

Summary of 2014 Guideline Amendments¹

The U.S. Sentencing Commission voted on April 10, 2014 to amend the sentencing guidelines. These amendments will be sent to Congress on May 1, 2014. If Congress does not pass legislation disapproving the amendment, then the amendments will take effect on November 1, 2014.

None of these amendments are effective until November 1, so any arguments based upon them – whether by defense counsel for a decrease or the prosecution for a decrease or increase in sentence length – must be done in the form of a variance.

Nor has the Commission voted to make any of these amendments retroactive. The retroactivity of the amendments to the drug quantity table will be taken up at a public hearing in June with public comment due in July. The earliest the Commission will vote on retroactivity is July. If the amendment is made retroactive, it will not take effect until November 1. The Commission declined to take up retroactivity on any other amendment that may have the effect of lowering sentences.

Here is a summary of the amendments. The unofficial version of the promulgated amendments can be found at this link: http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20140410_Unofficial_RFP_Amendments.pdf. The actual amendments should be reviewed for purposes of advising clients, plea bargaining, or sentencing.

Drug Quantity Table

The offense levels in the drug quantity table at 2D1.1 and the precursor table at 2D1.11 are reduced by 2, but the ceilings remain at 38 and certain drugs retain a floor of 12.

Commissioners Hinojosa and Pryor publicly criticized the Attorney General for directing prosecutors to agree to a 2 level variance, claiming it disrespected the role of the Sentencing Commission and Congress and suggesting it was unlawful. If judges decline to vary by 2 levels, the best option is to seek a continuance until November 1, 2014. It should not be assumed that these amendments will be made retroactive. And if they are retroactive, the Commission may place limits upon who is eligible for relief, e.g., only persons who received safety-valve or only persons sentenced before *Booker*. The Issues for Comment on Retroactivity are available at this link: http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20140410_Prelim_Issue_for_Comment.pdf

2K2.1, Felon in Possession

The adjustment at 2K2.1(b)(6) for possession of any firearm or ammunition in connection with another offense applies only if the other offense was relevant conduct to the offense of conviction, i.e., two unlawful possession offenses were part of the same course of conduct or common scheme or plan. This amendment primarily alters existing Fifth Circuit law and may have subtle implications in other Circuits.

¹ Prepared by the National Sentencing Resource Counsel Project, Federal Public and Community Defenders

The cross-reference at 2K2.1(c) applies only if the firearm or ammunition is "cited in the offense of conviction." As noted above, while this amendment will have the effect of making the cross-reference inapplicable in some cases, it will not be made retroactive.

2L1.1, Alien Smuggling

The commentary for the reckless endangerment enhancement at 2L1.1(b)(6) is amended to add an example of the conduct to which the adjustment applies – “guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements.”

2D1.1, Marijuana Cultivation

The amendment adds a 2 level adjustment to 2D1.1 if the offense involved marijuana cultivation on state or federal land or trespassing on private or tribal land AND the defendant receives an aggravating role adjustment.

1B1.10, Mandatory Minimum Cases

In cases where the defendant received a reduction below the mandatory minimum for substantial assistance, the amended guideline range is determined without regard to the trumping mechanism of 5G1.1 and 5G1.2, which calls for the statutory mandatory minimum to be the guideline sentence when the mandatory minimum is greater than the maximum of the applicable guideline range. This new rule rejects the approach of the Second, Sixth, and Eleventh Circuit and follows the Third.

Supervised Release

Failure to register as a sex offender is not a sex offense.

When there is a statutory minimum term of supervised release, the minimum restricts the low end of the guideline range, but the top of the range does not go up to life. This amendment rejects the approach of the Eighth Circuit.

These amendments will not be made retroactive.

5G1.3, Undischarged and Anticipated Terms of Imprisonment

Unless otherwise specified in 5G1.3(a) governing consecutive sentences, sentences shall be concurrent when the undischarged term is for an offense that is relevant conduct under 1B1.3(a)(1) to (3) whether or not it also formed the basis for a Ch 2 or Ch 3 increase.

A new subsection (c) is added, which provides that unless otherwise specified in 5G1.3(a) governing consecutive sentences, sentences shall be concurrent when a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense under 1B1.3(a)(1) to (3). This subsection applies where the "court anticipates that, after the federal sentence is imposed, the

defendant will be sentenced in state court and serve a state sentence before being transferred to federal custody for federal imprisonment."

Sentencing of Certain Aliens with Undischarged terms of Imprisonment, new application note to 2L1.2 providing for downward departure

The commentary to 2L1.2 is amended to provide for a departure provision for certain cases where the defendant is located by immigration authorities while serving time in state custody, whether pre-or post-conviction, for a state offense. The court may consider a departure where BOP will not credit the time in state custody. The court may depart only in cases where the departure is not likely to increase the risk to public safety.

Violence Against Women Reauthorization Act

Assault of a Spouse, Intimate Partner, or Dating Partner by Strangling or Suffocating, 18 U.S.C. § 113(a)(8), is referenced to 2A2.2. The aggravated assault guideline at 2A2.2 is amended to provide a 3 level increase where "the offense involved strangling, suffocating, or attempting to strangle or suffocate a spouse, intimate partner, or dating partner." A cap of 12 is placed on cumulative adjustments under 2A2.2.

Section 2A2.3 (Assault, no longer "Minor Assault") is amended to provide for a 4 level increase where the offense resulted in substantial bodily injury to a spouse, intimate partner, or dating partner.

Section 2A6.2, Stalking or Domestic Violence, is amended to provide for a 4 level increase where the offense involved strangling, suffocating, or attempting to strangle or suffocate. The definition of stalking in the commentary is also changed to conform to 18 U.S.C. § 2261A.

The commentary to the supervised release guideline, 5D1.1, is amended to provide guidance on terms of supervised release in domestic violence cases.

Assault with Intent to Commit Sexual Abuse, 18 U.S.C. § 113(a)(1) is referenced in the Appendix to 2A3.1.

Assault with Intent to Commit Certain Sex Offense, 18 U.S.C. § 113(a)(2,) is referenced to 2A2.2, 2A3.2, 2A3.3, and 2A3.4.

Assault by Striking, Beating or Wounding, under 18 U.S.C. § 113(a)(4), which now carries a statutory maximum penalty of one year, is referenced to 2A2.3.

Regulation of International Marriage Brokers, 8 U.S.C. § 1375a(d), is referenced to 2H31.1 and 2B1.1.

Transportation of Minors, 18 U.S.C. § 2423, is referenced to 2G1.3.

Unlawful Conduct with Respect to Immigration Documents, 18 U.S.C. § 1597, is referenced to 2X5.2.