

## Opportunities in Guideline Amendments Sent to Congress May 1, 2007

### Four good, or partially good, amendments

On May 1, the Commission sent amendments to Congress (posted on [www.USSC.gov](http://www.USSC.gov)) that will go into effect Nov. 1. There are a few improvements, thanks to a Democratic Congress and a severely weakened DOJ.

You can use the improvements in various ways as a basis for a lower sentence now. Argue that (1) the guidelines are not mandatory, (2) the USSC has acknowledged through the amendment that the current guideline is too high, (3) so the judge should follow the improvement right now.

### Criminal History

#### Minor Offenses-4A1.2(c)

Moved fish & game violations and local ordinance violations to the (c)(2) "never counts" category

Offense counts under (c)(1) only if term of imprisonment was at least 30 days or term of probation was "more than" one year (rather than "at least" one year)

More flexibility in deciding whether a prior sentence is "similar to" a listed offense in (c)(1) or (c)(2)

#### Related Cases – 4A1.2(a)(2)

For purpose of counting prior sentences (worth 3 points each in the CH score) separately or as single sentence

Still count separately if intervening arrest.

But if not, count as single sentence if

- contained in same charging instrument, or
- sentenced on the same day

Negative effect: The amendment hurts if the priors “occurred on the same occasion” or “were part of a single common scheme or plan,” which language has been removed, but were not contained in the same charging instrument or sentenced on the same day. Most circuits interpreted the removed language very narrowly (the opposite of how they interpret nearly identical language in the relevant conduct rule), but nonetheless, there are cases in which the priors fit the narrow interpretation. If you have this circumstance (occurred on the same occasion or were part of a single common scheme or plan but not contained in the same charging instrument or sentenced on the same day), then the current guideline is best. If you have this circumstance in a case that is sentenced on or after November 1, 2007, the court has to use the guideline in effect on the date the offense for which the defendant is being sentenced was committed if using the guideline in effect on the date of sentencing produces a higher sentence. See USSG 1B1.11. If you have this circumstance in a case in which the offense was committed on or after November 1, 2007, you can argue unwarranted disparity vis a vis those whose priors were contained in the same charging instrument or sentenced on the same day.

Positive effect: The amendment can help in several ways, illustrated by the following hypo (with thanks to Randy Alden):

Client committed two burglaries on different dates, was arrested for both on the same date (no intervening arrest), indicted in two separate indictments, sentenced on the same day. Under the current rule, he gets 3 points for each burglary; under the Amendment, the two burglaries are the "same sentence" and he receives only 3 points.

Suppose he is later convicted as a felon in possession. Under the current guidelines, he starts at a level 24 under 2K2.1(a)(2) because he has two prior felony convictions of a crime of violence. Application Note 10 to 2K2.1 states:

For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). See §4A1.2(a)(2); §4A1.2, comment. ( n.3).

After the amendment, the defendant would start at a level 20 (under 2K2.1(a)(4)(A)) because he has one prior felony conviction "that receive[s] criminal history points under §4A1.1(a), (b), or (c)." But the second sentence of note 10 suggests that only if you are being sentenced under 2K2.1(a)(1) or (a)(2) do you use only those felony convictions counted separately under 4A1.2(a)(2). But it makes no sense to say that the same rule does not apply in deciding whether you had two or one prior felony conviction. I have found no law on this, but I think the defendant starts at 20 after the Amendment.

It also helps under the Career Offender guideline. Application Note 1 to 4B1.1 refers to USSG 4B1.2 for the definition of "two prior felony convictions." USSG 4B1.2 (c) says that "the term 'two prior felony convictions' means . . . the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of 4A1.1(a), (b), or (c)." Under the Amendment, if the defendant above was charged with a later crime of violence or controlled substance offense, he would not be subject to the Career Offender guideline because he does not have two prior felony convictions that were counted separately as defined in 4B1.2(c).

### **Crack**

The Amendment will reduce crack penalties by 2 points. If you have a judge who is afraid to vary from the crack guidelines for the glaringly obvious reasons, s/he should at least have the courage to knock off the two points that the Commission acknowledges have to go.

As explained in the press release, see <http://www.ussc.gov/PRESS/rel0407.htm>, and the new Crack Report at pp. 3 and 9, [http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf), the rationale for 2 points off is that the Commission made the crack guidelines 2 points

higher than was necessary to reach the mandatory minimum level for a first offender with no other adjustments.

The 2007 Crack Report was sent to Congress on 5/15/07. In it, the USSC tells Congress it should:

- Increase the 5 and 10-year threshold quantities to focus on major traffickers *not more than 20-1* (emphasis in original)
- Repeal the mandatory minimum for simple possession
- Not lower powder threshold quantities

See [http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf).

### **Grouping, USSG 3D1.1**

Under new 3D1.1, the grouping rules apply not only to multiple counts in the same indictment but to multiple counts in different indictments when sentences are imposed at the same time or in consolidated proceedings. This is consistent with the law of most circuits, but is now explicit in the guidelines, in case there is any question.

### **Sentence Reduction, USSG 1B1.13**

18 USC 3582 (c)(1)(A), enacted 20 years ago, says in part:

- (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment [of a person who is already serving a sentence] after considering the factors set forth in [section 3553\(a\)](#) . . . if it finds that--
  - (i) extraordinary and compelling reasons warrant such a reduction.

Also 20 years ago, Congress told the Commission to give criteria and examples in the Guidelines for what should be considered extraordinary and compelling reasons. 28 USC 994(t).

Here is the USSC's tardy and rather disappointing but better than nothing list:

- Terminal illness
- Permanent physical or medical condition . . . that substantially diminishes the ability of the defendant to provide self-care within a correctional facility and for which conventional treatment promises no substantial improvement
- Experiencing deteriorating physical or mental health because of the aging process . . . that substantially diminishes the ability of the defendant to provide self-care within a correctional facility and for which conventional treatment promises no substantial improvement
- Only family member capable of caring for the defendant's minor child or children has died or become incapacitated
- Any other reason or combination of reasons "as determined by" BOP
- Rehabilitation "is not, *by itself*," an extraordinary and compelling reason.

You can use these reasons, if present in the case, to get a lower sentence at the time of sentencing (rather than after the D has already started serving the sentence). For example, if the only family member capable of caring for the defendant's minor child or children has died or become incapacitated, the defendant should receive a sentence that allows him or her to go home, despite the fact that the so-called "family circumstances" departure requires that "no effective remedial or ameliorative programs are reasonably available," i.e., foster care is A-OK.

Once the guideline goes into effect on Nov. 1, 2007, you can use it to get sentence reductions for clients already serving a sentence. You may wonder how, if the authority to make the motion is in the hands of BOP, which only makes motions when the person is in the throes of death or dead.

The BOP's role is quite limited.

The "**court**, upon motion of the Director of the Bureau of Prisons, **may reduce the term of imprisonment** [of a person who is already serving a sentence] after considering the factors set forth in section 3553(a) . . . **if it finds that-- (i) extraordinary and compelling reasons warrant such a reduction.**" 18 USC 3582(c)(1)(A).

BOP has a limited role: to make the motion when it is aware of an extraordinary and compelling reason **as defined by the Commission** (which you can bring to BOP's attention).

What if BOP refuses to do so? Because the Commission has finally identified what are extraordinary and compelling reasons, now you can litigate it. *See* <http://circuit9.blogspot.com/2007/05/neglected-compassion-reduction-of.html>. I would think you cannot litigate it until the Amendment takes effect Nov. 1, 2007.