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Amending the Sentencing Guidelines

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Last year, in a burst of activity, the United States Sentencing Commission issued numerous amendments to the Sentencing Guidelines. These amendments followed a year-long period of inactivity during which the Commission was hamstrung, without a quorum, because of unfilled vacancies in its membership.¹ During that time, circuit conflicts went unresolved and Congress imposed new mandates on the Commission.

On November 15, 1999, President Clinton appointed a new slate of members to the Commission.² Working through its docket, the Commission issued a flurry of amendments – fifteen in all – which became effective on Nov. 1, 2000.³

Although a few of these amendments are technical, many of them reflect substantive changes. In addition, because some of the amendments were prompted by new anti-crime legislation, they may be indicators of areas of more intensive activity for law enforcement, as well as emerging areas of crime to which the law is adapting. This article provides a brief analysis of some of the recent amendments.

Procedure for selecting the applicable guideline (Amendment 591). In attempting to calculate the Sentencing Guidelines range for any particular case, the first task – and the most fundamental – is to determine the applicable guideline.

To assist in this process, the Commission created Appendix A, a comprehensive table which lists guidelines for virtually all federal crimes. In most cases, Appendix A provides an easy method for finding the applicable guideline: one simply consults the appendix, finds the relevant statute of conviction, and follows the table to determine the applicable guideline. Until the recent amendments, however, this seemingly mechanical system had an escape hatch for “atypical” cases. In such cases, where the court concluded that the guideline listed in Appendix A was “inappropriate,” the court was permitted to deviate from the appendix and pick out another, more apt, guideline.⁴

In the November 2000 amendments, the Commission eliminated, as a general matter, a court’s authority to deviate from Appendix A. This amendment is consistent with the modified “charge offense” philosophy which undergirds the guidelines.⁵

In addition, it promises to simplify the sentencing process, and to reduce the risk of error in the fundamental decision of which guideline to apply, by eliminating what had been a somewhat confusing area of judicial discretion.

Exceptions

Under the new amendment, there are only two exceptions to the general requirement that courts must apply the guideline listed in Appendix A. First, if the parties stipulate that a more severe guideline should be applied, the court must adopt that guideline.⁶ Second, the amendments did not eliminate specific provisions, embedded in particular guidelines, which permit selection of a guideline not listed in Appendix A in certain circumstances. One such provision is Application Note 14 to the fraud guideline, U.S.S.G. §2F1.1.⁷

The Sentencing Commission took the unusual step of declaring that this amendment is retroactive.⁸ Thus, defendants who were previously sentenced based on a guideline not listed in Appendix A, and who received a higher sentence because of the deviation, may be permitted to petition the court for a sentence reduction.⁹

Use of uncharged or dismissed conduct to impose an upward departure (Amendment 604). In negotiating plea agreements, prosecutors sometimes elect to forego upward guidelines adjustments. Such prosecutorial flexibility typically arises when the proof relating to an adjustment is questionable, or when the government wishes, for any number of reasons, to resolve a case speedily. When the government elects to forego certain offense conduct in a plea agreement, can the court nevertheless rely on that conduct as a basis for an upward departure? Until the recent amendments, there was a split in the circuits on this question. One group of courts, led by the Second and Third Circuits, held that courts were permitted to rely on dismissed or uncharged conduct in imposing an upward departure; another group, led by the Ninth Circuit, reached the contrary conclusion.¹⁰ In its recent amendments, the Commission rejected the Ninth Circuit's view. The Commission added a new policy statement, U.S.S.G. §5K2.21, which permits the court to sentence a defendant above the guideline range based on conduct that was dismissed as part of a plea agreement.¹¹

In most cases, it seems likely that courts are unlikely to impose an upward departure based on conduct which the government has dismissed as part of a plea agreement. The government, of course, is required to abide by its plea agreement, and in our experience it is unusual for a court to impose a harsher sentence than the government is advocating.

Nevertheless, the risk of an unanticipated sua sponte upward departure may create some uncertainty in plea bargaining, especially where defense counsel has secured unusually favorable stipulations from the government. In order to cure this uncertainty, defense counsel might seek plea agreements under Fed. R. Crim. P. 11(e)(1)(C).

Generally, prosecutors have traditionally been reluctant to enter into such agreements, because of the view that they intrude too far upon the court's sentencing function.

Recent amendments to Rule 11(e)(1)(C), however, might make such agreements more palatable to prosecutors and judges. Whereas previously under Rule 11(e)(1)(C) the parties stipulated to a specific sentence that was binding on the court, the amended rule allows the parties to agree upon a sentencing range, or to agree that a particular guidelines provision is either applicable or inapplicable. As under prior practice, the court is then required to either

accept or reject the parties' plea agreement; in the case of rejection, the defendant has the right to withdraw his plea.¹²

A plea agreement under Rule 11(e)(1)(C) would afford protection against unforeseen upward departures based on dismissed conduct. Alternatively, in order to avoid such departures, defense counsel might seek to confirm from the government, either formally or informally, that a particular adjustment is not supported by the evidence, meaning that the court would find it difficult to justify an upward departure in any event.

Downward departures for aberrant behavior (Amendment 603). In the introduction to the original version of the guidelines manual, the Commission outlined its view that courts had traditionally treated certain white-collar first offenders too leniently.¹³

The Commission explained that it had sought to rectify this problem by drafting the guidelines to ensure that many white-collar offenders would face at least a short period of incarceration, even if they lacked any prior criminal record. At the conclusion of this discussion, the Commission added, somewhat cryptically, that it had not “dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.”¹⁴

Not surprisingly, defense lawyers quickly latched onto the Commission's proviso, and motions for “aberrant behavior” departures became commonplace. In response, courts adopted conflicting approaches. One contingent, led by the Seventh Circuit, adopted a narrow view, under which a departure would be available only if the defendant committed a “spontaneous and seemingly thoughtless act” that required little or no planning. Other courts, led by the Ninth Circuit, adopted a broader “totality of the circumstances” test, which examined factors such as the defendant's criminal record, psychological condition, life circumstances, and motives for committing the crime. In 1998, in *Zecevic v. United States Parole Comm'n*, the Second Circuit adopted the broader “totality of the circumstances” test.¹⁵

In the recent amendments, the Commission resolved the circuit split by issuing a new policy statement, U.S.S.G. §5K2.20.

This provision works a number of changes in the law. First, it imposes several threshold requirements. Aberrant behavior departures are now prohibited in cases involving drug-trafficking or serious violence, or if the defendant used a gun, has more than one criminal history point, or has a prior felony conviction.¹⁶ Next, the new policy statement spells out the criteria for awarding aberrant-conduct departures. Here, the Commission attempted to chart a middle course between the two conflicting approaches in the pre-existing case law. Thus, commentary to §5K2.20 defines “aberrant behavior” as a single occurrence or transaction that was committed without planning, was of limited duration, and represented “a marked deviation from an otherwise law-abiding life.” The commentary then states that, in determining whether a departure is warranted, a court may consider many of the factors previously recognized in the “totality-of-the-circumstances” circuits.¹⁷

Departures for aberrant behavior have generally been among the more difficult for prosecutors to address and for courts to resolve. The “totality of the circumstances” test invited

consideration of a broad array of facts and circumstances, provided they were somehow probative of the aberrant nature of the defendant's criminal conduct. Despite the Commission's criticism of this standard as "overly broad and vague,"¹⁸ it is noteworthy that the new policy statement retains many of the factors which had informed the analysis under that test. Thus, absent further development in the case law, it is unclear whether the new policy statement will significantly alter the frequency with which aberrant-conduct departures are granted.

As a final note, for cases in which the offense conduct occurred before Nov. 1, 2000, there is a question whether application of new §5K2.20 would be barred, in the Second Circuit and other "totality of the circumstances" jurisdictions, by ex post facto considerations. It would therefore be prudent for practitioners to ask a sentencing court to make alternative findings under both the old and new standards.

Downward departures for post-sentencing rehabilitation (Amendment 602). Courts have uniformly held that a downward departure may be warranted for a defendant's exceptional rehabilitative efforts – such as demonstrated efforts to stop using drugs, get a job, and the like – prior to the imposition of sentence.¹⁹

A more difficult question arises when a defendant is sentenced to imprisonment, begins serving his sentence, and then prevails on appeal or in a post-conviction motion. When the case is sent back to the district court for re-sentencing, should the judge consider the defendant's efforts to rehabilitate himself in prison? If the defendant has made exceptional efforts, can the judge impose a downward departure?

Until the recent amendments, there was a lopsided circuit split on this issue. The vast majority of circuits held that a court was free to impose a downward departure based on a defendant's extraordinary rehabilitation while in prison.²⁰ Standing alone, however, the Eighth Circuit reached the opposite conclusion.²¹

In the recent amendments, the Commission adopted the Eighth Circuit's view.²² The Commission added a new policy statement, U.S.S.G. §5K2.19, which prohibits downward departures based on post-sentencing rehabilitation. (The policy statement notes, however, that post-sentencing rehabilitation might provide a basis for early termination of supervised release.)

This policy statement overturns the settled law of many circuits, including the Second Circuit, and takes away one benefit that some defendants had previously achieved from filing a successful appeal or §2255 motion. As the Commission made clear, however, exceptional rehabilitation between the time of the offense and the time of the original sentencing continues to be a valid basis for departure.²³

Increased penalties for bankruptcy fraud (Amendment 597). Over the past several years, a circuit conflict has developed as to whether defendants should receive an extra two-point adjustment if they committed fraud in connection with a bankruptcy proceeding.²⁴

Due to an ambiguity in pre-existing language in the guidelines, several courts, including the Second Circuit, indicated that an extra adjustment for bankruptcy fraud would be inappropriate.²⁵

In the recent amendments, however, the Commission cured the ambiguity by creating a new subsection, U.S.S.G. §2F1.1(b)(4)(B), which expressly requires a two-level upward adjustment for misrepresentations or fraud during the course of a bankruptcy proceeding. The Commission also added an explanatory sentence in the background commentary to §2F1.1, which notes that the increased penalty is intended to reflect the harm to the bankruptcy process, and the damage caused to others with an interest in the bankruptcy estate, when a defendant commits bankruptcy fraud.²⁶

Over the past few years, these same arguments have been advanced in a number of circuit court opinions but, until the recent amendments, they lacked clear textual support in the guidelines. The new amendment removes any doubt in this area, and confirms that persons who commit bankruptcy fraud will face increased penalties.

Additional amendments. In other amendments, the Commission stiffened the penalties for intellectual property offenses such as criminal trademark and copyright infringement (amendment 593); imposed higher penalties for crimes involving “identity theft,” in which a criminal assumes the victim’s identity to commit crimes such as credit card fraud (amendment 596); heightened the penalties for cases involving sexual abuse of minors, particularly where the victim is solicited over the Internet (amendment 592); ratified a previous amendment which imposed higher penalties for certain crimes involving telemarketing (amendment 595); stiffened the penalties for drug crimes involving methamphetamines (amendment 594); and clarified the interplay of complicated sentencing provisions in firearms offenses (amendments 598-601).

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¹ See Rovella. “Sentencing Body To Get Nominees: Vacancies Cloud Guidelines, Leading To Disparities”, *The National Law Journal* (June 7, 1999); U.S. Sentencing Commission, Report of the United States Sentencing Commission To The Judicial Conference Of The United States (Sept. 1999).

² U.S. Sentencing Commission, 1999 Annual Report, at viii.

³ U.S.S.G. App. C Supp., at 29-84 (2000).

⁴ See U.S.S.G., App. A intro. comment. (1998); see also *United States v. Elephant*, 999 F.2d 674, 675-77 (2d Cir. 1993); *United States v. McCall*, 915 F.2d 811, 814 (2d Cir. 1990).

⁵ See U.S.S.G., Ch. 1 Pt. A, §4(a) (2000).

⁶ See U.S.S.G. §1B1.2(a) (2000); U.S.S.G §1B1.2, comment. (n.1) (2000).

⁷ The Second Circuit recently affirmed the continuing vitality of Application Note 14. See *United States v. Kurtz*, 2000 WL 8405 (2d Cir. Jan. 3, 2001).

⁸ U.S.S.G. App. C Supp., at 83-84 (Amend. 607) (2000).

⁹ See 18 U.S.C. §3582(c)(2); U.S.S.G. §1B1.10(a).

¹⁰ See U.S.S.G. App. C Supp., at 79 (collecting cases) (2000).

¹¹ U.S.S.G. App. C Supp., at 78-79 (Amend. 604) (2000).

- ¹² See Fed. R. Crim. P. 11(e)(1)(C); Fed. R. Crim. P. 11(e)(4); see also Fed. R. Crim. P. 11, Adv. Comm. Notes, 1999 Amendment.
- ¹³ See U.S.S.G. Ch. 1, Pt. 4(d) (1987).
- ¹⁴ *Id.*
- ¹⁵ See *Zecevic v. United States Parole Comm'n*, 163 F.3d 731, 733 (2d Cir. 1998) (collecting cases on each side of the circuit split, including leading Seventh and Ninth Circuit cases).
- ¹⁶ U.S.S.G. §5K2.20 (2000).
- ¹⁷ U.S.S.G. §5K2.20, comment. (n. 1 & 2) (2000).
- ¹⁸ U.S.S.G. App. C Supp., at 77 (2000).
- ¹⁹ See U.S.S.G. App. C Supp., at 75.
- ²⁰ See U.S.S.G. App. C Supp., at 74-75 (2000) (collecting cases).
- ²¹ See *United States v. Sims*, 174 F.3d 911 (8th Cir. 1999); see also *United States v. Rhodes*, 145 F.3d 1375, 1384 (D.C. Cir. 1998) (Silberman, J., dissenting).
- ²² U.S.S.G. App. C Supp., at 74-75 (Amend. 602) (2000).
- ²³ U.S.S.G. App. C Supp., at 75 (2000).
- ²⁴ See U.S.S.G. App. C Supp., at 66-67 (2000) (collecting cases).
- ²⁵ See *id.*
- ²⁶ U.S.S.G. App. C Supp., at 65-67 (Amend. 596) (2000).