Raising Family Circumstances in Federal-Court Sentencing Proceedings

Federal sentencing statute: 18 U.S.C. § 3553

- 18 U.S.C § 3533 provides the roadmap for federal sentencing.
- Sentences must be "sufficient, but not greater than necessary" to comply with specific sentencing purposes, which include that the sentence reflect the severity of the offense, afford adequate deterrence, protect the public from future crimes of the defendant, and provide necessary educational or vocational training, medical care, or other correctional treatment for the defendant in the most effective manner. 18 U.S.C. § 3533(a).
- Courts have considered family ties at sentencing under 18 U.S.C. § 3553(a)(1), which states that sentencing judges may consider "the history and characteristics of the defendant." *See, e.g.*, *United States v. Thavaraja*, 740 F.3d 253, 255, 262–63 (2d Cir. 2014).

The United States Sentencing Guidelines: Section 5H1.6 restricts consideration of family ties.

- The Federal Sentencing Reform Act of 1984 established the United States Sentencing Commission and charged it with promulgating the United States Sentencing Guidelines. The Act curbed judicial discretion in sentencing in favor of promoting uniformity, honesty, and proportionality. Federal courts consequently lost flexibility to sentence based on real-world factors such as family circumstances.
- The sentencing guidelines instruct that certain characteristics, including "family ties and responsibilities," are not ordinarily relevant to determining whether a departure may be warranted. United States Sentencing Commission, Guidelines Manual, § 5H1.6 (Nov. 2021).
    - The Guidelines commentary to section 5H1.6 provides that "loss of caretaking or financial support" may only justify a departure under limited, specified circumstances. U.S.S.G. § 5H1.6 Commentary, Application Note 1(B)(i)-(ii).
- Courts interpreted section 5H1.6 to mean that family ties may not be considered as a basis for a downward departure except in extraordinary circumstances. Interpretations of "extraordinary" vary by circuit. *See* Jason Binimow, *Downward Departure from United States Sentencing Guidelines (U.S.S.G. §§ 1A1.1 et seq.) Based On Extraordinary Family Circumstances*, 145 A.L.R. Fed. 559 (compiling federal cases that discuss departures from the guidelines based on extraordinary family ties, circumstances, or responsibilities).

***United States v. Booker*:** Restoration of sentencing discretion

- In *United States v. Booker,* the United States Supreme Court held that the federal sentencing guidelines must be advisory rather than mandatory in order to be consistent with the Sixth Amendment. 543 U.S. 220, 245 (2005).
- While courts now have discretion to consider family ties in sentencing, the circuits vary as to whether they still closely adhere to the section 5H1.6 extraordinary-circumstances standard or allow broader judicial discretion.

Post-*Booker*: Sample case law by circuit[1]

- **1st Circuit:** Has adopted a broad reading of *Booker*, reasoning that "post-*Booker*, a judge may vary from the [guidelines sentencing range], disagreeing with details or even major premises." *United States v. Prosperi*, 686 F.3d 32, 48 (1st Cir. 2012).
    - *Prosperi*, 686 F.3d at 48-49 (affirming downward variances for a defendant who cared for wife battling terminal cancer and a defendant who provided care for daughter with disabilities).
    - *United States v. Herman*, 848 F.3d 55, 59–60 (1st Cir. 2017) (affirming district court's refusal to grant downward departure for family responsibilities where defendant failed to demonstrate that her caretaking role was irreplaceable given that alternative care sources were available, including family living in the same state and hired visiting nurse).
    - *United States v. Nuñez-Polanco*, 428 Fed. Appx. 13 (1st Cir. 2011) (affirming district court's denial of a downward departure for defendant who had young son with disabilities, but the child remained in the care of his mother).
- **2nd Circuit:** Has determined that section 5H1.6 is "no more binding on sentencing judges than the calculated Guidelines ranges themselves" and has considered family circumstances as part of "the history and characteristics of the defendant" under 18 U.S.C. § 3553(a)(1). *Thavaraja*, 740 F.3d at 255, 262–63.
    - *Thavaraja*, 740 F.3d at 262 (rejecting argument that district court gave improper weight to defendant's family circumstances and permitting consideration of the impact that potential immigration-related consequences would have on the defendant and his family).
    - *United States v. Graham*, 840 F. App'x 652, 653–54 (2d Cir. 2021) (affirming sentence where district court considered but denied defendant's request for downward departure based on defendant being sole caregiver of children who would be separated into three different homes in three different countries).
    - *United States v. White*, 301 F. Supp. 2d 289 (S.D.N.Y. 2004) (granting downward departure for defendant who was guardian and sole provider for six children).
- **3rd Circuit:** Has applied section 5H1.6 extraordinary-circumstances standard, but with a broad definition of "extraordinary." *See United States v. Dominguez*, 296 F.3d 192, 195 (3d Cir. 2002) ("[T]he term 'extraordinary' . . . retains its literal meaning: the circumstances of the case must simply place it outside the ordinary.").
    - *United States v. Grier*, 585 F.3d 138, 145 (3d Cir. 2009) (affirming sentence where district court declined downward departure for defendant's role as single father caring for daughter with spina bifida, finding that family circumstances did not warrant variance from guidelines range after "painstaking[] consider[ation]" of § 3553(a) factors).
    - *United States v. Gaskill*, 991 F.2d 82 (3d Cir. 1993) (determining that the district court had discretion to grant a downward departure when defendant was sole caretaker and provider for his wife who suffered from severe mental health conditions that required ongoing care, and defendant was not convicted of a violent crime).
    - *United States v. Thomas*, 181 Fed. Appx. 188 (3d Cir. 2006) (affirming district court's decision to deny a downward departure where defendant had

[1] *See* Binimow, *Downward Departure from United States Sentencing Guidelines (U.S.S.G. §§ 1A1.1 et seq.) Based On Extraordinary Family Circumstances*, 145 A.L.R. Fed. 559; Amy B. Cyphert, *Prisoners of Fate: The Challenges of Creating Change for Children of Incarcerated Parents*, 77 Md. L. Rev. 385, 406 (2018).

  - six minor children, and her husband, who was the father of the children, was a codefendant who was also sentenced to term of imprisonment).
- **4th Circuit:** Has persisted with its pre-*Booker* "irreplaceable" standard.
  - *United States v. Hampton*, 441 F.3d 284, 289 (4th Cir. 2006) (vacating and remanding for resentencing where the district court relied primarily on defendant's status as sole custodial parent, "a discouraged factor under the guidelines," and failed to establish an adequate "basis for a reduction of this magnitude").
  - *United States v. Lackard*, 549 F. App'x 193 (4th Cir. 2013) (concluding that district court did not abuse its discretion in refusing to grant a downward departure for defendant to care for his disabled son because defendant was not irreplaceable, and "the Guidelines are still to be considered in determining an appropriate sentence").
  - *United States v. King*, 230 F. App'x 345, 347 (4th Cir. 2007) (affirming denial of variance where defendant sought reduced sentence to serve as potential kidney donor for elderly mother, holding that unconfirmed donor eligibility and uncertainty regarding prison furlough rendered family circumstances too speculative to warrant departure or variance).
- **5th Circuit:** Has continued to apply section 5H1.6 "extraordinary" standard.
  - *United States v. Alaniz*, 726 F.3d 586, 627 (5th Cir. 2013) (concluding that appellate court lacked jurisdiction to review district court's denial of downward departure for family ties and responsibilities where the record showed the court understood its authority to depart but found departure unwarranted based on defendants' knowing risk to leave children parentless).
  - *United States v. Alvarez*, 575 Fed. Appx. 522 (5th Cir. 2014) (concluding that district court did not abuse its discretion in rejecting defendant's argument that his 295-month sentence merited a downward departure because his children would have to live with their grandparents upon his incarceration).
  - *United States v. Jackson*, 254 F. App'x 434, 454 (5th Cir. 2007) (vacating sentence where district court improperly relied on defendant's family circumstances as basis for downward variance without "acknowledg[ing] and consider[ing] the policy statement in § 5H1.6").
- **6th Circuit:** Has emphasized the section 5H1.6 exceptional-circumstances requirement and limited the use of section 3553(a)(1) to consider family circumstances.
  - *United States v. Mitchell*, 681 F.3d 867, 881 (6th Cir. 2012) (affirming sentence where district court declined to grant downward departure for defendant's family circumstances, finding no evidence that shorter incarceration would enable defendant to ameliorate his wife's medical condition and financial situation).
  - *United States v. Christman*, 607 F.3d 1110 (6th Cir. 2010) (reversing district court's decision to depart, and noting that caretaking responsibilities should not ordinarily be considered "as long as alternate arrangements for care can be made, which in the case of children may include foster care").
  - *United States v. Baker,* 502 F.3d 465, 467 (6th Cir. 2007) (upholding variance where defendant's son would be adversely affected by defendant's incarceration and defendant demonstrated remorse).
- **7th Circuit:** Permits consideration of caretaking responsibilities under section 3553(a), but in practice, appears to emphasize the section 5H1.6 extraordinary circumstances requirement.

- *United States v. Reed*, 859 F.3d 468 (7th Cir. 2017) (explaining that although "truly extraordinary" family circumstances may justify sentencing departure or variance, the district court fairly denied defendant's request for a departure where he was the caretaker for his wife and son with disabilities).
- *United States v. Pape*, 601 F.3d 743, 747 (7th Cir. 2010) (concluding that although caretaking responsibilities may be considered under section 3553(a), defendant was not entitled to a mitigated sentence where his conviction was for possession of child sex-abuse material).
- *United States v. Schroeder*, 536 F.3d 746 (7th Cir. 2008) (vacating and remanding for resentencing where the district court failed to properly consider defendant's family circumstances).

- **8th Circuit:** Permits consideration of caretaking responsibilities under section 3553(a).
  - *United States v. Underwood*, 639 F.3d 1111, 1114 (8th Cir. 2011) (affirming district court's decision to decline downward variance for defendant's caretaking responsibilities for disabled son where court found that alternative care arrangements were feasible based on child's doctor's testimony that child could be cared for by one person with occasional help).
  - *United States v. Lehmann*, 513 F.3d 805 (8th Cir. 2008) (affirming a downward variance where the district court found that a prison sentence would negatively affect the defendant's young son with disabilities).
  - *United States v. Cox*, 271 F. Supp. 3d 1085, 1087 (S.D. Iowa 2017) (granting variance after considering defendant's minor children in the section 3553(a) analysis, and concluding that to fashion a sentence "sufficient, but not greater than necessary" under the statute, "the welfare of a defendant's children *must be fully considered*" (emphasis added)).
- **9th Circuit:** Has endorsed consideration of family responsibilities as part of the defendant's "history and characteristics" under section 3553(a)(1).
  - *United States v. Rivera*, 682 F.3d 1223, 1232–37 (9th Cir. 2012) (vacating and remanding for resentencing where district court violated defendant's Sixth Amendment right to public trial by excluding family members from sentencing proceedings based solely on judge's displeasure with their allegedly "manipulative" presence).
  - *United States v. Whitehead*, 532 F.3d 991, 993 (9th Cir. 2008) (affirming substantial downward variance from potential fifty-one months' imprisonment to probation where district court reasonably considered defendant's family circumstances, including his role as custodial parent of eight-year-old daughter and mother's illness).
  - *United States v. Menyweather*, 447 F.3d 625, 628, 634 (9th Cir. 2006), *overruled on other grounds by Kimbrough v. United States*, 552 U.S. 85 (2007) (affirming downward departure for defendant mother who was a single parent, and noting that district courts "can justify consideration of family responsibilities, an aspect of the defendant's 'history and characteristics,' 18 U.S.C. § 3553(a)(1), for reasons extending beyond the Guidelines").
- **10th Circuit:** Acknowledges that a family-circumstances based variance is permissible under section 3553(a), but evaluates such requests by reference to the extraordinary-circumstances standard of section 5H1.6.
  - *United States v. Barnes*, 890 F.3d 910, 918–19 (10th Cir. 2018) (affirming sentences below guidelines range where district court adequately considered defendants' family circumstances and sentences fell within permissible discretionary bounds despite appellate court's view that higher sentences would have been appropriate).

- *United States v. Sayad*, 589 F.3d 1110, 1118 (10th Cir. 2009) (affirming substantial downward variance from potential sixty months' imprisonment to sixty months' probation where district court reasonably considered defendant's family responsibilities, including parents' reliance on him to run family restaurant and their need for his assistance due to father's health).
- *United States v. Muñoz-Nava*, 524 F.3d 1137 (10th Cir. 2008) (holding that the sentencing court's finding that the defendant's family circumstances were extraordinary, where the defendant cared for his eight-year-old son as a single parent and had elderly parents with serious medical problems, was supported by the record).

- **11th Circuit:** Continues to apply section 5H1.6 extraordinary-circumstances standard.
  - *United States v. Devegter*, 439 F.3d 1299, 1302 (11th Cir. 2006) (vacating sentence that was a downward departure based, in part, on family circumstances, remarking that "[t]here is nothing inherently extraordinary about caring for a child or a sick parent").
  - *United States v. Saucedo-Patino*, 358 F.3d 790, 794 (11th Cir. 2004) (vacating and remanding where district court granted downward departure based on defendant's employment history and family responsibilities, finding that paying child support and maintaining good relationship with daughter were not exceptional circumstances "outside the heartland" of typical cases).
  - *United States v. Rose*, 722 F. Supp. 2d 1286, 1290 (M.D. Ala. 2010) (granting downward departure for extraordinary family circumstances based on defendant's role as caretaker for his girlfriend's nephew who had severe autism).

Practice Tips for defense counsel

- **Number 1:** Raise the issue of caregiving/effect on the child in the sentencing-position memorandum.
  - Argue for both:
    - a departure, explaining why the case is extraordinary such that a downward departure from the guidelines sentence might apply; and
    - a variance, explaining why the defendant's parenting role is a specific characteristic that the court should consider under 18 U.S.C. § 3553.
  - Argue that the parent's role is unique and irreplaceable.
  - Discuss, to the extent applicable, the direct and indirect impacts of incarceration on the child's life.
  - Utilize the most recent social-science research.
- **Number 2:** Collect and present information from people in the child's life.
  - Collect letters and photos from relatives, friends, teachers, coaches, etc. that describe the parent's relationship with the child and the impact that incarceration would have on the child's life.
  - Send those letters to the court prior to sentencing.
- **Number 3:** Advocate for family impact statements in the presentencing investigation (PSI) report.
  - Family impact statements include information about a defendant's family and the impact that a prison sentence would have on the family.
  - Fed. R. Crim. P. 32 (d)(2)(G) authorizes the judge to order the probation officer to investigate and report on relevant information, such as family impact. Attorneys should consider requesting that the court order a family impact statement in appropriate cases.