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Featured:

FSA Retroactivity and Recidivism

The 2011 Fair Sentencing Act Guideline Amendment

On August 3, 2010, Congress passed the Fair Sentencing Act (FSA), which, among other things, reduced the disparity between the amount of crack cocaine and powder cocaine that triggered statutory mandatory minimum penalties from a 100-to-1 drug quantity ratio to an 18-to-1 drug quantity ratio. The quantity threshold of crack cocaine required to trigger the 5-year mandatory minimum term of imprisonment was increased from 5 grams to 28 grams, and the quantity threshold required to trigger the 10-year mandatory minimum term of imprisonment was increased from 50 grams to 280 grams.

As directed by the FSA, the Commission conformed the drug guideline penalty structure for crack cocaine offenses to the

amended statutory quantities. The base offense levels for crack cocaine were set in the Drug Quantity Table so that the statutory minimum penalties corresponded to offense levels 26 and 32. The revised Drug Quantity Table became effective November 1, 2010.

Congress did not give retroactive effect to the statutory reductions made by the FSA, but the Commission did give retroactive effect to the FSA Guideline Amendment as of November 1, 2011. That action allowed incarcerated crack cocaine offenders whose guideline range would have been lower if the FSA Guideline Amendment had been in effect when they were originally sentenced to file a motion with the sentencing court for a reduced

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Three new e-learning
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Effects of Aging on Recidivism

Released December 7, 2017

The Commission found that older offenders are substantially less likely to recidivate following release compared to younger offenders. Among offenders released younger than age 21, 67.6 percent were rearrested, compared to 13.4 percent of those released age 65 or older. Older offenders who do recidivate do so later in the follow-up period, do so less frequently, and have less serious recidivism offenses on average.

After accounting for age, criminal history, as measured by the offenders' Criminal History Category, was closely correlated with recidivism rates. Demographic factors including gender (males had higher rates), race and ethnicity (minorities had higher rates), and education levels (those with lower education levels had higher rates) also stood out. More information:



<https://www.ussc.gov/research/research-reports/effects-aging-recidivism-among-federal-offenders>



HELPLINE! Who's Calling & What's the Buzz?

Helpline: (202) 502-4545

QUESTIONS OF THE QUARTER

Have a look at how we addressed recent questions. Be sure to give our HelpLine a call, we're here for you! And who knows, your call may be featured right here in our quarterly Newsletter!

NEED HELP WITH THE SINGLE SENTENCE RULE?

This e-Learning course teaches how to correctly apply the single sentence rule when calculating criminal history involving multiple prior offenses.

<https://www.ussc.gov/education/training-resources/treatment-multiple-prior-sentences>

The caller advised that on May 4, 2016, the defendant was arrested for DUI and Kidnapping. He was convicted and sentenced in District Court on October 4, 2016 for DUI. However, on October 25, 2016, he was convicted and sentenced in Circuit Court for Kidnapping. Are these convictions treated as a single sentence or are they counted separately?

The rule regarding multiple prior sentences is found at §4A1.2(a)(2). It says that if the defendant has multiple prior sentences you have to first determine if there was an intervening arrest. In this case, there is no intervening arrest because the defendant was arrested on the same date for both offenses. If you don't have an intervening arrest, the second part of the analysis at 4A1.2(a)(2) is to determine if either of the sentences resulted from offenses contained in the same charging document or the sentences were imposed on the same date. In this case, the charges were filed in different charging documents and they were sentenced on different dates. This means that the DUI and the Kidnapping will be treated as separate sentences and that they will be counted separately.



for applying criminal history points. However, in 2009, the defendant's probation was revoked and he was sentenced to 90 days in jail, which is within the 10-year time frame. How many criminal history points should be assigned?

Zero points. Subsection §4A1.2(k)(2)(C) states that unless the original term of imprisonment plus the term imposed upon revocation results in a sentence length of greater than 13 months, the court is to use the date of the original sentence to determine whether the prior sentence is too old to count. The original date was 2005 and is outside of the 10-year time frame.

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The earliest date of relevant conduct for the instant offense is June 2013. Defendant has a prior conviction for which he was sentenced in 1997 to 270 days' time served followed by probation. The defendant violated his probation and was revoked in 2002. He received a sentence of 1 year in jail. How many criminal history points should be assigned?

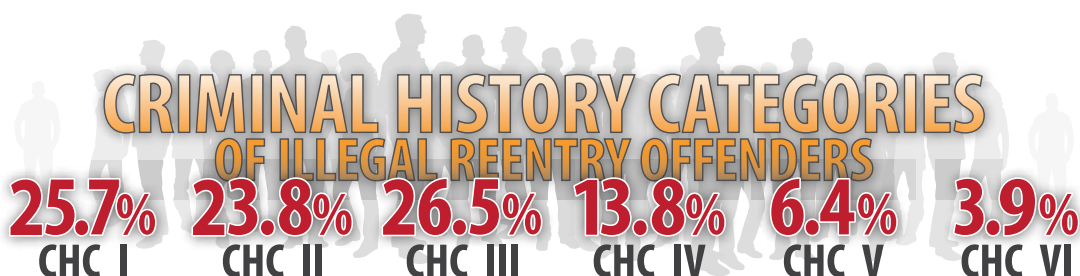
Three points would be assigned. Pursuant to §4A1.2(k)(2)(C), because the total sentence (original term of imprisonment plus the term imposed upon revocation) now exceeds 13 months (270 days plus 1 year), you use the last date of release from incarceration. The new revocation sentence opens the 15-year window and as a result, three criminal history points are assessed.

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The earliest date of relevant conduct for the instant offense is March 2017. Defendant has a prior conviction for robbery for which he was sentenced in 2005 to a term of probation, which would be outside the 10-year time frame

Illegal Reentry Offenses Criminal History Category

In fiscal year 2017, there were 15,895 offenders convicted of illegal reentry, accounting for 81.5% of all immigration offenders sentenced under the guidelines. The number of illegal reentry offenders has decreased 18.2% over the last five years.



CASE LAW UPDATE

On November 2, 2015, the victims table in §2B1.1(b)(2) was changed to incorporate substantial financial hardship to victims as a factor in sentencing economic crime offenders. Consistent with the Commission's overall goal of focusing more on harm to victims, the revised victims table ensures that an offense that results in even one victim suffering substantial financial harm receives increased punishment, while also lessening the cumulative impact of loss and the number of victims, particularly in high-loss cases.

United States v. Minhas, 850 F.3d 873 (7th Cir. 2017), The Seventh Circuit determined that the enhancement for causing substantial financial hardship to victims was supported by sufficiently reliable evidence. Of the victims, 18 lost over \$10,000, 30 lost more than \$7,000, and 45 lost more than \$5,000. The court determined that the victims were of modest economic circumstances and their individual losses were substantial. Those findings were supported by the victims' testimony and impact statements, which also established that because of the monetary loss, many of the victims would not be able to make the hajj, or pilgrimage to Mecca, for at least a year. The "spiritual injury inflicted" was "a significant alteration in life circumstances" similar to those listed in Application Note 4(F) to §2B1.1.

United States v. Castaneda-Pozo, 877 F.3d 1249 (11th Cir. 2017), The defendant's bank fraud crimes, which involved theft of victims' rent payments, resulted in substantial financial hardship to five or more victims, and the District Court properly applied the four-level sentencing enhancement. Five victims were each required to repay \$400–\$800 to their landlords on short notice to comply with the terms of their leases, which resulted in three victims having to borrow money from friends and family, one taking out a loan at 29% interest, two falling behind on other bills, one having to take on an extra part-time job, and one having to work extra shifts. Despite all of those arrangements, two were still threatened with eviction.

DID YOU KNOW?

In 2017 there were 19,843 drug trafficking cases.

The average age of drug trafficking offenders was 36.

48.1% of drug traffickers were in criminal history category I.

31.8% of offenders qualified for the safety-valve reduction.

19.4% of offenders received an enhancement for possession of a weapon.

The average sentence for drug trafficking was 68 months.



JUST RELEASED: USSC's annual Sourcebook of Federal Sentencing Statistics presents more than 100 tables and figures with FY17 sentencing data:
ussc.gov/research/sourcebook-2017/#USSCData

— SentencingCommission (@TheUSSCgov)
March 6, 2017

Guidelines Issue of the Quarter Mandatory Minimum Penalties for Drug Offenses

Key findings of the Commission's study. Released October 2017.

- In fiscal year 2016, mandatory minimums were used less often in federal drug offenses (44.7% vs. 66.1% in fiscal year 2010).
- The average sentence for drug offenders convicted of an offense carrying a mandatory minimum was 94 months of imprisonment, more than double the average sentence for offenders whose drug offense did not carry a mandatory minimum (42 months).
- Half (49.8%) of all federal inmates are drug offenders and three-quarters (72.3%) of those offenders were convicted of a drug offense carrying a mandatory minimum.

- In fiscal year 2016, Black and White offenders convicted of a drug offense carrying a mandatory minimum remained subject to the mandatory minimum at different rates (64.6% and 50.8% respectively). This difference of 13.8% has narrowed, however, since fiscal year 2010 (59.5% vs. 35.3%).
- Many of the offenders (45.9%) convicted of a drug offense carrying a mandatory minimum had little or no criminal history (Criminal History Category I). More than one-third (37.7%) received no criminal history points under the federal sentencing guidelines.



**UPCOMING
PROGRAMS**

Heart of America
Sentencing Guide-
lines Conference,
Kansas City, Kansas

Federal Judicial
Center Appellate Law
Clerks, Albuquerque,
New Mexico

National Advocacy
Center Guidelines
Seminar (AUSAS),
Columbia,
South Carolina

**RECENT
PROGRAMS**

Court Family,
San Francisco,
California

Court Family,
Harrisburg,
Pennsylvania

Criminal Justice
Act Attorneys,
Greenville,
South Carolina

FSA Retroactivity and Recidivism

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sentence pursuant to 18 U.S.C. § 3582(c)(2) and U.S.S.G. §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range). Courts granted 7,748 (55.4%) of the 13,990 motions filed seeking retroactive application of the FSA Guideline Amendment. Offenders whose motions were granted received an estimated sentence reduction of 30 months (19.9%) from an average of 153 months to an average of 123 months of imprisonment.

The report addresses whether the retroactive application of the 2010 FSA Guideline Amendment resulted in increased recidivism.

To answer this question, the Commission studied two groups of offenders – those who received a reduced sentence through retroactive application of the FSA Guideline Amendment (the “FSA Retroactivity Group”) and those who served their full sentence. Commission researchers compared the recidivism rates of the two groups during a period of three years after release.

The recidivism rates of the FSA Retroactivity Group and the Comparison Group were virtually identical, even though the FSA Retroactivity Group was released early after serving an estimated average of 30 fewer months of imprisonment. The recidivism rate for both groups was 37.9 percent within three years of release from incarceration.

For both the FSA Retroactivity Group and the Comparison Group, the offenders who

did recidivate most commonly had a “most serious” post-release recidivism event that was categorized as a court or supervision violation. Almost one-third of offenders in each group who recidivated – 32.9 percent of the FSA Retroactivity Group and 30.8 percent of the Comparison Group – had such a violation as their most serious post-release recidivism event during the three-year period. Both groups also had drug trafficking as the next most common serious post-release recidivism event, followed by simple assault (typically classified as a misdemeanor).

For the 37.9 percent of offenders in both groups who did recidivate, the median time from release to recidivism was nearly identical for both the FSA Retroactivity Group and the Comparison Group. Among offenders in the FSA Retroactivity Group who did recidivate, the median time to recidivism was 14.5 months, while the Comparison Group’s median time to recidivism was 14.4 months.

The Commission’s findings in this study are consistent with the Commission’s other recent studies of federal crack cocaine offenders in 2014 and 2017. For additional information and to read the full report, click here:

https://www.ussc.gov/research/research-reports/recidivism-among-federal-offenders-receiving-retroactive-sentence-reductions-2011-fair-sentencing?utm_medium=email&utm_source=govdelivery

“The recidivism rate for both groups was 37.9 percent within three years of release from incarceration”

ESP HIGHLIGHTS



- There are two new introductory-level e-Learning courses available on our website. Learn the foundational principles of the guidelines through these interactive courses on relevant conduct and calculating the defendant’s criminal history score. Completing these courses will be especially important for those who are new to federal sentencing and who plan to attend our national seminar in San Antonio. These courses are in addition to the e-Learning course on the treatment of multiple prior sentences (the single sentence rule). All three of the programs can be found at: <https://www.ussc.gov/education>.

- Shortly, we will be announcing openings for the Probation Officers Advisory Group (POAG). We will

seek representatives for the 1st, 4th, and 10th Circuits to serve 5-year terms. Check with your Chiefs for additional information. You can also review the POAG charter, as well as recent written submissions and meeting minutes at the following link:

<https://www.ussc.gov/about/who-we-are/advisory-groups>

