

UNITED STATES PROBATION SERVICE

MEMORANDUM #22

DATE: February 27, 1992

REPLY TO Presentence Unit/Western District of New York
ATTN OF:

SUBJECT: Proposed Amendments to Sentencing Guidelines

TO: Sentencing Commission

The members of the presentence unit in the Western District of New York individually reviewed the proposed amendments to the Sentencing Guidelines. Individual responses were formulated. The unit then met and are now submitting this collective response to the proposed amendments to the Sentencing Guidelines.

Amendment 29 - Expanded Availability of Non-prison Sentencing Options

There was a general concurrence that Option 6 is the most favorable. One officer expressed concern about Option 6 because it combines options 1, 4, and 5. The concern specifically revolves around Option 4. This officer's concern is that defendants with increased criminal history categories should not receive the same benefit as defendants in criminal history categories I or II.

However, in general, Option 6 was viewed favorably because it allows expanded use of numerous alternatives to incarceration which will result in less overall prison time for low-level defendants. It also provides judges with greater discretion.

Amendment 33 - Departures Based on Offender Characteristics

There was a general concern that this amendment creates a Pandora's Box. It is too subjective. There is grave concern that an amendment such as this lends itself to abuse by defense attorneys. This type of amendment invites disparity between offenders. The only amendment in this section that warrants consideration is Part D, where a downward departure for advanced age is allowed as long as the required details are met.

Amendment 26

In general, there is overall support for Option 2 which adds advice the court should consider in determining

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whether to depart from category VI, the nature of prior offenses rather than simply the number of prior offenses.

Amendment 23 - Acceptance of Responsibility

Our office concurs that a graduated approach to acceptance of responsibility is the most appropriate approach. The tendency is to concur with Option 3. One officer expressed concern regarding defendants who go to trial getting a two level reduction for acceptance of responsibility.

Additional Amendments of Special Interest

Amendment 17 - Part A - Role in the Offense, Especially Offenses Involving Drugs

There was general support for both Part A and Part B of Amendment 17. It is our experience that this can be one of the most misused adjustments in the guideline applications, especially from the standpoint of the government. One of the most important factors that should be considered for applying a mitigating role reduction is the time of the individual's involvement in the offense, the amount of remuneration the defendant was expected to receive, and at what level he knew other participants in the offense.

Amendment 18

The group generally liked this amendment in that it provided a clearer definition of when reductions can be applied. There is support for the court being able to depart below four levels for a defendant's more than minimal participation.

Amendment 19

Again, we direct the Sentencing Commission back to Part B of Amendment 18 and emphasize that the court should be able to depart below the applicable guideline range when it determines that a defendant's minimal participation exists to a kind or degree not taken into consideration by the Commission. While Option 1 under Amendment 19 had some reception, the main concern was how to decide which cap you choose. Based on the abuse of discretion that could occur under this option, there is some concern.

Amendment 27 - Redefinition of Career Criminal

Most of the changes under this guideline were concurred with. Part C makes it easier to calculate conviction dates, using the date of plea rather than the date of sentence. Part E, two cases consolidated for trial as

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joinable issues under 8(a) should be counted as one conviction.

Amendment 35 - Plea Bargaining Policies

There was strong support for Part A of Amendment 35, it would be helpful and pressure the U. S. Attorney's Office to disclose the true guideline relevant facts, and circumstances, rather than what sometimes amounts to a fantasy version in plea agreements.

Amendment 36

This amendment also received strong support by the unit. It makes clear that dismissal of a charge does not mean that the conduct cannot be considered under relevant conduct.

List of Additional Proposed Amendments

Amendment 5

In general, there is great concern in a move to remove the more than minimal planning adjustment. The unit felt that there are some offenses which are unsophisticated and others that are well planned out and executed. These types of offenses should be differentiated and receive different consideration. The more sophisticated offender would receive no additional sanctions for the sophistication other than possibly an increase in the offense level based on the amount of loss. Sophistication and loss do not always go hand in hand.

Amendment 8

This section discusses the idea of increasing the offense level depending on the number of unlawful alien smuggled. Each alien represents money. Therefore, the current two level increase for previous convictions should not be deleted.

Amendment 13

General support with this amendment; currently you end up with a lower guideline score for willfully failing to file than you do for an evasion. This difference makes little sense.

Amendment 15

The three level upward departure would usually be insufficient to capture promoting terrorism and if it is adopted, should not certainly include both international and

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domestic terrorism. The full wording states that it would apply to international terrorism. This might eliminate from consideration domestic terrorists or white supremacy groups.

Amendment 21

Should be adopted. There should be some adjustment for a range of behavior for reckless endangerment during flight.

Amendment 22

The current multiple count rules are very workable, however, they do not really result in much of an increase for multiple counts.

Amendment 24

This amendment should not be adopted. Different states impose different periods of incarceration for the same basic offense. Therefore, like offenders would not be treated similarly.

Amendment 25

This amendment under Chapter 4 of the Guidelines should definitely be implemented. This is a very clear statement as to what should and should not count.

Amendment 28

In general, the group did not believe a criminal history category VII is necessary. We find that the criminal history categories as they presently exist are functional. It seems to complicate the sentencing guidelines more than is necessary. Criminal history category I is usually a good measurement of the first time criminal who is not likely to be a recidivist.

Amendment 30

The general consensus for this amendment was a "NO".

Amendment 34

Amendment 34 under Chapter 5 guidelines is very important. This gives the court more discretion and allows the Probation Service to provide information to the judge concerning substantial assistance if, in fact, it truly exists.

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Amendment 36

Amendment 36, Part H, is strongly urged not to be adopted. It will make it more difficult to determine loss and will essentially give a break to a defendant who preys on wholesaler victims rather than retailer victims.

In general, the group strongly urges the Sentencing Commission not to further complicate the sentencing guidelines. There seems to be a general consensus that more judicial discretion with direction or parameters is preferable.

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Comments:

