

HIGHLIGHTS OF CHANGES TO AUTHORITY TO DEPART
Effective October 27, 2003

Carmen D. Hernandez
Washington, DC

These changes were adopted by the United States Sentencing Commission on October 8, 2003 to implement the directive to the Commission in section 401(m) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108B21 (the "PROTECT Act"). They go into effect, subject to technical and conforming changes, on October 27, 2003. These new amendments apply to all cases; more restrictive rules for downward departures in child-related cases went into effect April 30, 2003.

All amendments are subject to the *ex post facto* clause of the United States Constitution, Art. 1, § 9, cl. 3.

1. AUTHORITY TO DEPART BU.S.S.G. § 5K2.0

This provision was amended in two ways: (1) substantive changes were made that eliminate several existing grounds for downward departures; and (2) technical changes were made redrafting the entire guidelines.

1. Eliminates Grounds B § 5K2.0(d):
 1. Eliminates 5 existing or unmentioned grounds for downward departures; all prohibited factors are now collected in this section:
 1. acceptance of responsibility;
 2. minor role in the offense;
 3. gambling addiction; and
 4. legally required restitution (e.g., repayment of victims of white collar offenses);
 5. based solely on the existence of a plea agreement.
2. Departure must Advance the objectives set forth in 18 U.S.C. § 3553(a)(2)
 1. Just punishment
 2. Adequate deterrence
 3. Protection of public
 4. Defendant's needed rehabilitation
3. § 5K2.0(a)(2): **Identified and Unidentified Circumstances 1 5K2 Grounds**
 1. Departure May be warranted@
4. § 5K2.0(a)(3): **Circumstances present to a degree not adequately considered**
 1. Available in an exceptional case
 2. Present to a degree **substantially in excess** or below

5. ' 5K2.0(a)(4): **Not Ordinarily Relevant Circumstances 1 5H Offender Characteristics**

1. Offender characteristic or other circumstances
2. Present to an **exceptional** degree

6. ' 5K2.0(c), Multiple Circumstances BAmends this circumstance by bringing it out of the commentary into the body of the policy statement:

a downward departure is available based on a combination of offender characteristics and circumstances, none of which independently is sufficient if each circumstance is present to a "substantial degree" and identified in the guidelines as a permissible ground, even if not ordinarily relevant

G. ' **5k2.0(e) B Specific Written Reasons for Departure.**

If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. ' 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those reasons with specificity in the written judgment and commitment order.

2. ' 5H1.6, FAMILY TIES AND RESPONSIBILITIES

Adds factors to be considered when granting a downward departure:

1. Requires the court to first consider a non-exhaustive list of circumstances, *i.e.*,
 1. seriousness of offense,
 2. involvement of family members in the offense, and
 3. danger to family members from offense; and
2. Loss of Caretaking or Financial Support Bif departures is based on this ground, requires the presence of four additional circumstances:
 1. Service of sentence within the range will cause an **extraordinary; substantial and direct loss of essential caretaking or financial support** to the family;
 2. for which no effective or ameliorative programs are reasonably available;
 3. and where the departure will address the loss of the caretaking or financial support; and
 4. departure will **effectively** address the loss.

3. ' 5K2.20, Aberrant Behavior -- limits the availability of a downward departures based on this circumstance:
 1. If defendant has > 1 CH point; prior felony conviction or Any other significant prior criminal behavior"
 1. Prohibits a departure
 2. Regardless of Whether the conviction or significant prior criminal behavior is countable under Chapter Four@
 2. Safety Valve Defendants: Amends the commentary so that defendants whose offense of conviction is a "serious drug offense" are precluded from eligibility for an aberrant behavior departure even when they are eligible for the Safety Valve, a circumstance that had previously made them eligible for aberrant behavior departures despite the fact that the offense of conviction was a "serious drug offense";
 3. Fraud Schemes: Adds commentary that states that fraud schemes "generally" would not meet the requirement that conduct not be "repetitious or significant planned behavior"
 4. Existing Circumstances: These new requirements are in addition to the existing restrictions, that prohibit a departure on this ground where
 1. the offense involved serious bodily injury or death;
 2. the defendant discharged or otherwise used a dangerous weapon;
 3. the offense of conviction is a serious drug offense; and
 4. the defendant had more than one criminal history point or a prior federal or state felony conviction.

4. ' 4A1.3, Criminal History B
 1. ACCA defendants B Eliminates criminal history downward departures for offenders who are Armed Career Criminals, as defined in USSG ' 4B1.4;
 2. Repeat Dangerous Sex Offenders, as defined in USSG ' 4B1.5 B Eliminates Criminal History Downward Departures for these defendants;
 3. Career Offenders B Limits departures for Career Offenders, as defined in ' 4B1.1:
 1. to a single Criminal History category;
 4. Safety Valve Defendants B
 1. prohibits the use of a criminal history downward departure to qualify a defendant for the application of the "Safety Valve;" a defendant who falls in the category may still receive a criminal history downward departure but does not thereby qualify for the Safety Valve;

5. Floor for Criminal History DeparturesB
 1. Cannot depart "below the lower limit of the applicable guideline range" for Criminal History category I;
5. ' 5K3.1, Early Disposition Programs (as directed in section 401(m)(2)(B) of the PROTECT Act).
 1. Creates a new downward departure for "Early Disposition Programs"

not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides