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UPDATED FEDERAL SENTENCING GUIDELINES PROVIDE HOPE FOR WHITE-COLLAR DEFENDANTS

By Michael G. Freedman

Though we aim to avoid charges against clients before they are filed or to defeat them at trial, white-collar defense attorneys must also be prepared to argue under the United States Sentencing Guidelines when clients face sentencing in federal court. White-collar defendants often lack significant or any criminal history, so a recent amendment to the Guidelines offers the opportunity to argue for reduced sentences in pending and future cases and to seek reductions retroactively for defendants still in prison.

The Guidelines

The advisory Guidelines are issued by the United States Sentencing Commission, and provide the roadmap for calculating the range of months in prison a defendant may face. Using the Guidelines, a Court at sentencing must calculate both a defendant's total offense level for the crime(s) of conviction as well as the defendant's criminal history category based on a point system. The Guidelines provide a table with offense level on one axis and criminal history category on another, with resulting ranges of months' imprisonment for each location on the table. For example, Defendant 1 with an offense level of 30 and a criminal history category of I would

start out facing an advisory Guidelines range of 97-121 months, whereas Defendant 2 with the same offense level but a criminal history category of II would start out facing an advisory Guidelines range of 108-135.

The Court may then depart from these Guidelines after considering a variety of other factors and arguments by the government and the defendant, but they are an important starting point in every sentencing.

The Recent Amendment

A newly-amended version of Guidelines took effect on Nov. 1, 2023 and includes Amendment 821, which is focused on reducing sentences for defendants with little or no criminal history. The amendment achieves this reduction in two parts.

Part A - Reduced Criminal History

First, Part A amends U.S.S.G. § 4A1.1, which addresses "status points." Status points are additional points added to a defendant's criminal history score if the defendant was already under a "criminal justice sentence," which includes probation, supervised release, or imprisonment. Under the amendment, such defendants now receive only one status point, instead of two, and only if they have a more serious criminal history. Thus, in the example above,



if Defendant 2 had reached criminal history category II because of status points, Part A would reduce her criminal history points by at least one point and possibly two, lowering her criminal history to I and lowering her Guidelines range from 108-135 months to 97-121 months.

Part B - Zero-Point Offender Departures

Second, Part B adds a new section, U.S.S.G. § 4C1.1, which provides an Adjustment for Zero-Point Offenders. This section decreases a defendant's offense level by two if the defendant has no prior criminal history and the offense did not involve certain aggravating factors. Most relevant for white-collar cases, the

defendant must not have personally caused substantial financial hardship. Substantial financial hardship has a relatively narrow meaning under U.S.S.G § 2B.1, which U.S.S.G. § 4C1.1, incorporates, and is reserved for cases where a victim suffers a certain type of loss, such as becoming insolvent or filing for bankruptcy.

Assuming that Defendant 1 or 2 in the example above committed a white-collar crime that did not cause substantial hardship, the offense level in the example above would be reduced by Part B from 30 to 28. Defendant 1 would now be facing 78-97 months instead of 97-121 months and Defendant 2 (even without the status-point reduction described above) would be facing 87-108 months instead of 108-135 months.

The Appropriateness of Probation

In addition to lowering a defendant's offense level and thus Guidelines range, the amendment also includes a new application note to U.S.S.G. § 5C1.1, expanding when a term of probation may be permissible. The new application note provides that if the defendant receives the zero-point offender adjustment "and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment ... is generally appropriate." Zone A in-

cludes offense levels 1-8 and Zone B includes offense levels 9-11. Defendants in these zones now have even stronger arguments that probation rather than imprisonment is appropriate.

Retroactive Application of the Amendment

While the amendment is already effective for defendants facing sentencing, it also offers the chance of a reduced sentence for many defendants already serving their sentences because the amendment applies retroactively.

Under 18 USC § 3582(c)(2), "a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Commission" may file a motion to reduce the term of imprisonment. The amendment discussed here has been made retroactive as of Feb. 1, 2024, as of which date, defendants currently serving sentences imposed before Nov. 1, 2023 may have their sentences reduced if the amendment would have applied to them.

For example, if Defendant 1 in the above-example was sentenced in October 2023 based on an offense level of 30 but would have qualified for a two level-reduction if sentenced in November 2023 because she had

no criminal history, Defendant 1 may file a motion to have this reduction applied.

Many defendants have already moved for such relief in the hopes that it will be granted as soon as possible after Feb. 1, 2024, and it is likely there will be many more such motions. The Commission estimated that over 7,000 defendants may qualify for a possible reduction, with the average reduction expected to be 15 months. Of these, over 1,000 may be eligible for immediate release once this reduction is applied. Additionally, over 11,000 defendants with status points may qualify for a possible reduction, with the average reduction expected to be 14 months.

Conclusion

This is a welcome amendment for white-collar defendants and their attorneys should be prepared to argue for reduced sentences in pending and future cases as well as to seek reduced sentences retroactively for currently incarcerated clients.

Michael G. Freedman is the principal and founder of *The Freedman Firm*.