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## New Guidelines Narrow Causes For Granting Lesser Sentences

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Gary Fazio will not be the last person with a gambling problem convicted of a federal crime, but chances are his sentence will be more lenient than most of those who follow him.

Mr. Fazio, who was convicted of laundering \$2.5 million he made off his bookmaking operation, was sentenced Friday to five years probation by Southern District Judge Kimba M. Wood. He received a reduced sentence for what his attorney argued is a "pathological" gambling habit that began at the racetrack during his childhood.

As it turns out, Mr. Fazio missed a mandatory 1 year to 1-1/2 year jail sentence by a day. Yesterday, new guidelines from the U.S. Sentencing Commission went into effect that prohibit and limit numerous circumstances for which federal judges can grant downward departures for criminals. A gambling addiction is among those that was eliminated.

Mr. Fazio's attorney, Jeffrey Lichtman, knew what a difference a day could make last week when he pushed to complete his client's sentencing, which had been originally scheduled for April but had been pushed back by adjournments.

"The judge said, 'Do you want to work through lunch,' and I said, 'Absolutely,'" Mr. Lichtman said in an interview after the sentence was passed.

In opposition, Assistant U.S. Attorney Robin W. Morey argued in a letter to Judge Wood that the court should not grant a downward departure even before the guidelines went into effect, and should take into account the public policy implications of the Sentencing Commission's changes. After a hearing Friday, Judge Wood granted the departure and spared Mr. Fazio from prison.

A spokesman for Southern District U.S. Attorney James B. Comey declined to comment on whether the office would appeal the sentence.

Gambling is not the only cause for a downward departure eliminated under the new guidelines, which were requested by Congress in an amendment to the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today [PROTECT] Act of 2003.

No more downward departures will be allowed for accepting responsibility for a crime. Though criminals can receive a downward adjustment in a sentence if they accept responsibility for their actions, no additional departures can be awarded by judges for extraordinary examples of this conduct, such as, say, providing restitution to victims before being charged.

Under the new guidelines, a judge can no longer grant a downward departure if he or she finds that a criminal had a very small role in a crime, unlike in the past. Nor can a departure be granted simply because a defendant agreed to plead guilty. Also, a defendant's ties to a community — such as work for a charity or a civic group — can no longer form the basis for a downward departure.

Other causes for departure that have not been eliminated were made more difficult to justify. Under §5K2.0, judges are allowed to grant downward departures for circumstances not specifically identified in the guidelines. Under the new rules, though, such departures are only warranted in "the exceptional case."

Departures for family ties will be more difficult to win, as defendants must show that incarceration would result in a financial loss to the family that is beyond that normally associated with going to jail and also irreplaceable. Defendants must also show how a reduced sentence would alleviate this problem.

Aberrant behavior has been restricted as a cause for a reduced sentence under the guidelines as well. Also, judges can no longer grant a departure based on a combination of mitigating factors unless each factor is a specific grounds for departure under the guidelines.

The amendments to the guidelines can be found on the U.S. Sentencing Commission's Web site, at <http://www.ussc.gov/2002suppc/OCT03CON.pdf>.