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WHITE-COLLAR CRIME

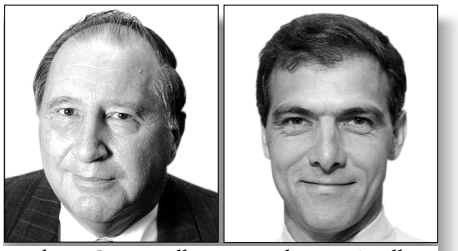
BY ROBERT G. MORVILLO AND ROBERT J. ANELLO

Sentencing Guidelines in 2004

THE FEDERAL SENTENCING guidelines continue to generate controversy and concern. Unfortunately, the activism by the courts in this area seems to have outstripped the efforts of the defense bar to bring some sanity to the process.

The judiciary's response has been centered upon passage last April by Congress of the Feeney Amendment, as part of the PROTECT Act. This legislation severely limited judges' sentencing flexibility and, in the words of the U.S. Sentencing Commission, "should have a broad and substantial impact on departure practices."[1]

Even before the Sentencing Commission, in October, promulgated amendments to the guidelines pursuant to the act, Attorney General John Ashcroft, also pursuant to the act, revised Justice Department practices to increase further the likelihood of harsher sentences. Stating that the circumstances in which prosecutors should request or accede to downward departures in the future should be "properly circumscribed" and "rare," Attorney General Ashcroft, in an Orwellian manner, ordered prosecutors to notify the Justice Department whenever a federal judge issues a sentence with a downward departure and re-emphasized prosecutors' affirmative obligation to oppose any sentencing adjustments — including downward departures — "that are not supported by the facts and the law." He also directed prosecutors to charge defendants with "the most serious, readily provable offense" in every case and, with some exceptions, not to engage in plea negotiations thereafter.[2]



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Some judges have spoken out against the new guidelines. Judge John Martin of the U.S. District Court for the Southern District of New York has resigned from the bench, in part in reaction to the guidelines. Chief Judge John Walker of the U.S. Court of Appeals for the Second Circuit has joined with the 26 other members of the Judicial Conference in calling for a repeal of the Feeney Amendment.[3] Other judges in the Second Circuit have made clear their frustration with federal sentencing laws in open court and in written opinions.[4] Even Chief Justice William Rehnquist and Justice Anthony Kennedy have been critical.[5]

Downward Departure Cases

Although the Feeney Amendment provisions and Attorney General Ashcroft's actions will make it even tougher for defendants to obtain downward departures, reported decisions from this past year show that, even now, it is not easy for defendants to obtain downward departures based on factors other than their assistance to the prosecution.

Family Circumstances. Defendants in the Second Circuit again this past year faced a tough struggle to obtain downward departures based on family circumstances — though not as tough as obtaining such relief will be under the Feeney Amendment.

One exception was *United States v. Greene*,[6] where Judge Shira A. Scheindlin granted a seven-level downward departure based on a combination of the defendant's extraordinary family circumstances and charitable work and community service, noting in her opinion that both are "discouraged" bases for departure under the guidelines, but that each factor warranted a departure "standing alone." The defendant in *Greene*, convicted of aiding and assisting in the preparation of false income tax returns, had devoted his life to parenting disturbed and hard-to-place orphaned children and had adopted six underprivileged boys, three of whom remained dependent on him as their sole financial and emotional support.

Another exception was *United States v. Nivar*,[7] where Judge Robert W. Sweet found the family circumstances in the case of a 22-year-old single mother of two to be extraordinary. Noting that the defendant's life was "marked by a long history of family dysfunction, abuse and social ills," as well as the fact that it was her "first contact with the criminal justice system" and that she had "taken important steps toward rehabilita-

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tion," Judge Sweet departed downward, even though the defendant was unemployed and had a boyfriend who supported her family financially.

Youth and parenthood, however, failed to elicit a downward departure from Judge Gerard E. Lynch in *United States v. Perez*,[8] where the court found the defendant's family circumstances were not atypical of youthful narcotics offenders who had come before the court. Likewise, in *United States v. Smith*,[9] the Second Circuit upheld Judge Lawrence M. McKenna's decision not to depart downward for family circumstances because the defendant was not the sole caregiver or financial supporter of his son, stating that "[i]t is not unusual … for a convicted defendant's incarceration to cause some hardship to the family."

In *United States v. Madrigal*,[10] the Second Circuit found, just a few days before its decision in *Smith*, that Judge McKenna had abused his discretion in granting an eight-level downward departure for family circumstances. The government's appeal suggested that the departure was not warranted because the defendant would be deported as soon as she was released from prison. The Second Circuit reversed because caregiving was available to the defendant's children but acknowledged that in certain "family circumstances — e.g., where family members may choose to leave the country with the defendant or where the defendant may be able to provide the needed support from abroad — the prospect of deportation does not preclude a downward departure."

October Amendments

The October guidelines amendments require the sentencing court in a family circumstances analysis to take additional steps: the court must consider the seriousness of the offense, the involvement of family members in the offense, and the danger to family members from the offense before deciding whether to grant a downward departure.[11]

Rehabilitation

Southern District judges granted two notable downward departures based on defendants' rehabilitation efforts in 2003. In *United States v. Rivera*,[12] Judge Victor Marrero granted a downward departure based on the defendant's pre- and post-arrest rehabilitation, as well as his voluntary disclosure of his participation in eight bank robberies, finding that the two factors were "inextricably connected." The court made a point of stating that, although the factors "combined to present extraordinary grounds" to depart, the defendant's rehabilitation, enrollment in drug treatment and vocational training, also presented an "independent" basis for departure.

Judge Robert P. Patterson granted a downward departure of three levels for extraordinary circumstances due to post-offense, pre-arrest rehabilitation in *United States v. Blumenthal*.[13] The defendant there, who pleaded guilty to narcotics violations, had "cut his ties to a narcotics ring and physically removed himself from the environment of his own accord without the threat of impending prosecution." Those efforts, along with his "change of lifestyle, his steady employment, and his completion of a university degree," led the court to depart downward.

Aberrant behavior, already a difficult ground for departure for defendants to obtain, [is] now even more so under the Feeney Amendment.

Multiple Circumstances

Departures based on family circumstances and rehabilitation often also are based on other factors, or "multiple circumstances." Because the October guidelines amendments restrict the availability of departures based on "multiple circumstances,"[14] it becomes even more important for judges to make clear that each circumstance is present individually, as both Judges Scheindlin and Marrero did.

Aberrant Behavior

Aberrant behavior, already a difficult ground for departure for defendants to obtain and now even more so under the Feeney Amendment, was the basis for a 13-level downward departure in *United States v. Patterson*.[15] The defendant in *Patterson*, after refusing an offer to import cocaine into the United States for $2,500, communicated the offer to a friend, who was detained and found with 4,000 grams of cocaine attached to her body. Judge Jack B. Weinstein found that the defendant, who had been convicted of conspiracy to import narcotics, had engaged in a single, spontaneous act that involved no planning.

The Second Circuit in *United States v. Castellanos*,[16] discussed aberrant behavior departures based on "spontaneous acts" at length. Judge Michael B. Mukasey, sentencing a defendant who had been convicted of conspiring to distribute heroin, declined to make a two-level departure for aberrant behavior because "[t]his was not a spontaneous offense." Judge Mukasey explained that the defendant had a week's notice of the crime, was carrying the money to purchase drugs at the time of arrest, and later perjured herself, showing that she was not otherwise law-abiding.

On appeal, the defendant argued that the district court improperly considered the fact that her offense conduct was not spontaneous. The Court of Appeals, in affirming Judge Mukasey's decision not to depart, explained that the "absence or presence of spontaneity alone never determines whether criminal conduct is aberrant behavior." Although a "non-spontaneous criminal act might be aberrant behavior," the court explained that "a spontaneous criminal act is not necessarily aberrant behavior."

As for aberrant behavior departures in fraud cases, the October guidelines amendments add commentary that states that fraud schemes "generally" would not meet the requirement that conduct not be "repetitious or significant planned behavior."[17]

Enhancements

The Second Circuit showed sympathy for defendants who are subjected to multiple, overlapping enhancements in two fraud cases last fall.

In *United States v. Lauersen*,[18] the Second Circuit held that because two "overlapping enhancements" applied to the sentence of Niels Lauersen, a prominent physician convicted of health care fraud, the district court could exercise its discretion on remand to make a downward departure. Judge William H. Pauley III increased the defendant's offense level by 13 levels because of the large amount of money involved in the fraud and then by an additional four levels in large part because the proceeds of the fraud exceeded $1 million. The court found that, although the cumulation of enhancements was not "impermissible double-counting," there was "substantial overlap between the two enhancements; the large amount of money involved in the fraud significantly trigger[ed] both of them."

Two weeks later, citing *Lauersen*, the Second Circuit again held, in a fraud case, *United States v. Jackson*,[19] that a downward departure was available given the following distinct, yet overlapping, enhancements that applied: 10 levels for a large sum of money, another two levels for careful planning, another two for sophisticated means and another four because the scheme was extensive.

Upward Departures

The Feeney Amendment contains a bit of good news for defendants — it requires courts of appeals in most cases to apply a de novo standard of review, which applies equally to upward and downward departures. Thus, defendants may have a better chance than before at successfully appealing upward departures.

In *United States v. Crispo*,[20] Judge Alvin K. Hellerstein imposed a two-level upward departure on the sentence of a defendant who had been convicted of attempted extortion. The court departed based on the defendant's intent "to seriously disrupt a bankruptcy proceeding, undermine the ability of the trustee and his counsel to fulfill their duties, and defy his own responsibilities as a debtor." The Court of Appeals upheld the departure, finding that, even if the defendant's threats to the trustee did not qualify for the official victim enhancement because the trustee was not a "government official," the district court's upward departure by analogy to that enhancement was appropriate.

In *United States v. Genao*,[21] a money-laundering case, the government appealed a six-month sentence where Judge Kimba M. Wood found that she could not depart pursuant to the fraud guideline's "offense specifically covered by another guideline" cross-reference and that she lacked discretion to grant an upward departure under an application note to that guideline applicable where the "offense level … substantially understates the seriousness of the offense." The Court of Appeals found that, although the sentencing court was correct in determining it could not depart on the first basis, it still had discretion to depart on the second basis.

The application note states that a court, in determining whether to grant an upward departure, may consider whether a "primary objective of the offense was an aggravating, non-monetary objective." Given that Judge Wood had found that, in providing false statements to federal investigators, the defendant had "an aggravating, non-monetary objective" to thwart his prosecution for participating in a money-laundering conspiracy, she had discretion to depart upward.

In *United States v. Massey*,[22] the Second Circuit affirmed an upward departure based on multiple acts of obstruction by a defendant convicted of producing false Social Security cards and witness tampering. There, the defendant had obstructed justice twice — once in the underlying substantive offense of witness tampering and again by committing perjury at trial.

Conclusion

Like painting by the numbers, sentencing by the numbers results in a woeful picture. Compassion, individuality, past good works and the true pain of sentencing have been nearly obliterated. The protest of our independent third branch of government is welcome.

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(1) Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub L. No. 108-21, 117 Stat. 650 (2003); 18 USC §§3553(c), 3742; 28 USC §994(w); United States Sentencing Commission, Report to the Congress: Downward Departures from the Federal Sentencing Guidelines (October 2003), at ii, available at http://www.ussc.gov. For a detailed discussion of the Feeney Amendment, see Elkan Abramowitz & Barry A. Bohrer, "Challenging the Feeney Amendment: Judicial and Defense Responses," The New York Law Journal, Jan. 6, 2004.

(2) Memoranda from Attorney General John Ashcroft, United States Department of Justice, to All Federal Prosecutors (July 28, 2003 & Sept 22, 2003), available at http://www.usdoj.gov, www.fpdpaw.org.

(3) See News Release, Administrative Office of the US. Courts, "Judicial Conference Seeks Restoration of Judges' Sentencing Authority," Sept. 23, 2003, available at http://www.uscourts.gov/Press_Releases/index.html.

(4) See, eg., *United States v. Kim*, No. 03 CR. 413, 2003 WL 22391190 (SDNY Oct. 20, 2003) (Patterson, J.); Benjamin Weiser, "A Struggle to Avoid Imposing a Penalty He Hated," The New York Times, Jan. 13, 2003 (discussing Judge Gerard Lynch's criticism of federal sentencing laws).

(5) See "Remarks of the Chief Justice," Federal Judges Association Board of Directors Meeting, May 5, 2003, available at http://wwwsupremecourtus.gov/ publicinfo/speeches/sp_05-05-03.html; Jonathan Groner, "Judges' Ire Up as Downward Departure Issue Persists," Legal Times, Aug. 19, 2003.

(6) 249 FSupp2d 262 (SDNY 2003).

(7) No 02-CR. 382, 2003 WL 21488061 (SDNY June 26, 2003).

(8) No 01 CR. 754, 2003 WL 21018815 (SDNY May 5, 2003).

(9) 331 F3d 292 (2d Cir. 2003).

(10) 331 F3d 258 (2d Cir. 2003).

(11) USSG §5H1.6.

(12) 262 FSupp2d 313 (SDNY 2003).

(13) No 03 CR. 651, 2003 WL 22888803 (SDNY Dec. 5, 2003).

(14) USSG §5K2.0.

(15) 281 FSupp2d 626 (EDNY 2003).

(16) No 03-1036, 2003 WL 22835705 (2d Cir. Dec. 1, 2003).

(17) USSG §5K2.20.

(18) 348 F3d 329 (2d Cir. 2003).

(19) 346 F3d 22 (2d Cir. 2003).

(20) No 03-1114, 2003 WL 22097817 (2d Cir. Sept. 10, 2003).

(21) 343 F3d 578 (2d Cir. 2003).

(22) No 02-1219, 2003 WL 1720064 (2d Cir. April 1, 2003).