
***Amendments to the
Federal Sentencing Guidelines
(Effective October 27, 2003)***

Highlights of Key Points



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SENTENCING GUIDELINES
AMENDMENT HIGHLIGHTS – OCTOBER 27, 2003

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I. INTRODUCTION

In response to the Congressional directive in § 401(m) of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (hereinafter referred to as the “PROTECT Act”), Pub. L. 108-21, the United States Sentencing Commission (hereinafter referred to as “the Commission”) promulgated an emergency amendment effective October 27, 2003. The PROTECT Act was enacted on April 30, 2003, and directed the Commission, not later than 180 days after the enactment of the legislation, to promulgate:

- (1) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced,
- (2) a policy statement authorizing a downward departure of not more than four levels if the government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney, and
- (3) any other necessary conforming amendments, including a revision of paragraph 4(b) of Part A of Chapter 1 and a revision of section §5K2.0.

Before making a decision on how best to implement the directives of the Protect Act, the Commission conducted an extensive empirical study of downward departures, reviewed departure case law and literature, weighed public comment, and held two public hearings at which the Commission heard testimony from the Department of Justice, judges, federal defenders and prosecutors, as well as other experts in the field of criminal law.

The emergency amendment makes several modifications to §5K2.0 (Grounds for Departure), §5H1.2 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), §5H1.6 (Family Ties and Responsibilities), §5H1.7 (Role in the Offense), §5H1.8 (Criminal History), §5K2.10 (Victim’s Conduct), §5K2.12 (Coercion and Duress), §5K2.13 (Diminished Capacity), §5K2.20 (Aberrant Behavior), §4A1.3 (Departures Based on Inadequacy of Criminal History Category), and §6B1.2 (Standards of Acceptance of Plea Agreements). The amendment also creates one new policy statement, §5K3.1 (Early Disposition Programs), among other changes.

II. GROUNDS FOR DEPARTURE (5K2.0) – Of all the changes made to the guidelines in these emergency amendments, the most prolific changes were made to this guideline. This amendment responds to the directive from Congress contained in the PROTECT Act of 2003. 401(m) of the Act required the Commission to review the grounds for downward departures that are authorized by the guidelines and to promulgate appropriate amendments to “ensure that the incidence of downward departures is substantially reduced.”

In order to comply with the Congressional mandate, the first thing the Commission did was to add subsection (d) which forbids departures based on:

- (1). Acceptance of responsibility beyond the three levels allowed by 3E1.1, i.e. no so-called “super acceptance,”
- (2). Role in the offense beyond the two to four levels permitted in subchapter 3B., i.e. no so-called “super mitigating role,” (3B1.1 and 3B1.2)
- (3). A plea of guilty or stipulated to in the plea agreement, in and of itself. (6B1.2),
- (4). Restitution as otherwise required by law or the guidelines, or
- (5). Any other circumstance specifically prohibited such as race, gender, family background, etc.

The Commission also added subsection (e) which requires a statement of the specific reasons for any departure in the written judgment and commitment order, pursuant to 18 USC 3553(c). The Commission also added this same provision to 6B1.2 and 4A1.3. The district court can no longer use “pursuant to 3E1.1,” (for example) as justification for a downward departure. The court must state its reason(s) for granting the departure with specificity.

The PROTECT Act, effective April 30, 2003, limited downward departures in violent crimes and sexual offenses against children. The Act also requires that departures are to be limited to those expressly enumerated in Chapter Five, Part K, as a ground upon which a downward departure may be granted.

In addition, the Commission added subsection (c) to provide that departures for “multiple circumstances,” (previously known as a ‘combination of factors’) are limited to offender characteristics and other circumstances that are identifiable in the guidelines as permissible grounds for departure. This guideline is to be used when you have a case where there is no single characteristic sufficient to warrant a departure. A departure may be granted, however, in limited circumstances in combination with other circumstances, which, taken together, make the case an “exceptional one.” Also, each of the offender characteristic or other circumstance must be present to a substantial degree and be identified in the

guidelines as a permissible ground for departure. Necessarily then, circumstances that are not mentioned in the guidelines are no longer to be used for departure based on subsection (c).

III. PHYSICAL CONDITION, INCLUDING DRUG OR ALCOHOL DEPENDENCE OR ABUSE (5H1.4) – With the passage of the PROTECT Act, effective April 30, 2003, Congress directly added 5K2.22 to the guidelines which stated that drug, alcohol, or gambling dependence or abuse is not a valid reason for imposing a downward departure in cases involving a minor victim under 18 USC 1201 or 18 USC 1591. In addition, downward departures based on those circumstances where any offense involving obscenity, sexual abuse, sexual exploitation and other abuse of children or transportation for illegal sexual activity is prohibited as well.

Effective October 27, 2003, the Commission extended this prohibition to all offenses by adding it to the list of prohibited departures in 5K2.0(d)(1), and by adding a specific prohibition of such departures in this section.

IV. FAMILY TIES AND RESPONSIBILITIES AND COMMUNITY TIES (5H1.6) – The Commission amended this policy statement to limit the availability of departures for family ties and responsibilities. The Commission added an application note (1(A)) which 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.

Second, the Commission made changes to the Financial Support of Family provision. Application note 1(B) was added that established more strenuous criteria for departures based on caretaking or financial support. This amendment intended to distinguish hardship or suffering that is ordinarily incident to incarceration from that which is exceptional.

Third, the Commission eliminated community ties as a separate ground for downward departure.

V. ROLE IN THE OFFENSE (5H1.7) – The Commission amended this policy statement to state that that a defendant’s role in the offense is not a basis for a downward departure. While a defendant’s role in the offense is relevant in determining the applicable guideline range in Chapter 3, Part B, it has no bearing on any downward departures.

- VI. CRIMINAL HISTORY (5H1.8)** – The Commission amended this policy statement by adding the language “For grounds of departure based on the defendant’s criminal history, see 4A1.3.”
- VII. VICTIM’S CONDUCT (5K2.10)** – The Commission added the language to this policy statement which allows courts to take into account “the proportionality and reasonableness of the defendant’s response to the victim’s provocation” when determining if a downward departure should be granted. It is important to note that the departure must be proportional to the provocation.
- VIII. COERCION AND DURESS (5K2.12)** – The Commission amended this policy statement to provide that the extent of a departure based on coercion and duress ordinarily should depend on several considerations. Some of these considerations include the proportionality of the defendant’s actions to the seriousness of the coercion, blackmail, or duress involved. As with the departure for Victim’s Conduct (5K2.10), the departure must be proportional to the coercion or duress.
- IX. DIMINISHED CAPACITY (5K2.13)** - In this policy statement, the Commission limited the availability of departures for diminished capacity by adding an element of causation. In order to receive the departure under this amendment, the reduced mental capacity must have heavily contributed to the commission of the offense. In other words, there must be a readily identifiable causal link between the defendant’s mental condition and the commitment of the act.

In addition, the amendment limited the extent of this departure by stating that it should reflect the extent to which the mental condition contributed to the commission of the offense.

- X. ABERRANT BEHAVIOR (5K2.20)** – The Commission amended this policy statement to place more emphasis on the stringent requirements for aberrant behavior departures by moving the requirements from an application note to a new subsection (b).

In addition, the Commission added a new application note to clarify that repetitious or significant planned behavior does not meet the requirements for receiving a departure under 5K2.20.

Next, the amendment expanded the existing prohibitions on aberrant behavior departures in certain circumstances. There is no longer a basis for granting a downward departure under this guideline for defendants who have any significant prior criminal history even if the conduct is not a state or federal felony and even if it is countable under Chapter Four.

Finally, the amendment expanded the definition of “serious drug trafficking offense,” which now includes any controlled substance offense under Title 21, United States Code, other than simple possession under 21 USC 844, that provides a mandatory minimum term of imprisonment of five years or greater, regardless of whether the defendant qualifies for the safety valve under 5C1.2.

XI. DEPARTURES BASED ON INADEQUACY OF CRIMINAL HISTORY

CATEGORY (4A1.3) – the Commission amended this policy statement to limit the number of downward departures and to require written specification of the basis for a criminal history departure. The amendment reiterated a long standing prohibition against a departure below Criminal History Category I.

The amendment also prohibits a criminal history downward departure for armed career criminals (4B1.4) and repeat and dangerous sex offenders against minors (4B1.5).

In addition, this guideline now restricts downward departures for Career Offender (4B1.1) to one criminal history category.

Finally, the amendment states that a downward departure to criminal history category I cannot make an otherwise ineligible defendant eligible for the safety valve in 5C1.2.

XII. STANDARDS FOR ACCEPTANCE OF PLEA AGREEMENTS

(6B1.2) – The Commission amended this guideline by adding a new subsection that requires if a departure is negotiated in a plea agreement, the specific reasons for the departure must be set forth in writing in the statement of reasons or judgment and commitment order.

XIII. EARLY DISPOSITION PROGRAMS (5K3.1) – One of the key directives from the PROTECT Act instructed the Commission to promulgate “a policy statement authorizing a downward departure of not more than four levels if the government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney.” The Commission reviewed many cases which involved the “fast track” programs and issued a report based on its findings made available to Congress

on October 27, 2003. In the report, the Commission surmised that the premise on which fast track programs are based is that defendants who promptly agree to participate in such a program ultimately save the government much needed and scarce resources that can be used in prosecuting other cases. In addition, the Commission also stated in its report that defendants who accept this program demonstrate acceptance of responsibility above and beyond what is taken into account under 3E1.1.

Although not part of the guidelines, it is important to have an understanding of the policy employed by the Attorney General in which the United States Attorney and the courts must follow in order for the fast track programs to be validated. On September 22, 2003, the Attorney General issued a memorandum which outlines how the provisions of the fast track programs are to be handled. The memorandum sets forth specific criteria which must be met if the fast track program is to be approved. The United States Attorney must show that:

- (1). The district court either:
 - (i). confronts an exceptionally large number of a specific class of offenses within the district, and failure to handle such cases on an expedited basis would significantly strain prosecutorial and judicial resources in the district,
 - or
 - (ii). Confronts some other exceptional local circumstance with respect to a specific class of cases that justifies expedited disposition of such cases.
- (2). State prosecution of such cases is either unavailable or unwarranted;
- (3). The specific class of cases is comprised of highly repetitive and substantially similar fact scenarios; and
- (4). The cases do not involve an offense designated by the Attorney General as a “crime of violence.”

The Attorney General’s policy requires that the defendant must enter into a written plea agreement that includes an accurate description of the defendant’s offense conduct. The defendant must agree (1) not to file any of the motions described in Rule 12(b)(3) of the Federal Rules of Criminal Procedure; (2) to waive appeal; and (3) to waive the opportunity to Challenge the conviction under 28 USC 1255, except with respect to

ineffective assistance of counsel.

IVX. AUTHORITY (1A1.1) – the Commission created a new guideline setting forth the Commission’s authority to promulgate guidelines. The amendment moved the introduction to the guidelines, which was formerly Part A of Chapter 1 to the commentary as an editorial note.