

The Enduring Value of Departures in a Post-*Booker* World

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Introduction

In the 17 years since the Supreme Court issued its ruling in *United States v. Booker*, 543 U.S. 220 (2005), and the United States Sentencing Guidelines (the “Guidelines”) became advisory, variances² have become ever more prevalent while downward departures³ have become increasingly rare. In 2020, a record 26.3% of federal sentences included a variance from the sentencing guidelines and only 0.4% of cases involved a non-government initiated departure.⁴ The decreasing frequency of departures can lead to defense lawyers dismissing them out of hand, but recent substantial departures involving the prosecution of tax crimes highlight their enduring value and why they remain an important part of any white collar defense.

Background

The United States Sentencing Guidelines were created by the United States Sentencing Commission, as authorized by the Sentencing Reform Act of 1984, and have been in effect since November 1, 1987. Congress was attempting, in part, to alleviate the significant sentencing disparities that had been observed among similar offenders committing similar criminal offenses.⁵ To this end, the Guidelines were then mandatory. Application of the Guidelines would produce a prescribed range of possible sentences and judges were only permitted to sentence a defendant above or below that range if they determined that a specific, permitted, reason for departure applied. While reasons for departure were, in some cases, necessarily broad, a sentencing judge was required to explicate his or her reasons with specificity, and the application of the departure was vulnerable to scrutiny on appeal.

Because of the structure of the Guidelines, which limited the consideration of mitigating factors while mandating the consideration of various aggravating factors and constraining a judge’s ability to deviate from the Guidelines range, sentencing began functioning as an upward ratchet. The frequency and length of custodial sentences predictably skyrocketed. In the first full year the Guidelines were in effect, the amount of prison time handed out by judges nearly doubled. That all changed, however, in 2005 when the Supreme Court issued its decision in *United States v. Booker*, 543 U.S. 220 (2005). The Court ruled that the Guidelines’ mandatory consideration

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² A “variance” is a sentence above or below the calculated Guidelines range based on the factors described in 18 U.S.C. § 3553(a). See *United States v. Rangel*, 697 F.3d 795, 801 (9th Cir. 2012).

³ A “departure” is a change from the Guidelines range based on the application of provisions of the United States Sentencing Guidelines themselves. See *United States v. Rangel*, 697 F.3d 795, 801 (9th Cir. 2012).

⁴ 2020 Annual Report and Sourcebook of Federal Sentencing Statistics, United States Sentencing Commission, Figure 9.

⁵ U.S.S.G. Ch. 1 Pt. A(1)(3).

of facts not presented to the jury was a violation of the Sixth Amendment. The constitutional infirmity was rectified, however, if the Guidelines became advisory and judges were left with discretion to sentence defendants above, below, or within the Guidelines range.

A subsequent decision, *Gall v. United States*, 552 U.S. 38 (2007), further liberalized sentencing when the Court ruled that extraordinary circumstances did not need to be present to justify a sentence outside of the Guidelines range. The case also held that an appeals court could review the length of sentences only under an abuse-of-discretion standard. From that point on, departures, which are permitted only in specific circumstances described in the Guidelines, fell out of vogue; and variances, which appeal to a judge's discretion and focus on more general factors to be considered at sentencing,⁶ became the name of the game.

Decline in Prevalence of Departures and Recent Wins

In current sentencing practices, defense-initiated departures have become exceedingly rare. In 2020, 22.9% of sentences contained a downward departure, but 83% of those departures were the product of government motions under §5K1.1 for substantial assistance to the government and under §5K3.1 as part of early disposition programs.⁷ Only 967 of 64,233 sentences, 1.5%, contained a defense-initiated motion for downward departure.⁸ In the white-collar world,⁹ only 75 sentences contained non-§5K1.1/§5K3.1 downward departures.¹⁰ By contrast, 630 white-collar sentences in 2020 contained downward variances.¹¹

This trend makes obvious sense. Departures are based on standards explicitly prescribed in the Guidelines, with associated commentary and application notes. Variances are more open-ended. When pressing for a variance, defense lawyers can be more creative in their arguments and judges are less constrained in the sentences that they can give out. But when crafting a strategy for sentencing, a default focus on variances should not lead to an outright dismissal of potential departures. As noted above, a few recent, substantial departures in the tax context highlight the enduring value of downward departures as a frame for sentencing.

In *United States v. Asfaw*, Case No. 21-cr-491-JDB (D.D.C. 2021), the defendant and his co-defendant¹² jointly operated a tax return preparation business that had prepared over 10,000 tax returns during the relevant period. Both defendants pleaded guilty to a one count information for aiding and assisting in the filing false tax returns and both defendants admitted to a tax loss of between \$250,000 and \$550,000 resulting from a pattern of overstating deductions and schedule C expenses. As part of the government's case, an undercover agent had recorded the defendant

⁶ See 18 U.S.C. § 3553.

⁷ 2020 Annual Report and Sourcebook of Federal Sentencing Statistics, United States Sentencing Commission, Table 29.

⁸ 2020 Annual Report and Sourcebook of Federal Sentencing Statistics, United States Sentencing Commission, Table 33.

⁹ Here defined as including antitrust, bribery/corruption, money laundering, and tax charges.

¹⁰ 2020 Annual Report and Sourcebook of Federal Sentencing Statistics, United States Sentencing Commission, Table 39.

¹¹ 2020 Annual Report and Sourcebook of Federal Sentencing Statistics, United States Sentencing Commission, Table 40.

¹² Mr. Asfaw's business partner was prosecuted in a separate, but related, case, *United States v. Ayechev*, Case No. 21-cr-490-JDB (D.D.C. 2021).

preparing a Schedule C for a business that did not exist.¹³ The guideline range for both defendants was 24 to 30 months in prison. The only substantive factual difference between the defendants was the severe and rare medical condition of Mr. Asfaw's eldest son. Mr. Asfaw moved for a downward departure under U.S.S.G. §5H1.6 – Family Ties and Responsibilities, which the government ultimately agreed was applicable. Mr. Asfaw was sentenced to 1 year of home detention while his co-defendant received 14 months in prison.

In *United States v. Delivrance*, Case No. 9:21-cr-80044-RLR (S.D. Fla. 2021), the defendant operated a return preparation business and engaged in a pattern of claiming non-existent deductions and inflated itemized deductions on behalf of his clients.¹⁴ One of the defendant's employees was cooperating with the government to assist them in making their case. Mr. Delivrance pleaded guilty to a one count *Klein* conspiracy under 18 U.S.C. § 371. He admitted to a tax loss of between \$250,000 and \$550,000 and, after enhancements were applied for being in the business of preparing tax returns and being an organizer of the scheme, the guideline range was 30-37 months. Mr. Delivrance moved for a downward departure under U.S.S.G. §5K2.0. In particular, Mr. Delivrance asked the court to consider his history of charitable work, informal adoption of a child who relied on his support, and his efforts to mitigate the harm. Over the government's objection, the court granted the motion for departure and sentenced the defendant to 18 months home detention.

There are several notable takeaways from these two cases highlighting that departures still have an important place in modern white-collar sentencing.

First, in both abovementioned cases the defense sought both a downward departure and a downward variance. The ever-rising focus on variances does not preclude a defendant from seeking a departure and, in many cases, the arguments will complement each other. In fact, 18 U.S.C. § 3553(a)(5) requires the consideration of "any pertinent policy statement" at sentencing which provides an opportunity to connect the request for a discretionary variance to a departure contemplated by the Guidelines.

Second, both cases highlight the importance of considering applicable departures early and reserving the right to argue for them at sentencing. Most form plea agreements contain language that neither party will seek any offense-level calculation different from the estimated offense level agreed to by the parties. As departures are considered deviations from within the structure of the Guidelines,¹⁵ the government will often argue that a defendant is precluded from moving for a departure at sentencing unless they explicitly reserve the right to do so as part of the plea agreement. In the *Asfaw* case, the defense reserved the right to move for a downward departure pursuant to U.S.S.G. §5H1.6¹⁶ as part of plea negotiations. In contrast, in the *Delivrance* case the government opposed the motion for a downward departure and argued that the plea

¹³ Government's Memorandum In Aid of Sentencing, Case No. 21-cr-491-JDB at *3-4 (D.D.C. 2021).

¹⁴ Stipulated Factual Basis, Case No. 21-cr-80044-ROSENBERG/REINHART(s) at *2 (S.D. Fla. 2021).

¹⁵ See *United States v. Cousins*, 469 F.3d 572, 577 (6th Cir. 2006) ("Our court has previously explained that departures based on Chapter 5 of the Guidelines should be referred to as 'Guideline departures,' and that sentences lower than the Guidelines recommendation based on section 3553(a) factors' can be referred to as 'Non-Guidelines departures.'").

¹⁶ Government's Memorandum In Aid of Sentencing, Case No. 21-cr-491-JDB at *7 (D.D.C. 2021).

agreement precluded such a departure.¹⁷ The government was ultimately unsuccessful on this point,¹⁸ but such a result is not guaranteed in every case.

The early consideration of potential departures ensure that all possible arguments are available to the defense and can provide an opportunity to begin selling the prosecution on your argument in hopes they will join, or at least not oppose, your departure motion. All available information in support of the departure should be presented to the Probation Office in the pre-sentencing phase. The home visit, interview with the defendant, and contact with family members can all be opportunities to lay the groundwork for the departure. This early work proved essential in the *Asfaw* case where the Government specifically cited the medical records and information it was provided, an offer to visit the home and child of the defendant to demonstrate the severity of the child's condition, and an advanced copy of the defendant's sentencing memorandum as reasons why it was joining the defendant's motion for departure.¹⁹

Third, the more restrictive parameters for certain departures can serve as a helpful frame to advocate for a substantial departure. In the *Asfaw* case, the defense moved for a substantial six-level departure from an original adjusted offense level of 17 down to an offense level of 11. A recurring issue at sentencing is how to convince the judge that a guidelines sentence is incorrect, and that the defendant should not serve time in jail. The structure of U.S.S.G. §5H1.6 provided the answer. Under U.S.S.G. §5H1.6 Application Note 1(B) a departure will only be granted if the departure effectively addresses the loss of caretaking or financial support. In that case, the loss of caretaking could only be ameliorated by a non-incarceratory sentence. Pursuant to U.S.S.G. §5B1.1, a term of probation is only permitted if the applicable Guidelines range is in Zone A or Zone B. An offense level of 11 for a first-time offender is the top of Zone B. As a result, a six-level departure facilitated a sentence of home confinement under the guidelines which was the only sentence that could properly account for the caretaking considerations contemplated by U.S.S.G. §5H1.6.

Fourth, if the government can be convinced to join the motion for downward departure, the high standards for departure imposed by the Guidelines can work to incentivize the government to strongly advocate for the unique and compelling facts in the defendant's case. For example, under U.S.S.G. §5H1.6, family ties and responsibilities are not ordinarily relevant in sentencing but may form the basis for a departure in extraordinary circumstances. In the *Asfaw* case, once the government decided to join the defendant's motion, it was in its interest to emphasize the dramatic and extraordinary facts presented, to foreclose future defendants from trying to piggyback on the result.

Conclusion

While variances will continue to become an ever more common avenue for below Guidelines sentences, departures still present a valuable tool in the defense toolbox that should not be forgotten. While two cases do not necessarily indicate a trend, and the facts may not be

¹⁷ Government's Response to Defendant's Amended Motion For Downward Departure, Case No. 21-cr-800044-ROSENBERG/REINHART(s) at *1 (S.D. Fla. 2021).

¹⁸ The specific dispute concerned whether the clause "no other enhancements or reductions of the Sentencing Guidelines are applicable" encompassed a motion for downward departure. The Court ruled that it did not.

¹⁹ Government's Memorandum In Aid of Sentencing, Case No. 21-cr-491-JDB at *10 (D.D.C. 2021).

amenable to a departure in every case, recent positive results in the *Asfaw* and *Delivrance* cases highlight the unique value departures still have in a white-collar sentencing.