

## **The Feeney Amendment: Effective Date and *Ex Post Facto* Issues**

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*Ex Post Facto* problems arise whenever new sentencing laws are passed, but the constitutional doctrines which the courts use to resolve them are remarkably stable and clear. Simply put, the only punishment that can attach to a crime is that which was in effect when the crime was committed. Most provisions of the Feeney Amendment became effective immediately upon enactment, April 30, 2003. See PROTECT Act, Pub.L. 108-21, § 401(j). This raises a multitude of *ex post facto* issues.

Since 1987, every circuit has either held or assumed that the Constitution's *Ex Post Facto* Clause (Art. I, § 9, cl. 3) bars unfavorable retroactive application of amended provisions of the U.S. Sentencing Guidelines. See also *Miller v. Florida*, 482 U.S. 423 (1987) (adverse changes in statutory sentencing guidelines cannot apply to pre-enactment offenses). This doctrine is well settled, despite statutory language mandating that the court use the guideline which are "in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(4). While this provision is arguably unconstitutional on its face under the *Ex Post Facto* Clause, the Sentencing Commission's implementation of it supersedes, and is not. Section 1B1.11(b) provides that the guidelines and policy statements in effect on the date of commission of the offense must be used if the court determines that it would violate *ex post facto* to use the revised version.

A sentencing law violates the *Ex Post Facto* Clause if it operates both retrospectively and to the potential disadvantage of the defendant. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). This is not limited to substantive changes in the content and criteria of legal rules. Restrictions on the extent of favorable discretion that a court can exercise are within the *ex post facto* prohibition, too. Over half a century ago, the Supreme Court unanimously held that the *Ex Post Facto* Clause prohibited retrospective application of a law changing from a system of sentencing that was discretionary with the judge, to one where the statutory maximum would always be imposed, as an indeterminate sentence, and a parole board would set the release date, even though the available maximum term was not increased. *Lindsey v. Washington*, 301 U.S. 397 (1937).

Applying these principles, the new, direct restrictions on the availability of departures in certain sex crimes and child-victim cases set forth in the Feeney Amendment cannot be invoked in cases of offenses committed prior to April 30, 2003. Likewise, the provision eliminating one of the grounds for receiving an extra level of credit for acceptance of responsibility (PROTECT Act § 401(g)(1)(B), amending U.S.S.G. § 3E1.1(b)) is plainly subject to *ex post facto* restriction. For some years hence, whenever a Feeney provision is raised in the PSI or by a prosecutor, counsel will have to remember to compare the guidelines and policy statements which existed at the time of commission of the offense with the law in effect at the time of sentencing. In fact, since the *ex post facto* right applies to each offense committed, and thus to each count in a multi-count case, while the guidelines call for departures, as well as the acceptance of responsibility adjustment, to be implemented not with respect to a given count but to the case as a whole, it would seem that the *Ex Post Facto* Clause would bar use of any Feeney provisions at the sentencing of any case in which any affected count was committed before April 30, 2003.

It also seems fairly clear, for the same reasons, that the new Feeney provisions barring the use of favorably amended guidelines at a resentencing on remand (PROTECT Act § 401(e), creating new 18 U.S.C. § 3742(g)(1)), and restricting departure grounds applicable to resentencings after remand to those previously allowed by the district court and affirmed on appeal by the government (*id.*(g)(2)) violate *ex post facto* principles. See *United States v. Yeaman*, 248 F.3d 223, 227-28 (3d Cir. 2001) (prohibition on departing downward for post-sentence rehabilitation, U.S.S.G. § 5K2.19, did not apply at a resentencing on remand, because this restriction on sentencing discretion was not in effect at time of commission of offense). (Feeney § 401(g)(2) will also violate Article III of the Constitution in many cases, by requiring the district court to violate the mandate of the court of appeals, and is otherwise so badly worded as to be nonsensical. But that's another article.)

In addition to substantive rules, new procedural provisions may violate the *Ex Post Facto* Clause if they "creat[e] a significant risk of prolonging [the defendant's] incarceration." *Garner v. Jones*, 529 U.S. 244, 251 (2000) (no violation in change of regulation requiring parole review of life sentences every three years to review every eight years, where interim review not precluded). Thus, in *Carmell v. Texas*, 529 U.S. 513 (2000), the Court found that a changed rule of evidence, which eliminated the need for corroboration of a witness's testimony, violated *ex post facto* principles. Under this rule, the new requirement that the third level of downward adjustment for acceptance of responsibility can only be granted upon motion of the government (U.S.S.G. § 3E1.1(b), as amended by PROTECT Act § 401(g)), although arguably procedural (to the extent it only adds a motion requirement and does not change the substantive standard), should only be applied to offenses committed on or after April 30, 2003.

It is less clear how *ex post facto* and effective-date principles apply to the appellate changes made by the Feeney Amendment. Do the amendments apply only to review of departures imposed after April 30, 2003 (or, where *ex post facto* considerations govern, to departures in sentencings for offenses committed on and after that date), or to pending appeals as well? In several cases, the government has already taken the position that the less deferential standard of review over departures (*de novo* instead of abuse-of-discretion deference, they say) does apply to pending appeals, even those already briefed and argued. When a law changes procedures and standards in both the district court and appellate phases of cases, the applicability rule may differ. Thus, in *Slack v. McDaniel*, 529 U.S. 473, 481-83 (2000), the Court held that although the 1996 federal *habeas corpus* amendments' new standards and procedures only apply to petitions filed on or after its effective date, the provisions that apply solely to *habeas* appeals (specifically, the certificate of appealability requirement) are to be used for *habeas appeals* filed on or after that date. Since the PROTECT statute doesn't say, the courts must articulate a rule consistent with congressional intent and procedural due process. At the least, in fairness, the appellate court should not apply in its decision a rule different from that which the parties utilized in writing their briefs. This goes to applicability of the new provisions, however, and not necessarily to any *ex post facto* concern.

The changed standard of review on appeal of departures (*de novo* with respect to the district court's application of the guidelines to the facts, in its consideration of the factors set forth under § 3553(a) and in its articulation of reasons for the sentence under § 3553(c)), as provided in amended § 3742(e), arguably reduces the burden the government has when it appeals a downward departure and thus (in downward departure cases) meets the *Garner-Carmell* standard for being subject to *ex post facto* limitation. However, these complicated issues will have to be resolved by the courts.

Defense counsel should note that the appeal-related provisions apply equally to upward as to downward departures. In upward departure cases the new standards are more favorable to the defendant, and nothing bars their immediate application both on appeal and on remand. In particular, on remand from a successful defense appeal, the government is sharply restricted from obtaining upward departures on new or different grounds.

It is less clear how *ex post facto* principles apply to the burdensome reporting requirements imposed upon judges who depart (§ 401(h),(k)). This is arguably an Article III, separation-of-powers violation, but does a criminal defendant have standing to raise this challenge? Perhaps so, if the record reflects that a court's decision not to depart was because it did not have the time or inclination to comply with the reporting requirements. Moreover, since these provisions were designed to reduce the incidence of downward departure, and the Sentencing Commission is directed to set about accomplishing that goal, *see* Act § 401(m), they too may meet the *Garner-Carmell* standard of "creating a significant risk of prolonging [a defendant]'s incarceration."