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SENTENCING

Two experts on federal sentencing discuss the proposed amendment to the U.S. Sentencing Guidelines regarding acceptance of responsibility and challenging relevant conduct. The authors argue that any revised commentary to U.S.S.G. § 3E1.1 should make clear that challenges to relevant conduct, as well as arguments in favor of departures and variances, should not necessarily preclude a downward adjustment for acceptance of responsibility. The authors also discuss the proposed amendment for first offenders and alternatives to incarceration.

U.S. Sentencing Commission's 2018 Amendment Cycle: Holdovers Pertaining to Acceptance of Responsibility, First Offenders

BY ALAN ELLIS AND MARK H. ALLENBAUGH

During the bulk of the 2017 amendment cycle, the U.S. Sentencing Commission was without a quorum and thus unable to act on any of its proposed amendments to the U.S. Sentencing Guidelines. Now with a quorum, the Commission is considering many of the same proposed amendments for the 2018 amendment cycle, including a proposed amendment for acceptance of responsibility as well as one pertaining to first offenders/alternatives to incarceration. Part of this article was originally published in March 2017, but is being updated here to also include a discussion of the first offenders/alternatives to incarceration amendment.

I. Acceptance of Responsibility And Relevant Conduct

Historically, defendants who plead guilty to federal offenses almost always receive a two- to three-level downward adjustment for acceptance of responsibility under the U.S. Sentencing Guidelines. According to the Background commentary to USSG § 3E1.1, "[t]he reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense . . . is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility." According to the Commission's 2016 Annual Report, 97.3 percent of the 67,742 offenders sentenced during fiscal year 2016 pleaded guilty, with 95.8 percent receiving an adjustment for acceptance of responsibility. (See U.S. Sentencing Comm'n, 2016 Annual Report, Fig. C & Tbl. 19), While not categorically precluded from receiving an acceptance of responsibility adjustment, those defendants convicted after trial almost never receive the adjustment in practice. (See USSG § 3E1.1, commentary n.2).

Application Note 1 to USSG § 3E1.1 sets forth several non-exclusive factors for a court to consider when

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awarding a downward adjustment for acceptance of responsibility. Among these considerations is whether the defendant ''truthfully admit[ed] the conduct comprising the offense(s) of conviction, and truthfully admit[ed] or not falsely den[ied] any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct).'' While a defendant is not required to ''affirmatively admit'' relevant conduct and may ''remain silent in respect to relevant conduct beyond the offense of conviction'' without jeopardizing his ability to receive the downward adjustment for acceptance, ''falsely den[ying], or frivolously contest[ing]'' relevant conduct will preclude a downward adjustment for acceptance of responsibility. (USSG § 3E1.1, commentary n.1). And it is the contesting of relevant conduct that has presented a problem for practitioners and their clients with respect to receiving a downward adjustment for acceptance of responsibility.

Concerns

According to the Commission, it has received concerns that the Commentary to Section 3E1.1 . . . encourages courts to deny a reduction in sentence when a defendant pleads guilty and accepts responsibility for the offense of conviction, but unsuccessfully challenges the presentence report's assessments of relevant conduct. These commenters suggest this has a chilling effect because defendants are concerned such objections may jeopardize their eligibility for a reduction for acceptance of responsibility. Furthermore, probation officers who, like courts, are not bound by any plea agreements, will sometimes include adjustments not contemplated by the parties. However, increasingly, defendants are challenging the scope of relevant conduct during the sentencing process. U.S. Sentencing Comm'n, *Proposed Amendments to the Sentencing Guidelines* at 38 (Aug. 25, 2017) (hereinafter Proposed 2018 Amendments), available at https://www.ussc.gov/guidelines/amendments/proposed-2017-holdover-amendments-sentencing-guidelines.

Guilty pleas pursuant to plea agreements constitute the majority of guilty pleas. In addition to setting forth the elements of the offense to which the defendant is pleading guilty, they also generally require the defendant to admit certain relevant conduct germane to determining the appropriate advisory sentencing range.

Thus, the Commission's clarification of a defendant's ability to contest relevant conduct will have a significant impact on practice.

Furthermore, regardless of any plea agreement, Presentence Investigation Reports (PSRs) sometimes also include additional sentencing enhancements based on relevant conduct.

In light of the existing commentary to USSG § 3E1.1, it is not entirely clear as to the extent a defendant may contest relevant conduct, if at all, and still be eligible for the downward adjustment for acceptance of responsibility.

Chilling Effect

In light of the comments the Commission has received regarding the possible chilling effect of the current commentary on challenging relevant conduct, it is proposing to delete the following language from Application Note 1 to USSG § 3E1.1: ''a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.'' In its stead, the Commission proposes the following two options:

(1) ''a defendant may make a non-frivolous challenge to relevant conduct without affecting his ability to obtain a reduction;'' or

(2) ''a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact.''

Thus, it is clear the Commission believes merely challenging relevant conduct should not *ipso facto* preclude acceptance of responsibility. The question it seeks comment on, therefore, is: If the Commission were to adopt Option 1, what additional guidance, if any, should the Commission provide on the meaning of ''non-frivolous''? . . . If the Commission were to adopt Option 2, should the Commission provide additional guidance on when a challenge ''lacks an arguable basis either in law or in fact''? For example, should the Commission state explicitly that the fact that a challenge is unsuccessful does not by itself establish that the challenge lacked an arguable basis either in law or in fact? If the Commission were to adopt either Option 1 or Option 2, should the challenges covered by the amendment include informal challenges to relevant conduct during the sentencing process, whether or not the issues challenged are determinative to the applicable guideline range? Should the Commission broaden the proposed provision to address other sentencing considerations, such as departures or variances? Should the Commission, instead of adopting either option in the proposed amendment, remove from Section 3E1.1 all references to relevant conduct for which the defendant is accountable under Section 1B1.3, and reference only the elements of the offense of conviction? (Proposed 2018 Amendments at 42).

As relevant conduct, more than even the elements of an offense, determine the application of the guidelines and the ultimate offense level, the ability to challenge relevant conduct (which may not otherwise be stipulated to as part of a plea agreement) is quite important to ensure not only full vindication of a client's Sixth Amendment right to effective assistance of counsel, but also to develop robust jurisprudence on the application of enhancements generally. While pleading guilty certainly serves an important societal role in terms of conserving limited prosecutorial resources, and is an integral part of the rehabilitation and reconciliation process, it should not act as a *de facto* blanket waiver of a defendant's ability to litigate non-frivolous sentencing factors. In other words, the carrot of a two- to three-

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level downward adjustment for acceptance of responsibility should not also act as a stick—a stick in the sense of precluding defendants from challenging relevant conduct determinations.

The authors believe that to avoid unnecessary confusion, any revised commentary to USSG § 3E1.1 should also note that challenges to relevant conduct in the form of departures and variances also fall under the broad scope of legitimate challenges that still may warrant an adjustment for acceptance of responsibility.

In sum, the act of pleading guilty to offense conduct should be welcomed and encouraged (where appropriate) and courts should liberally award this downward adjustment even in those instances that defendants challenge relevant conduct including advocating for departures or variances.

II. First Offenders And Alternatives To Incarceration

Encouraging alternatives to incarceration has taken a prominent role in the Commission's research and policy considerations as of late. *See, e.g.*, U.S. Sentencing Comm'n, ''Federal Alternative-to-Incarceration Court Programs'' (Sept. 2017), available at https://www.ussc.gov/research/research-reports/federal-alternative-incarceration-court-programs.

According to the Commission: Recidivism data analyzed by the Commission indicate that ''first offenders'' generally pose the lowest risk of recidivism. *See, e.g.*, U.S. Sentencing Comm'n, ''Recidivism Among Federal Offenders: A Comprehensive Overview,'' at 18 (2016), available at http://www.ussc.gov/research/research-publications/recidivism-among-federal-offenders-comprehensive-overview. In addition, 28 U.S.C. § 994(j) directs that alternatives to incarceration are generally appropriate for first offenders not convicted of a violent or otherwise serious offense. (Proposed 2018 Amendments at 20).

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The Commission thus is considering a comprehensive two-part amendment to the guidelines. Part A would add a new downward adjustment in Chapter Four (USSG § 4C1.1) for those deemed *true* first offenders: One would be considered a first offender either if he has no criminal history, regardless of convictions, i.e., no arrests; or he has no prior convictions, which of course would allow for a greater number of offenders to qualify for the downward adjustment. For its part, the downward adjustment simply would reduce the offense level by one level, or up to two-levels if the offense level is 16 or less after all Chapter Two adjustments.

Part B would collapse Zone C of the Guidelines into Zone B, while leaving Zones A and D untouched. Under Zone B, provided the offense is not a Class A or B felony, no sentence of imprisonment is required provided ''the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention.'' USSG § 5B1.1(a)(2).

Thus, Parts A and B of the proposed amendment would greatly increase the likelihood that some offenders will receive an alternative to incarceration in prison. How much is unknown as the Commission has yet to release a prison impact study on the various permutations of this proposed amendment. Suffice it to say that as the Bureau of Prisons remains at least 15 percent over its current rated capacity, this proposed amendment will certainly help reduce the burden of overpopulation on the BOP and the inherent additional dangers such a situation creates for inmates as well as staff.

The Commission currently is considering commentary received regarding the various permutations of Part A of the proposed amendment. In light of the persistent problem of prison overcrowding, the authors hope the Commission adopts a broad definition of the downward adjustment to encourage judges to more frequently consider alternatives to incarceration.

With respect to Part B, the Commission is considering whether there should be ''a mechanism to exempt certain offenses from these zone changes? For example, should the Commission provide a mechanism to exempt public corruption, tax, and other white-collar offenses from these zone changes (e.g., to reflect a view that it would not be appropriate to increase the number of public corruption, tax, and other white-collar offenders who are eligible to receive a non-incarceration sentence)?'' (Proposed 2018 Amendments at 37). The authors are unaware of any empirical studies that would support precluding white collar offenders or any other offense type from being considered for probation under this modification. Further, any such arbitrary distinctions by offense type likely will result in unnecessary litigation. In all events, as the U.S. Supreme Court recognized in *Gall v United States*, 552 U.S. 38 (2007), a probationary sentence is not necessarily a pass: ''We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty.'' *Id.* at 48.

Conclusion

The Commission is to be applauded for seeking to clarify the commentary to USSG § 3E1.1 to ensure that non-frivolous challenges to relevant conduct do not au-

tomatically preclude downward adjustments for acceptance of responsibility. This will help to ensure that USSG § 3E1.1 continues to act like the carrot that it was intended to be, and not like a stick chilling robust advocacy.

Furthermore, the Commission's continued work toward encouraging judges to more frequently consider alternatives to incarceration especially for first-time offenders is most heartening, especially in light of the persistent problem of prison overpopulation that continues to plague the BOP. As the largest penal system in a country that continues to incarcerate more people than any other on earth, the Commission's work in this area can help encourage an overall reduction in over-incarceration generally.

The Commission is expected to hold hearings on these and other proposed amendments in the coming months, with any final proposed amendments to be sent to Congress by May 1, 2018. If Congress does not act to the contrary, such finalized amendments will take effect on Nov. 1, 2018.

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