

KEY 2010 GUIDELINE AMENDMENTS TO BE SUBMITTED TO CONGRESS¹

In April 2010, the United States Sentencing Commission voted to promulgate amendments that eliminate recency points in the criminal history calculation, expand the availability of alternatives to incarceration, and address the relevance of certain offender characteristics. This document is only a partial analysis of the amendments slated for submission to Congress in May 2010. If not disapproved by Congress, these amendments will formally go into effect on November 1, 2010. This does not mean, however, that courts must continue applying the current guidelines. The sentencing court remains free under 18 U.S.C. § 3553(a) and Supreme Court precedent to disagree with any part of the guidelines on policy grounds. The Commission's own conclusion that the guidelines should be amended provides a firm basis for a court to disagree with existing guidelines.

For a fuller history, see the proposed amendments and public hearing testimony of the Federal Public and Community Defenders and other witnesses.

For the language of the proposed amendments, go to fd.org.

For the written testimony of the defenders, go to fd.org:

http://www.fd.org/pdf_lib/FPD_Testimony%20of%20Meyers%20and%20Mariano_FINAL.pdf

For a transcript of the public hearing on these amendments and written statements of all witnesses, go to <http://www.ussc.gov/AGENDAS/20090317/Agenda.htm>

REGENCY POINTS

On April 6, 2010, the Commission voted to delete from the guidelines USSG §4A1.1 (e) (recency points). In a press release, the Commission stated that it deleted the amendment, "in part, because when combined with other guideline calculations for firearms or unlawful reentry (immigration) offenses, the addition of recency 'points' may result in a single criminal history event having excessive weight in the determination of the applicable guideline range. The Commission further determined that deletion of the provision did not detract from the overall ability of the criminal history score (resulting from the guidelines calculation) to predict an offender's likelihood of recidivism." *See* <http://www.ussc.gov/PRESS/rel20100419.htm>.

ALTERNATIVES TO INCARCERATION

The Commission voted to increase Zones B and C by one level in each criminal history category. Clients with ranges of 8-14 months (CHCs I-IV) and 9-15 months (CHC V-VI) will fall within Zone B rather than C; clients in a range of 12-18 months (all CHCs) will fall within Zone C rather than D.

The Commission also voted to amend USSG § 5C1.1 to provide for a treatment departure from Zone C to Zone B. The amendment clarifies § 5C1.1 n. 6 by giving examples of when a treatment alternative departure from Zone C to Zone B may be appropriate for drug and alcohol abusers as well as those who suffer from "significant mental illness." Under the terms of the guideline, the court must find (A) "that the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness," and (B) "the defendant's criminality must be related to the treatment

¹ Prepared by the National Sentencing Resource Counsel Project.

problems to be addressed before a departure is warranted.” The court should also consider “the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.” Finally, the amendment contains a new application note that advises courts to consider the effectiveness of residential treatment programs in deciding to impose a condition of community confinement.

Clients in CH III or above. The guidelines continue to recommend against the use of substitutes for imprisonment for “most defendants with a criminal history category of III or above.” USSC § 5C1.1 n.7. The Commission, however, voted to remove the statement that “such defendants have failed to reform despite the use of such alternatives.” Removal of that language should permit arguments that your client is an exception to the general rule because he or she has not received treatment or that prior treatment was not adequate to meet the client’s needs. It would also give you an opportunity to educate your judge about how relapse is common among drug/alcohol abusers and that mentally ill defendants often lack insight into their illness, which impedes their treatment and medication compliance.

Recognizing pretrial community confinement or home detention. Clients should be able to get “credit” toward a condition that requires community confinement or home detention for any time they spent in such confinement or detention pretrial so that they spend the least amount of post-sentencing time in community confinement, home detention, or imprisonment (for Class a and B felonies where a minimal term of imprisonment is statutorily required).

No statute prohibits a court from deciding that a defendant has already satisfied a condition of probation or supervised release. Take for example, a defendant in a 12-18 month range who receives a sentence of probation with twelve months intermittent confinement, community confinement or home detention. If before sentencing the defendant already has completed a 60 day residential treatment program and remained on home detention for an additional 2 months, the court may find that the defendant has already satisfied 4 months of the condition that he spend time in community confinement or home detention. *See also* 18 U.S.C. § 3564(a) (“term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court”) (emphasis added). The same reasoning applies to defendants sentenced to terms of imprisonment with supervised release. 18 U.S.C. § 3583(a) provides that a *term* of supervised release commences after imprisonment, but nothing in the statute precludes a court from finding that a *condition* of supervised release has already been satisfied.

The general rule that a defendant’s presentencing confinement in community confinement or home detention cannot be credited toward the term of imprisonment, *Reno v. Koray*, 515 U.S. 50 (1995); 18 U.S.C. § 3583(b), should not preclude the court from crediting a pretrial condition toward a condition of probation or supervised release.

BOP placement in community confinement for the minimal term of imprisonment.

Go to http://www.famm.org/Repository/Files/2nd_Chance_Act_-_RRC_Placements_04-14-08%5B1%5D.pdf for the BOP memo regarding front-end designations to community confinement. Keep this in mind when structuring sentences and be sure to ask the court to recommend that BOP designate a RRC placement.

DEPARTURE FOR CULTURAL ASSIMILATION

The Commission also voted in favor of an amendment permitting a downward departure for illegal reentry cases under USSG § 2L1.2 where the defendant has established cultural ties to the United States from childhood and those ties provided the primary motivation for the reentry or continued presence in the United States. The proposed new amendment is at Application Note 8 to § 2L1.2.

SPECIFIC OFFENDER CHARACTERISTICS

The Commission also voted to amend USSG §§ 5H1.1, 5H1.3, 5H1.4 and 5H1.11 to state that age, mental and emotional conditions, physical condition (including physique), and military service “may be relevant in determining whether a departure is warranted, if [the factor], individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.”

It also amended USSG § 5H1.4 to state that “drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure,” when previously it stated that this factor “is not a reason for a downward departure.” In other words, drug and alcohol dependence or abuse has been changed from a “prohibited factor” to a “discouraged” factor for departure purposes. It also added language stating that “[i]n certain cases, a downward departure may be appropriate to accomplish a specific treatment purpose,” citing newly-revised Application Note 6 to § 5C1.1 (setting forth a departure to accomplish a treatment purpose with various restrictions and conditions). It added identical language to § 5H1.3 regarding mental and emotional conditions: “In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* § 5C1.1, Application Note 6.”

With these changes, the Commission has opened a narrow window for a small category of downward departures based on offender characteristics. The Commission placed as a condition on departure that the particular factor be “present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.” In effect, the Commission has merely transformed a few “discouraged” factors requiring presence to an “exceptional” or “extraordinary” degree for a departure, *see* USSG § 5K2.0(a)(4), into “encouraged” factors that must be present to “an unusual degree.”

The requirement that a factor “distinguishes the case from the typical cases covered by the guidelines” is odd and seemingly irrelevant because the guideline rules do not take account of any of these factors. Take age, for example. A defendant’s age is not taken into account by the guideline rules. Thus, any issue related to age distinguishes the case from typical cases covered by the guidelines. What the Commission means for age to be present “to an unusual degree” is not clear. One interpretation is that age is present “to an unusual degree” whenever it can be linked to a reduced risk of recidivism or is relevant to the defendant’s culpability, vulnerability to abuse in prison, rehabilitative potential, or some other § 3553(a) consideration. Another interpretation, however, is that age is simply not relevant most of the time, which is how the courts interpreted “to an unusual degree” before *Booker*.

Rather than get bogged down in questions that are not relevant or helpful, it seems the better course in most courtrooms is to ask the judge to consider offender characteristics as required by the statutory framework and to vary from the guideline range. *See* 18 U.S.C. § 3553(a)(1) (must consider characteristics of the offender), (a)(2) (must impose a sentence that is sufficient but not greater than necessary to satisfy sentencing purposes in light of those characteristics and any other relevant factors). Under § 3553(a), the question is whether the defendant’s age is relevant to the purpose of sentencing. Is

the defendant's age relevant to his culpability? To his potential for rehabilitation? To his risk of recidivism? To his vulnerability to abuse in prison? Regarding substance abuse, is it relevant to his culpability? To the need for effective treatment? Would treatment reduce the defendant's risk of recidivism more than a prison term? If it seems helpful given the particular judge and circumstances, move for both a departure and a variance.

Fortunately, by their terms, each of the policy statements applies to "departures" only. Thus, the conditions placed on consideration of these factors for departure purposes do not apply to the court's consideration of offender characteristics under § 3553(a).

Nonetheless, the amended Introduction to Chapter 5, Part H clearly seeks to cabin judges' consideration of offender characteristics under § 3553(a). The Introduction repeatedly describes its policy statements as applying to "sentences outside the applicable guideline range." It claims that the guidelines take offender characteristics into account "in several ways," though, other than acceptance of responsibility, it cites only aggravating factors used to increase the guideline range. Then it states: "Although the court must consider 'the history and characteristics of the defendant' among other factors, see 18 U.S.C. § 3553(a), in order to avoid unwarranted sentencing disparities the court **should not give them excessive weight.**" (Emphasis added.) Then: "Generally, the most appropriate use of specific offender characteristics is to consider them **not as a reason for a sentence outside the applicable guideline range but for other reasons, such as determining the sentence within the applicable guideline range, the type of sentence** (e.g., probation or imprisonment) **within the sentencing options available for the applicable Zone.**" (Emphasis added.) The "purpose of this Part is to provide ... a framework addressing specific offender characteristics in a **reasonably consistent manner,**" to be used "**in a uniform manner,**" to "**avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.**" (Emphasis added.)

In other words, according to this Introduction, judges should use the aggravating factors to calculate the guideline range and use mitigating factors only within the guideline range. Excepted from this general principle are a *few* mitigating factors that judges are invited to consider for purposes of departure, which are circumscribed by the requirements that they be present to "an unusual degree" *and* that they "distinguish the case from the typical cases covered by the guidelines," with the *added* instruction that offender characteristics – including offender characteristics that were not the subject of this amendment (or the subject of a policy statement at all) – are not to be given "excessive weight." Further, just as when the guidelines were mandatory, and when they were still being treated as mandatory after *Booker* and before *Gall*, *Kimbrough*, *Spears* and *Nelson*, the Commission claims that individualized sentencing equals unwarranted disparity. This is wrong. As the Supreme Court and even the Commission have recognized, sentencing different offenders the same must be avoided, as unwarranted uniformity is just another form of unwarranted disparity. *See Gall*, 552 U.S. at 55 (approving judge's consideration of the "need to avoid unwarranted *similarities*") (emphasis in original); USSC, Fifteen Year Review at 113 ("Unwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing.") (emphasis in original).

The Introduction also refers to certain factors listed in 28 U.S.C. § 994(e) (education, vocational skills, employment record, family ties and responsibilities, and community ties), which the policy statements still describe as "not ordinarily relevant," as "discouraged factors." For years, the Defenders and others (including the Commission's own staff) have explained that the Commission's interpretation and labeling of these factors as "discouraged" is wrong. The plain language and the legislative history

show that Congress expected those factors to be considered and that they would be mitigating. Even if the Commission’s interpretation were correct, this directive is to the Commission, not to the courts. Yet, there now appears in the Manual a reference to these factors as “discouraged” without acknowledgement of Congress’s well-known intent.

In sum, it appears that the Commission made a few tweaks to individual policy statements the significance of which remains to be seen, but at the same time sought to constrain the discretion of judges by suggesting that its policy statements apply to variances under § 3553(a). None of this language was proposed for public comment.

APPLICATION INSTRUCTIONS

The Commission voted to amend § 1B1.1 (Application Instructions) to set forth a “three-step process” for arriving at the appropriate sentence. This guideline will now instruct courts as follows:

- (1) “The court shall determine the kinds of sentences and the guideline range” by following eight detailed steps and considering the relevant provisions as “appropriate” or “applicable”;
- (2) “The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence”; and
- (3) “The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole.”

This instruction appears to misstate the sentencing process set forth by the Supreme Court in its decisions, as well as the sentencing framework set forth in § 3553(a).

To the extent it can be read to instruct judges to consider policy statements regarding departures or offender characteristics even if a departure is not raised by a party, it does not accurately state the law. In *Rita*, the Supreme Court in no way suggested that judges must always examine policy statements. On the page cited by the Commission in its synopsis of the amendment and elsewhere in the opinion, the Court said that judges may consider a departure *or* a variance *or* both *if* raised by a party.² It stated that the district court, after calculating the applicable guideline range, “may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the ‘heartland’ to which the Commission intends individual Guidelines to apply, USSG § 5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless.” *See Rita v. United States*, 551 U.S. 338, 351 (2007). The only arguments the sentencing judge is required to address are the nonfrivolous arguments *raised* by the parties. *Id.* at 357. *See also Gall v. United States*, 552 U.S. 38, 49-50 (2007). Calculating the “guideline range” does not include

² In its synopsis of the proposed amendment, the Commission indicates that the Supreme Court set forth this “three-step” process, citing *Rita*, 551 U.S. at 351, and that the majority of circuits have adopted it. While most courts of appeals urge (if not require) district courts to consider departures and variances separately if both are raised, and if so to consider departures first, we have not found any appeals court decision that requires a district court to consider a policy statement when a departure *has not been raised*. Unlike its instructions for determining the applicable guideline range, and unlike the appeals court cases it cites in support of the three-step process in its synopsis, amended § 1B1.1 does not instruct judges that policy statements are to be considered only if “appropriate” or “applicable.”

consideration of policy statements regarding possible grounds for departure. Indeed, in *Gall*, the Court made no mention of the Commission’s policy statements regarding departure, although it upheld a probationary sentence based on factors that are prohibited or deemed not ordinarily relevant by those policy statements. Thus, to suggest that policy statements on departure must be consulted as a second step in sentencing when not raised is wrong.

As to the third step, there is nothing in 18 U.S.C. § 3553(a) or the Supreme Court’s cases that says anything about “factors . . . taken as a whole.” Instead, it requires a sentence that is sufficient but not greater than necessary to achieve the purposes of sentencing. 18 U.S.C. § 3553(a); *Rita*, 551 U.S. at 348; *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). This overarching principle does appear in revised § 1B1.1, although it is mentioned in new background commentary.

Although in practice, this amendment may not have any real impact in most courtrooms (since it is rarely consulted), it should be monitored and challenged in the event it causes judges to return to an incorrect and more restrictive view of the sentencing framework and process set forth in § 3553(a) and the Supreme Court’s decisions.

PRACTICE NOTE ON HOW TO PREVENT THE 1B1.1 AND CHAPTER 5, PART H AMENDMENTS FROM UNDERMINING THE ADVISORY NATURE OF THE GUIDELINES

If you are in a variance-friendly court, in most cases, you should continue to skip departures and move for a variance. If you are in one of the few departures-only courts, you can argue that the new policy statements must mean a broadening of the departure power, and, to protect the record, move for both a departure and a variance.

A brand new judge or probation officer or one who longs for harsh sentences or the comfort of mandatory guidelines could read these amendments as follows: “The application instructions tell me to consider the policy statements in every case. You have requested a variance based on the defendant’s mental and emotional condition. The Introduction to the Commission’s policy statements tells me not to give any offender characteristic, except the aggravating characteristics in the guideline calculation, excessive weight, and not to consider such factors to sentence outside the guideline range. In that way, I avoid “unwarranted sentencing disparities” as required by § 3553(a)(6). Furthermore, the Commission’s policy statement on mental and emotional condition tells me that this is relevant only if it is present to an unusual degree and if it distinguishes the case from the typical case covered by the guidelines. I therefore sentence the defendant to the bottom of the guideline range, and your motion for variance is DENIED.”

In other words, exactly like the days before *Gall* in some circuits that did not want to accept *Booker*. If anything remotely like this occurs in the district court or the court of appeals, you should object in your objections to the PSR, and on the record at sentencing, on appeal, and in petitions for certiorari that these provisions themselves, as well as the judge’s compliance with them, violate the Supreme Court’s decisions in *Booker*, *Rita*, *Gall*, *Nelson*, and *Kimbrough* and *Spears* for good measure. If this does begin to occur, please let SRC know.