

AMENDMENT 8 CIRCUIT CONFLICTS: STAFF ANALYSIS

(A) Aberrant Behavior Departure: See Proposed Amendment

(B) Drug Sales in Protected Location or to a Protected Individual

Issue

Whether the enhanced penalties in §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply only when the defendant is convicted of an offense referenced to that guideline or alternatively, whenever the defendant's relevant conduct included drug sales in a protected location or involving an underage or pregnant individual.

Overview

This amendment addresses the circuit conflict regarding whether the enhanced penalties in §2D1.2 apply only when the defendant is convicted of an offense referenced in that guideline or, alternatively, whenever the defendant's relevant conduct included drug sales in a protected location or involving a protected individual. The conflict involves the following guidelines: §§1B1.1, 1B1.2, 1B1.3 and Appendix A, the Statutory Index. Both §§1B1.1 and 1B1.2 state that the Statutory Index provides a "listing to assist" courts in determining the applicable Chapter Two offense guideline section for the offense of conviction. There is a three to three circuit split over whether a defendant can receive an enhanced penalty under §2D1.2 even if the defendant was not convicted of offenses under either 21 U.S.C. § 859 or § 860. Three circuits require that for §2D1.2 to apply the defendant must be convicted of an offense referenced to the guideline, whereas three circuits have used relevant conduct to justify applying the §2D1.2 enhancements to convictions under 21 U.S.C. § 841.

Option

The option presented for consideration by the Commission amends §§1B1.1, 1B1.2, and the Statutory Index (Appendix A) to make clear that the offense of conviction is the key determinant of the applicable guideline in Chapter Two. stem.

Analysis

The amendment modifies the Statutory Index (Appendix A) and §§1B1.1(a) and 1B1.2(a) to clarify the relationship among these provisions. Sections 1B1.1(a) and 1B1.2(a) state that courts must determine and apply the offense guideline in Chapter Two most applicable to the offense of conviction and that the Statutory Index provides a listing to assist in that determination. This amendment makes clear that the courts must apply the offense guideline referenced for the statute of

conviction listed in the Statutory Index unless the case falls within the limited “stipulation” exception set forth in §1B1.2(a). This exception is in the case of a plea agreement containing a stipulation that specifically established a more serious offense than the offense of conviction. In this situation, the court must determine the offense guideline section in Chapter Two most applicable to the stipulated offense. This amendment will make it clear that a court may not look to the defendant’s relevant conduct in determining the offense guideline to be used. Therefore, in order for the enhanced penalties in §2D1.2 to apply, the defendant must be convicted of an offense referenced to that guideline. Furthermore, the amendment deletes §1B1.2, application note 3 which had stated that in many instance it would be appropriate for the court to consider the actual conduct of the offender, even when such conduct did not constitute an element of the offense. This application note has been used by some courts to permit a court to decline to use the listed offense guideline in cases that were allegedly “atypical” or “outside the heartland.” *See United States v. Smith*, 186 F.3d 290 (3d Cir. 1999)(sentencing court should have used fraud guideline, not money laundering guideline).

An issue for comment invited input on whether the Commission should delete §2D1.2 and add an enhancement to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) either (A) for the real offense conduct of making drug sales in protected locations or involving protected individuals; or (B) for a conviction for such conduct. The Commission, in the absence of sufficient data, has decided to defer to another amendment cycle whether to make these changes.

(C) Fraud Guideline: Violation of Judicial Order or Process

Issue

Whether falsely filling out bankruptcy forms constitutes a two-level enhancement under §2F1.1(b)(4)(B)’s violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines.

Overview

This amendment will resolve a circuit split regarding whether a defendant who falsely files a bankruptcy form should receive a two-level enhancement under §2F1.1(b)(4)(B) for a violation of a judicial order. Section 2F1.1(b)(4)(b) states if the offense involved a violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by two levels. The majority of circuits have held the enhancement applies to a defendant who conceals assets in a bankruptcy case because the conduct violates a judicial order or violates judicial process. The data indicates that in Fiscal Year 1998, 41 defendants received an increase for either “violation of a judicial order . . . or misrepresentation of a charitable organization.” The data did not distinguish between the two parts of the enhancement.

Option

The option presented for consideration by the Commission amends §2F1.1(b)(4) to provide

an alternative trigger, in a new subsection (b)(4)(B), that if the offense involved a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding the defendant's sentence would be increased by two-levels. Furthermore, §2F1.1, application note 6 will state that in order for §2F1.1(b)(4) (C) to apply, the defendant must violate a specific prior judicial or administrative order, injunction, decree or process.

Analysis

This amendment will provide that any false statement made in a bankruptcy proceeding will receive a two-level enhancement. However, for the enhancement to apply in a fraud case not involving a bankruptcy proceeding, there must be a false statement in violation of a specific prior order. Therefore, any bankruptcy fraud will result in a two-level enhancement, whereas with a non-bankruptcy fraud, the enhancement only applies if a defendant was given notice of a particular action. The reason for treating bankruptcy fraud more severely is that federal sentencing policy recognizes the additional harm and seriousness of otherwise criminal conduct that misuses or disrupts government functions generally and judicial process specifically.

(D) Post-Sentencing Rehabilitative Efforts

Issue

Whether at a resentencing hearing, a district court may make a downward departure based on a defendant's post-sentencing rehabilitative efforts.

Overview

This amendment will resolve a five to one circuit split regarding whether a court can depart based on post-sentencing rehabilitation. There is no relevant data available on the number of defendants who have received this departure or have been denied this departure. Situations in which such a departure might occur arise infrequently. Post-sentencing rehabilitation will take place either in prison or on probation. Post-sentence rehabilitative efforts is different than post-offense rehabilitation which looks at a defendant's efforts at rehabilitation before he is sentenced. Since *Koon v. United States*, 518 U.S. 81 (1996), every circuit that has considered the matter agree that post-offense rehabilitation can justify a downward departure. The five circuits which have held that post-sentence rehabilitation departures should be granted have held that the rehabilitative efforts must be extraordinary.

Option

The option presented for consideration by the Commission will create a new guideline (§5K2.19) which will make post-sentencing rehabilitative efforts a prohibited departure factor.

Analysis

This amendment would add post-sentencing rehabilitative efforts as a prohibited factor for departure. The other prohibited departure factors are: §§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth), 5H1.4 (Drug Dependence and Alcohol Abuse) and 5K2.12 (Personal Financial Difficulties and Economic Pressures Upon a Trade or Business). This amendment would represent a determination by the Commission that post-sentencing rehabilitative measures should not provide a basis for a downward departure when resentencing a defendant initially sentenced to a term of imprisonment because such a departure would (1) be inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person, and (2) inequitably benefit only those who gain the opportunity to be resentenced *de novo*. A departure based on post-sentencing rehabilitative efforts would inject a large degree of inequity into the system. Depending on whether an error was committed by the government or the court that resulted in a remand for resentencing, some defendants would benefit from their efforts at rehabilitation while others, whose efforts have been more substantial, could not benefit simply because they chose not to appeal or appealed and had their sentences affirmed. Furthermore, Bureau of Prison policies arguably should cover efforts at rehabilitative efforts while in prison or on probation. This amendment does not address the possibility for a departure based on post-offense rehabilitation, which every circuit that has ruled on the matter post-*Koon* has approved as a basis for departure. See *United States v. Brock*, 108 F.3d 31 (4th Cir. 1997).

(E) DISMISSED/ UNCHARGED CONDUCT DEPARTURE

Issue

Whether a sentencing court may base an upward departure on conduct that is dismissed or uncharged pursuant to a plea agreement?

Overview

This amendment addresses the five to two circuit split regarding whether a court can base an upward departure on conduct that was dismissed or uncharged as part of a plea agreement in the case. According to the majority of circuits, the sentencing court in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See §1B1.4 and 18 U.S.C. § 3661. These courts hold that section 6B1.2 does not prohibit a court from considering conduct underlying counts dismissed pursuant to a plea agreement. The minority view holds that departure based on uncharged or dismissed in the context of a plea agreement is inappropriate. Courts holding the minority view emphasize the need to protect the expectations of the parties to the plea agreement.

Analysis

The option presented for consideration by the Commission modifies §§1B1.4 and 6B1.2, with an accompanying new departure guideline in Chapter Five (§5K2.19), to make clear that the court may accept a plea agreement and nevertheless depart upward based on charges dismissed or uncharged pursuant to that agreement.