

## 2011 Amendments to the U.S. Sentencing Guidelines

### Illegal Reentry, § 2L1.2

#### Amendment Specifics:

- Amends the offense-level enhancement scheme for convictions that previously incurred a 16 or 12-level enhancement under § 2L1.2(b)(1)(A) and (b)(1)(B).
  - 12-level enhancement only when the conviction is recent enough to count under Chapter 4. If not, then imposes an 8-level bump
  - 16-level enhancement only when the conviction is recent enough to count under Chapter 4. If not, then imposes a 12-level bump.
- Provides for an upward departure in the event that the new enhancements do “not adequately reflect the extent of the seriousness of the conduct underlying the prior conviction.”

#### Justification for Amendment:

- Responds to several critiques of the application of an unmitigated enhancement for stale convictions throughout the circuits
  - *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055 (9th Cir. 2009) (substantively unreasonable sentence when convictions were 25 years old)
  - *United States v. Chavez-Suarez*, 597 F.3d 1137, 1139 (10th Cir. 2010) (eleven-year old conviction wasn't too stale to *require* mitigation).

#### Potential Problems/Potential Objections:

- Doesn't go far enough because still counts old and/or isolated criminal history
  - U.S. Probation Officer's Advisory Group August 2010 letter questioned an enhancement at all for stale convictions
- Not in line with other provisions in the Guidelines that exclude consideration of predicate convictions when they are too stale
  - § 2K1.3 cmt. 9 (Receipt, Possession, or Transportation of Explosives)—restricts the use of convictions for higher base offense levels to only those that count under Chapter 4.
  - § 2K2.1 cmt. 10 (Receipt, Possession, or Transportation of Firearms/Amo)—(same),
  - § 4B1.2 cmt. 3 (Definitions of Terms Used in § 4B1.1)

#### Experience in E.D. of Washington

- Application without resistance, to this point.
- No requests for upward departures.

#### Additional Resources:

- (1) Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases are Unjust and Unjustified*, 51 B.C. L. REV. 719, 766 (2010).
- (2) Maureen Franco, et al., *The Fallacies Underlying Immigration Guideline §2L1.2*, Feb. 2010 (Winning Strategies Seminar), available at [http://www.fd.org/pub\\_IMMIGRATION.htm](http://www.fd.org/pub_IMMIGRATION.htm).

## Supervised Release, § 5D1.1 and § 5D1.2

### A. Deportable Aliens

#### Amendment Specifics

- Adds a subsection (c) to the Guideline that indicates supervised release is “ordinarily” not appropriate in cases where it is “likely” that a non-citizen defendant will be deported after imprisonment, and SR is not required by statute.
- Adds commentary indicating that SR term may be appropriate if the “court determines that it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.”
  - Need to deter from returning to United States typically addressed through an illegal-reentry charge

#### Justification for Amendment:

- Recent comprehensive study of supervised release. *See* U.S. Sent Comm’n, *Federal Offenders Sentenced to Supervised Release* (July 2010), available at [http://www.ussc.gov/Research/Research\\_Publications/publications.cfm](http://www.ussc.gov/Research/Research_Publications/publications.cfm)
  - Noncitizens are over half of the overall population of federal defendants
  - Supervised release is imposed in 91% of cases in which noncitizen
  - High rate of SR is not necessary because “recent changes in immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.” (citing *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010)).

#### Experience in E.D. of Washington:

- Problematic in: (1) initial imposition of SR and (2) lower sentence on revocation.

#### Additional Resources:

- *Johnson v. United States*, 529 U.S. 53, 59 (2000) (“Congress intended for supervised release to assist individuals in their transition to community life.”).
- Guide to Judiciary Policy, Vol.8: Probation and Pretrial Servs., Part E, Supervision of Federal Offenders (Monograph 109), § 160.10.20(c)
- U.S. Federal Courts, Probation and Pretrial Servs., Supervision, available at <http://www.uscourts.gov/FederalCourts/ProbationPretrialServices/Supervision.aspx>
- Dan Kesselbrenner & Sandy Lin, *Select Immigration Consequences of Certain Federal Offenses*, (National Lawyer’s Guild National Immigration Project) (2010), available at [http://www.fd.org/odstb\\_ConstructImmigrationCON.htm](http://www.fd.org/odstb_ConstructImmigrationCON.htm)

### B. Lesser Terms

- Lowers the minimum term from three years to two years for Class A and B felonies.
- Lowers the minimum term from two years to one year for Class C and D felonies.

#### Justification for Amendment:

- Commission found that lesser minimum terms are sufficient because the majority of offenders who violate do so within the first year of the term of SR.
  - In problematic cases, the Court can extend the SR term per § 3583(e)(2).

### **C. Guidance on Imposition**

- Adds commentary to § 5D1.1 and § 5D1.2 that outline the factors that a court should consider in deciding (1) whether to impose SR and (2) how long.
  - The factors include
    - Those required by statute—18 U.S.C. § 3583(c)
    - Defendant’s criminal history, noting that “the more serious the defendant’s criminal history, the greater the need for” SR.
    - Substance abuse, noting that “it is highly recommended” that SR be imposed when the defendant is an abuser of drugs and/or alcohol.

### **D. Early Termination**

- Adds commentary to § 5D1.2 encouraging courts to terminate SR early if appropriate

#### **Justification for Amendment:**

- Office of Probation and Pretrial Services, *Early Terminated Offenders: A Greater Risk to the Community?* (June 2010).
  - “Early term offenders presented a lower risk of recidivism than their full term counterparts. Not only were early term offenders charged with a new criminal offense at a lower rate than full term offenders, but when they were charged with a new crime, it was generally for misdemeanor offenses.”
- In deciding to terminate a period of supervised release, the court must consider a wide variety of factors set forth in 18 U.S.C. § 3553(a). *See* 18 U.S.C. §§ 3583(c) and (e).

### **Drug-Disposal Act, § 2D1.1**

#### **Amendment Specifics:**

- Expands list of those subject to an enhancement for abuse of a position of trust or use of a special skill pursuant to § 3B1.3.
- Amends § 2D1.1 Application note to provide that the § 3B1.3 adjustment applies where “the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility.”

#### **Justification for Amendment:**

- Drug Disposal Act amended 21 U.S.C. § 822 to authorize certain persons in possession of controlled substances (e.g., ultimate users and long-term care facilities) to deliver the controlled substances for the purpose of disposal.
- Response to Congressional directive to ensure an appropriate penalty for these individuals if they are convicted of a drug offense resulting from the authorization of that person to receive scheduled substances.

#### **Potential Problems/Potential Objections:**

- No empirical evidence. Amendment was the result of Congressional directive.

## Firearms, § 2K2.1 (Straw Purchasers)

### Amendment Specifics:

- Amended § 2K2.1 to increase the penalties for “straw purchasers” convicted under 18 U.S.C. § 922(a)(6) (false statements to acquire firearms) or § 924(a)(1)(A) (false statements to federal firearms licensee).
  - If committed offense with “knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person,” then the base offense levels increases from:
    - 12 to 14 under § 2K2.1(a)(4)(B), or
    - 18 to 20 under § 2K2.1(a)(6)
- Added 4-level enhancement and floor of 18 where possessed firearm or ammunition while “leaving or attempting to leave the United States” or possessed or transferred “with knowledge, intent, or reason to believe that it would be” exported.
- Added downward departure under certain circumstances where no enhancements applied, motivated by familial relationship, and no monetary compensation.

### Justification for Amendment:

- Concerns that flow of firearms across the border is contributing to border violence.
  - Individuals who purchase firearms on behalf of prohibited persons are contributing to illegal flow of firearms.
- To bring punishments under the above-mentioned statutes in alignment with straw purchasers convicted under § 922(d).
- Analogizes possession while attempting to leave the country with possessing a firearm in connection with another felony offense.

### Potential Problems/Potential Objections:

- Swift and unreasoned response that is not supported by empirical evidence.
  - Don’t Lie for the Other Guy campaign (run by National Shooting Sports Foundation, ATF, and US DOJ) indicates that “Less than 8.5 percent of criminals obtain their firearms from straw purchases.”  
<http://www.dontlie.org/FAQ.cfm>
- Straw purchasers are, by definition, first-time offenses or misdemeanors and certainty of punishment is more appropriate than severity to deter.
- Feedback from sentencing court is that the current Guideline is already too high—57% of sentencing courts nationally impose below-Guideline sentence for convictions under § 922(a)(6), § 924(a)(1)(A), and § 922(d).

### Additional Resources:

- (1) Mayors Against Illegal Guns, *The Link Between Gun Laws and Interstate Gun Trafficking* (2010), [http://www.mayorsagainstillegalsguns.org/downloads/pdf/trace\\_the\\_guns\\_report.pdf](http://www.mayorsagainstillegalsguns.org/downloads/pdf/trace_the_guns_report.pdf) (describing effective tactics to deter straw purchasers).
- (2) Bureau of Justice Statistics, *Firearm Use by Offenders* (2001), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fuo.pdf>
- (3) Michael Tonry, *Purpose and Functions of Sentencings*, 34 CRIME & JUSTICE 1(2006).
- (4) Valerie Wright, Ph.D., *Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment*, Sent. Project (Nov. 2010), *available at* <http://www.sentencingproject.org/doc/>.

## Firearms, § 2M5.2 (Exporting)

### Amendment Specifics:

- Amended § 2M5.2 to increase penalties for small arms crossing the borders.
  - Raised the base offense level from 14 to 26 when there are more than two nonfully automatic small arms.
  - Added provision relating to ammunition
    - Specifies base offense level of 14 if the offense involved 500 rounds or less of ammunition for nonfully automatic small arms.

### Justification for Amendment:

- Increasing concerns over gun trafficking on the border.
- “The Commission determined that export offenses involving more than two firearms are more serious and more likely to involve trafficking.”

### Potential Problems/Potential Objections:

- Guideline has only two base offense levels—14 and 26
- Groups together a broad range of activity under base offense level of 26.
  - Rockets, bombs, vessels of war are now the equivalent of two semi-automatic rifles
- Proposal had been to eliminate nonfully automatic small arms from the Guideline entirely and consolidate those offenses under § 2K2.1.

## Child Support Contempt, § 2J1.1

### Amendment Specifics:

- Amended § 2J1.1 to make clear that the specific offense characteristic under § 2B1.1(b)(8)(C) (failure to follow a court order) does not authorize a 2-level enhancement for conviction under 18 U.S.C. § 228 for willful failure to pay court-ordered child support.

### Justification for Amendment:

- Circuit split between the Eleventh and the Second as compared to the Seventh.
  - Prevailing Circuit: *United States v. Bell*, 598 F.3d 366 (7th Cir. 2010).
  - Determined that it would be impermissible double counting for a court to sentence an offender under both the contempt (§ 2J1.1) and fraud (§ 2B1.1) Guidelines.
- The fact that the offense involved a violation of a court order is adequately accounted for in the base offense level.

## Fraud, § 2B1.1

### Amendment Specifics:

- Added tiered enhancements for conviction of a “Federal health care offense involving a Government health care program” based on amount of loss. § 2B1.1(b)(8)
  - 2-level increase for more than one million; 3-level increase for more than seven million; and 4-level increase for more than twenty million
- Commentary defines “Government health care program.”
- Added a rebuttable prima-facie evidence rule for loss amount in health-care fraud
  - “[T]he aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, i.e., is evidence sufficient to establish the amount of the intended loss, if not rebutted.”
  - Consistent with the state of the law in most Circuits, including the Ninth
    - *United States v. Serrano*, 234 Fed. App’x 685, 687 (9th Cir. 2007).

### Justification for Amendment:

- Responding to congressional directives in recent health-care legislation.

### Potential Problems/Potential Objections:

- No empirical evidence supports the need for higher sentences in health-care fraud case involving Government health care programs.
  - Amendments are the result of Congressional directives, as opposed to research-based approach that the Commission typically undertakes.
  - Concern over the crime du jour mentality
- Look for evidence to rebut the prima facie case
  - Defendant’s knowledge regarding the Government fee schedules and the differences between what is billed and what is reimbursed. Loss amount should be based on amount paid because more accurately reflects the loss a defendant intended. *United States v. Singh*, 390 F.3d 168 (2d Cir. 2004)
- Government health care program includes state health care programs and likely private insurers.

### Additional Resources:

- (1) Alan Ellis, John R. Steer, and Mark H. Allenbaugh, *At a “Loss” for Justice: Federal Sentencing for Economic Offenses*, 25 WTR CRIM. JUST. 34, 35 (Winter 2011) (discussing the need for a complete revision to § 2B1.1)
- (2) James E. Felman, *Change in Federal Criminal Justice: Views from the Defense and Policy Advocacy Communities: The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 FED. SENT. REP. 138 (2010).

## Mitigating Role, § 3B1.2

### **Amendment Specifics:**

- Adds a paragraph to Application Note 3 that makes clear that a Defendant who is accountable for a loss amount under § 2B1.1 (fraud) that greatly exceeds personal gain and who had limited knowledge of the scope of the scheme is not precluded from a mitigating role adjustment.

### **Justification for Amendment:**

- Consistent with the congressional directive to amend § 2B1.1 “to account for any aggravating or mitigating circumstances that might justify exceptions.”
- Deleted two sentences from the Application notes:
  - (1) The court “is not required to find, based solely on the defendant’s bare assertion, that such a role adjustment is warranted.”
  - (2) “It is intended that the downward adjustment for minimal participant will be used infrequently.”

### **Justification for Amendment:**

- Fear that the language was discouraging the adjustment’s use.