "[a]ge may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration").
- ⁶ See, e.g., U.S.S.G. §5H1.5 (stating that "[e]mployment record is not ordinarily relevant in determining whether a departure is relevant").
- ⁷ See, e.g., U.S.S.G. §5H1.10 (declaring that race, sex, national origin, creed, religion, and socioeconomic status "are not relevant in the determination of a sentence").