



**“SO WHAT’S THE DIFFERENCE ANYWAY?”
THE DIFFERENCE BETWEEN VARIANCES
AND DEPARTURES**

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U.S. V. BOOKER, 135 S. CT. 738 (2005)

- ❖ Pre Booker (before 2005) the guidelines were mandatory
- ❖ Booker made the guidelines advisory
- ❖ The S.C. since Booker has gone on to say that the Courts must give consideration to the guidelines but can't simply defer to the policy reasons of the guidelines, *Rita v. U.S.*, 551 U.S. 338 (2001); *Gall v. U.S.*, 552 U.S. 38 (2007).
- ❖ Sentencing Courts may disagree with a particular guideline provision on policy grounds and impose a non-guideline sentence because a particular guideline provision lacks a basis in empirical data or study. *Kimbrough v. U.S.*, 552 U.S. 85 (2007)

18 U.S.C. SECTION 3553

- ❖ Sentencing decisions are governed by the factors listed in 3553(a)
- ❖ Every sentence imposed in the federal system must be “sufficient but not greater than necessary”
- ❖ There are a number of factors the Courts must consider:
 - ❖ The seriousness of the offense committed and its nature and circumstances, to promote respect for the law, and to provide just punishment for the offense
 - ❖ To afford adequate deterrence to criminal conduct
 - ❖ To protect the public from further crimes of the defendant
 - ❖ To provide an individual defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner
 - ❖ The kinds of sentenced available and the sentencing range
 - ❖ Any pertinent policy statement
 - ❖ The need to avoid unwarranted disparity
 - ❖ The need to provide restitution

A VARIANCE

- ❖ at this point the Court can sentence under the guidelines or decide the guidelines are not appropriate in considering all the 3553(a) factors and grant a variance
- ❖ The variance can be lower or higher than the guidelines
- ❖ The variance must be supported by the 3553(a) factors

A DEPARTURE

- ❖ A departure is part of the guidelines
- ❖ Found in Chapter 5 of the guideline manual
- ❖ Departures are specifically set out in the guidelines and are much more restrictive than variances

5K: DEPARTURES

- ❖ 5K1.1: is a government sponsored departure based upon substantial assistance
- ❖ 5K2.0: Lists specific grounds for departures
- ❖ This section sends us back to Section H of Chapter 5 that lists specific offender characteristics that don't normally matter but if there is an exceptional degree they can be used as a reason to depart.

5H

- ❖ Age: individually or in combination with other reasons
- ❖ Education and vocational skills are not usually relevant
- ❖ Mental and emotional conditions may be relevant
- ❖ Extraordinary physical impairment may be relevant
 - ❖ Drug or alcohol abuse is not relevant
- ❖ Employment record is not relevant
- ❖ Family ties and responsibilities are not usually relevant
- ❖ Role in the offense is an enhancement not a basis for a departure
- ❖ Criminal livelihood is dealt with in Ch 4
- ❖ Race, Sex, National origin, Creed, Religion, Socio-Economic Status is not considered
- ❖ Civic, Charitable or Public Service Employment or prior good works not considered; military service may be relevant

CRIMINAL HISTORY 4A1.3

- ❖ 4A1.3 gives a basis for an upward departure if the criminal history is not adequately represented
 - ❖ If reliable information indicates that a defendant's criminal history category substantially underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.
 - ❖ Prior sentences not used in computing CH such as foreign sentences or tribal sentences
 - ❖ Prior sentence of substantially more than one year imposed as a result of independent crimes committed on different occasions
 - ❖ Prior similar misconduct established by a civil adjudication or by failure to comply with an administrative order
 - ❖ Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense
 - ❖ Prior similar criminal conduct not resulting in a criminal conviction

4A1.3 CONTINUED

- ❖ A prior arrest record by itself shall not be considered
- ❖ Determination of extent of departure:
 - ❖ Use as reference the criminal history category applicable to the defendants whose criminal history most closely resembles that of the defendant
 - ❖ If you go up from a CHC VI you have to go higher on the offense level.
- ❖ If reliable information indicates the defendants criminal history category substantially over represents the seriousness of the defendant's criminal history or the likelihood the defendant will commit other crimes a downward departure may be warranted.
- ❖ A departure below CHC I is prohibited
- ❖ ACC and Repeat and dangerous sex offender, downward departure is prohibited
- ❖ The extent of a downward departure under CO is limited to one CHC

GROUNDS FOR DEPARTURE 5K UPWARD

- ❖ Extreme psychological injury to the victim
- ❖ Abduction or unlawful restraint
- ❖ Property damage or loss
- ❖ Weapons and dangerous instrumentalities
- ❖ Significant disruption of government function
- ❖ Extreme conduct
 - ❖ Defendant's conduct was unusually heinous, cruel, brutal or degrading to the victim
- ❖ There was a criminal purpose
- ❖ Public welfare
- ❖ Semiautomatic firearm used in connection with COV

GROUNDS FOR DEPARTURE 5K UPWARD (CONT)

- ❖ Violent street gangs
- ❖ Dismissed or undercharged conduct (based upon conduct that was dismissed or not pursued as part of a plea deal)
- ❖ Discharged term of imprisonment
- ❖ Commission of offense while wearing or displaying unauthorized or counterfeit insignia or uniform

GROUND FOR DEPARTURES 5K DOWNWARD

- ❖ Victim's conduct
- ❖ Lesser harms to avoid a greater harm
- ❖ Coercion and duress not amounting to a complete defense
- ❖ Diminished capacity not based on voluntary drug use
- ❖ Voluntary disclosure of offense prior to discovery of offense
- ❖ Aberrant behavior
 - ❖ Basically no criminal history
 - ❖ Can't use this if
 - ❖ Bodily injury or death resulted
 - ❖ A firearm or dangerous weapon was used
 - ❖ Is a serious drug offense
 - ❖ Have more than 1 CH point

SPECIFIC CHARACTERISTICS TO DEPART DOWNWARD IN CHILD CRIMES OR SEX CASES

- ❖ Age
- ❖ An extraordinary physical impairment
- ❖ Drug and Alcohol or gambling is not a reason

WHAT DOES ALL THIS MEAN?

- ❖ Departures are run by the guidelines and are very restrictive
- ❖ Variances are run by the statute and give the Court less restriction
- ❖ The Court must always state a reason for both

WHAT TO DO WITH MULTIPLE TYPES OF DRUGS

❖ 2D1.1: When you have multiple types of drugs you must convert everything to marijuana

❖ Example:

- ❖ 3g of crack
- ❖ 40 g of meth
- ❖ 20 g of ice
- ❖ 200 g of cocaine
- ❖ 4 kg of marijuana

❖ Crack: $3 \times 3,571\text{g}$ 10,713 g or 10.7 Kg of marijuana

❖ Meth: $40 \times 2\text{ Kg}$ 80 Kg of marijuana

❖ Ice: $20 \times 20\text{ Kg}$ 400 Kg of marijuana

❖ Cocaine: $200 \times 200\text{ g}$ 40,000g or 40 Kg of marijuana

❖ Marijuana 4Kg

❖ Total is 534.7 Kg of marijuana which is a base offense of 26

EXAMPLE 2

- ❖ 80 g of ice
- ❖ 90 g of crack
- ❖ 450 g of cocaine
- ❖ 10 Kg or marijuana

❖ Conversions:

- ❖ Ice 20Kg
- ❖ Crack 3571 g
- ❖ Cocaine 200 g

WHAT'S THE ANSWER?????

- ❖ Ice: 80 x 200Kg 1600Kg of marijuana
- ❖ Crack: 90 x 3571 321.39 Kg of marijuana
- ❖ Cocaine: 450 x 200 90 Kg of marijuana
- ❖ Marijuana 10 kg of marijuana
- ❖ Total 2,021.39 kg
- ❖ Base level 30