

BY LISA A. CAHILL AND KEVIN F. CLINES

Waiver Dangers Under the PROTECT Act

The enactment on April 30 of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003¹ (PROTECT Act) has provoked a healthy, if regrettably belated, debate among members of Congress, the bar, the judiciary and legal commentators.

The vast majority of these commentaries have focused appropriately and predictably on the anticipated impact of the act on the frequency of downward departures, its possible retroactive application, and what the legislation reveals about Congress' views of federal district judges (Southern District Judge John S. Martin's recent editorial in The New York Times being the most notable of these commentaries).

Yet little, if any, commentary has focused on a technical aspect of the act which, if overlooked, could present important consequences for defense lawyers and their clients.

The relevant provision, enacted through PROTECT Act §401(e) and codified at 18 U.S.C. §3742(g), effectively requires defense counsel at sentencing to seek and obtain written rulings on every possible basis for a downward departure — even alternative bases to departure grounds already accepted by a court — else these potential departures will be permanently waived under the PROTECT Act in any future remand. Rules within the Second Circuit and other jurisdictions, which previously would have preserved such arguments on remand, have been effectively erased by the act.

Section 401(c) of the PROTECT Act amends 18 U.S.C. §3553(c) to require the district court in virtually every instance to state its reasons for a departure "with specificity in the written order of judgment and commitment."

Standing alone, this is a harmless enough change in the law. However, subsection (e) goes further, and amends 18 U.S.C. §3742(g) to restrict the district court's ability to depart on remand to departure bases held by the circuit court to be "permissible" and specifically and affirmatively included in the written district court statement of reasons now required by this amended section 3553(c).

There are no exceptions giving the sentencing court discretion on remand: If the departure ground was not specifically "included" in the original written sentence, it may not be considered or included in the sentencing decision on remand.

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Practically speaking then, if at the original sentencing a defense lawyer has not raised every conceivable basis for a departure, pressed the district judge to adopt each of those conceivable bases for departure, and ensured that the district judge referenced each of these accepted bases in the original written order of judgment and commitment, the district court will be precluded from departing downward on that alternative basis on remand, even if the circuit court blessed that specific departure basis on appeal.

A Practical Example

To illustrate, imagine the following hypothetical. In the pre-sentence submission, defense counsel argues for a downward departure based on the client's cooperation, his voluntary disclosure of the offense, and the aberrant nature of the offense, all recognized departure bases under the guidelines (U.S.S.G. §§5K1.1, 5K2.16, 5K2.20). The government opposes all departures. The district court begins the sentencing proceeding by announcing that the defendant's cooperation does warrant a departure, and that the defendant will be sentenced to time served based on that departure ground alone. The court avoids as moot any ruling on the "aberrant nature" or "voluntary disclosure" grounds for departure.

Most seasoned defense attorneys prior to passage of the PROTECT Act would follow the wise adage "quit while you're ahead," and sit down without pressing for specific rulings on the alternative departure grounds.

That adage is no longer wise in the sentencing context because under the new act, if the government successfully appealed the one departure ground ruled upon

by the district court — a result made more likely under the new de novo review standard imposed by the PROTECT Act, §401(d), amending 18 U.S.C. 3742(e) — on remand the sentencing court would be barred from considering alternative departure grounds not specifically included in the original sentence. 18 U.S.C. §3742(g).

Before the PROTECT Act, these arguments would have been preserved both because defense counsel raised them (whether or not they were specifically ruled upon), and in any event because counsel lacked the "incentive" to specifically press them once the minimum sentence was imposed.²

The act's hard-line rule against new departure grounds on remand applies even where defense counsel raised the departure ground at the initial sentencing, and even if the circuit court thought that the alternative grounds should be considered on remand now that they could

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conceivably make a difference in the sentence. Thus, defense counsel must now find a way to insist politely but firmly that the initial sentencing court rule on every alternative basis for departure and that it include those accepted bases in the written statement of reasons for the departure in the judgment and commitment order.

This rule translates into significant extra costs and pressures on the courts and the lawyers. Sentencing hearings that previously might have taken 30 minutes can be expected to lengthen significantly and increase in complexity as the prosecutor, defense lawyer, and judge debate the merits of the alternative departure grounds that may or may not ever have a bearing on the sentence.

This does not even account for the additional research and drafting time for departure bases that might not have been raised prior to the PROTECT Act but now must be raised or considered waived.

It is doubtful Congress, which held no public hearings on the guidelines-related portions of the legislation and apparently enter-

tained almost no debate, had any appreciation when it drafted this legislation of the practical impact these provisions would have on sentencing proceedings.³ Indeed, this new predicament underscores the great dangers of enacting legislation without debate, and particularly without input from experienced practitioners and the bench.

Conclusion

The PROTECT Act contains more bad news for defense lawyers than even its widely decried design to reduce downward departures.

Barring its repeal, it is an "ineffective assistance" minefield for the unwitting lawyer who thought it was always not only safe but smart practice to quit while ahead. To everyone's disadvantage — from the Probation Department to the circuit courts — that is the case no more.

(1) Pub. L. No. 108-21 (April 30, 2003). It should be noted that on May 20, 2003, the Judicial Use of Discretion to Guarantee Equity in Sentencing Act of 2003, or JUDGES Act, was introduced in the Senate to repeal the controversial guidelines-related provisions of the PROTECT Act. S. 1086, 108th Cong. (2003).

(2) Ordinarily, on remand to correct a sentencing error, the so-called "mandate rule" restricts a party from raising new arguments that he did not make in connection with his initial sentencing or on his appeal, as these are considered to be waived. *United States v. Quinieri*, 306 F.3d 1217, 1227 (2d Cir. 2002), cert. denied sub nom. *Donato v. United States*, 123 S. Ct. 2246 (2003). The important exception to this rule is that an argument is not considered waived on resentencing if a party did not, at the time of the purported waiver, "have both an opportunity and an incentive to raise it before the sentencing court or on appeal." Id. at 1229 (citing *United States v. Ticchiarelli*, 171 F.3d 24, 32-33 (1st Cir. 1999), cert. denied sub nom. *Bowen v. United States*, 528 U.S. 850 (1999)).

(3) See Mark H. Allenbaugh, A Special Report: Who's Afraid of the Federal Judiciary? Why Congress' Fear of Judicial Sentencing Discretion May Undermine a Generation of Reform, 27 *Champion* 6, 9 (June 2003); see also Dan Christensen, Stealth bomber: With Attention Fixed on Iraq, Freshman Florida Congressman Attached Widely Decried Sentencing Rider to Popular Child-Protection Measure, *Broward Daily Business Review*, April 15, 2003, at A1 ("This is the most important development in federal sentencing since the passage of the 1984 Sentencing Reform Act, and it happened with virtually no debate in little more than a week" (quoting Ronald Weich, a Washington, D.C., attorney, and also quoting Senator Edward M. Kennedy who criticized the legislation as resulting "from a hasty and unreliable process that ill-serves us.")); 149 *Cong. Rec.* S9115-6 (daily ed. July 9, 2003) (Senator Patrick Leahy's observation that the Act was passed "without any serious process in the House or Senate," and stating, relative to Judge John S. Martin's New York Times editorial and intention to resign, that "[i]t is shameful that we have allowed such half-baked, poorly-crafted legislation to lead to the loss of a judge that has dedicated his career to fighting crime and preserving justice.").